

# The interplay between EU legislation and effectiveness, effective judicial protection and the right to an effective remedy in EU public procurement law

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## Abstract

*Until recently, the remedies directives were the only benchmark used by the Court of Justice to assess the legality of national remedial rules. The general principles of equivalence, effectiveness and effective judicial protection have been rarely invoked, and when they have, this has only happened in recent years. Recourse to the Charter has been even rarer and has only exceptionally resulted in accrued judicial protection as compared to what is already provided by the remedies directives. Today the Court seems in some cases to switch from being too focused on the remedies directives to becoming oblivious of their effet utile. Taking the Charter into considerations does not yet translate in an advancement of the protection of the rights of economic operators.*

## I. Introduction

Public procurement has been regulated by (then) EEC secondary law since 1971. Those rules were enacted to give effect to the Treaty fundamental (economic) freedoms in an area in which the Member States were seen as favouring national undertakings or, to use the specific public procurement jargon, economic operators. Substantive EU rules in this area aim at enforcing non-discrimination in the internal market.<sup>1</sup> To this end, they prescribe competitive and transparent award procedures contracting authorities or entities must follow in choosing their partners. The degree of detail characterising those rules has grown almost exponentially over the years up to and including the 2014

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<sup>1</sup> S. Arrowsmith, 'The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies' (2012) 14 CYELS 1.

reforms.<sup>2</sup> Substantive procurement law is regulated by Directive 2014/24/EU<sup>3</sup> (classic sectors works, supplies and services procurements) and by Directive 2014/25/EU<sup>4</sup> (utilities or special sectors procurements). Today, the scope of EU rules has been extended to cover both defence and security procurements (Directive 2009/81/EC)<sup>5</sup> and works and services concessions (Directive 2014/23/EU).<sup>6</sup>

Remedies for breaches of substantive procurement rules have been the object of an early codification in (then) EEC law. The recitals in Directive 89/665/EEC (the first remedies directive) clearly state the issue the directive itself is expected to address: ‘existing arrangements at both national and Community levels for ensuring their application are not always adequate to ensure compliance with the relevant Community provisions particularly at a stage when infringements can be corrected’. More specifically, ‘in certain Member States the absence of effective remedies or inadequacy of existing remedies deter Community undertakings from submitting tenders in the Member State in which the contracting authority is established’. Therefore, ‘effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law’.

Directive 92/13/EEC was enacted soon afterwards providing remedies for breach of procurement rules in the utilities sectors which were very much in line with those foreseen in the older directive.<sup>7</sup> Both directives were later amended by Directive 2007/66/EC. Recital 3 of the more recent directive somewhat reworded the recitals in Directive 89/665/EEC which were just recalled. According to Recital 3, consultations of the interested parties and the case law of the Court of Justice have revealed a certain number of weaknesses in the review mechanisms in the Member States. More specifically it was not

<sup>2</sup> Detailed analysis in M. Steinicke and P.L. Vesterdorf (eds), *EU Public Procurement Law* (Nomos et al 2018).

<sup>3</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65.

<sup>4</sup> Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L94/243.

<sup>5</sup> Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and services contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC [2009] OJ L216/76.

<sup>6</sup> Directive 2004/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L94/1.

<sup>7</sup> E.g. the assessment of AG Bobek in Case C-391/15 *Marina del Mediterráneo and Others* [2017] EU:C:2017:268, Opinion of AG Bobek, para. 24. According to Case C-328/17 *Amt Azienda Trasporti e Mobilità and Others* [2018] EU:C:2018:958, para. 40, even the scant provision in Article 5(7) of Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road, establishes a system of remedies analogous to the system in Directive 89/665/EEC (see Recital 21 thereof). See also in the later Case C-328/17 *Amt Azienda Trasporti e Mobilità and Others* [2018] EU:C:2018:958, Opinion of AG Compos Sánchez-Bordona, paras 60 and 63.

always ‘possible to ensure compliance with Community law, especially at a time when infringements can still be corrected’. Therefore, Directive 2007/66/EC introduced new mechanisms and remedies in the text of Directives 89/665/EEC and 92/13/EEC to strengthen the guarantees of transparency and non-discrimination.

EU public procurement and concessions remedial rules have already been discussed in the literature.<sup>8</sup> Basically, a) Directives 89/665/EEC and 92/13/EEC afforded economic operators with a generous right of access to court (standing) and provided for the traditional European continental administrative law remedies of interim relief (suspension), annulment and damages; conditions for awarding the remedies were however not much, or not at all, specified by those directives; b) Directive 2007/66/EC added much detailed rules introducing standstill obligations and the new remedy of the ineffectiveness of the contract concluded following a list of egregious breaches of EU substantive law.<sup>9</sup>

In line with the more general project this article is part of, this article’s focus will be on the relations between those rules and (a) the general principle of effectiveness as a limit to the procedural autonomy of the Member States along equivalence, and (b) the general principle of effective judicial protection. The latter has now grown into the right to an effective judicial remedy as enshrined in the EU Charter of Fundamental Rights (henceforth ‘the Charter’). Reference will also be made to the concept of effectiveness of EU law (the ‘*effet utile*’ of the older case law). The use of very similar words is obviously unfortunate and makes it at times difficult to tell apart the ground(s) on which a given judgment is grounded.<sup>10</sup>

<sup>8</sup> A. Sanchez-Graells, “‘If it ain’t broke, don’t fix it’? EU requirements of administrative oversight and judicial protection for public contracts’ in L. Folliot-Lalliot and S. Torricelli (eds), *Contrôles et contentieux des contrats publics. Oversight and Challenges of public contracts* (Bruylant 2018) 503 ff; R. Caranta, ‘Remedies in EU public contract law: The proceduralisation of EU public procurement legislation’ (2015) 1 *REALaw* 75; C. Bovis, ‘Remedies’ in M. Trybus, R. Caranta and G. Edelstam (eds) *EU Public Contract Law. Public Procurement and Beyond* (Bruylant 2014) 389; S. Treumer, ‘Enforcement of the EU Public Procurement Rules: The State of the Law and Current Issues’ and R. Caranta, ‘Many Different Paths, but Are They All Leading to Effectiveness?’ in S. Treumer and F. Lichère (eds), *Enforcement of the EU Public Procurement Rules* (DJØF 2011) 17 ff and 53 ff.

<sup>9</sup> See M.-J. Clifton, ‘Ineffectiveness – The New Deterrent, Will the New Remedies Directive Ensure Greater Compliance with the Substantive Procurement in the Classical Sector?’ (2009) *Public Procurement Law Review* 167; S. Treumer, ‘Towards an obligation to terminate contracts concluded in breach of the E.C. Public procurement rules – the end of the status of concluded public contract as scared cows’ (2007) *Public Procurement Law Review* 371.

<sup>10</sup> This makes the history and genealogy of the relevant concepts and their relations interesting, but very complicated. Limits of space preclude what would become a long digression. See however the analysis of the older case law in U. Šadl, ‘The Role of *Effet Utile* in Preserving the Continuity and Authority of European Union Law: Evidence from the Citation Web of the Pre-Accession Case Law of the Court of Justice of the EU’ (2015) 8 *EJLS* 18. See also S. Prechal and R. Widdershoven, ‘Redefining the relationship between “Rewe-effectiveness” and effective judicial protection’ (2011) 4 *REALaw* 31; J. Krommendijk, ‘Is there light on the horizon? The distinction between “Rewe effectiveness” and the principle of effective judicial protection in Article 47 of the Charter after *Orizzonte*’ (2016) 53 *CMLRev* 1395.

One reason why public procurements and concessions law is relevant is that Directive 89/665/EEC was passed at about the same time when the principle of effective judicial protection was being elaborated and developed in seminal judgments such *Marshall*,<sup>11</sup> *Francovich*<sup>12</sup> and *Factortame* and *Brasserie du Pêcheur*.<sup>13</sup> While the concern about litigants' rights was not absent from *effet utile*,<sup>14</sup> the cases just mentioned framed the discourse in terms of rights of (then) EEC citizens and market participants thus refocusing the case law away from the objective effectiveness of EU law itself (*effet utile*).<sup>15</sup>

It is well known that those judgments<sup>16</sup> limited the procedural autonomy of the Member States by (a) imposing the respect of the principles of equivalence of the protection afforded to both domestic and EU rights, and (b) requiring national law not to render practically impossible nor excessively difficult the exercise of rights conferred by EU law (principle of 'effectiveness', but not to be mistaken for *effet utile*).<sup>17</sup>

Whether and, if so, to what extent the interpretation of the directives was influenced by these more general developments is one of the overarching questions that will be addressed in this article. The 'maturity' of the legislation in this area also provides a yardstick to measure the effects – if any – of the 'constitutionalisation' of the right to an effective remedy and to fair trial contained in Article 47 of the Charter.<sup>18</sup>

The analysis in this article will focus first on the scope of judicial review, including both standing (i.e., the right to bring a claim in court) and justiciability (i.e., the identification of the acts that may be challenged) (section 2). The rich case law concerning national procedural rules or requirements conditioning access to justice (other than those relating to standing and justiciability) will be

<sup>11</sup> Case C-152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] EU:C:1986:84.

<sup>12</sup> Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] EU:C:1991:428.

<sup>13</sup> Joined Cases C-46/93 and 48/93 *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others* [1996] EU:C:1996:79.

<sup>14</sup> Some of the old *effet utile* cases indeed referred to the 'protection of the individual'. See also for references U. Sadl (n 10). 'Direct effect' also played a role. See C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] EU:C:1990:257, para. 19, which may be seen as a bridge between direct effect and a 'right-based' approach, being referred to as a ground for the latter in Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] EU:C:1991:428, para. 32.

<sup>15</sup> R. Caranta, 'Judicial Protection against Member States: A new *jus commune* takes place' (1995) 35 *CMLRev* 710, 725.

<sup>16</sup> See Case C-33/76 *Rewe v Landwirtschaftskammer für das Saarland* [1976] EU:C:1976:188, para. 5.

<sup>17</sup> See generally A. Arnulf, 'Remedies before national courts', in R. Schutze and T. Tridimas (eds), *Principles of European Union Law. Volume I: The European Union Legal Order* (OUP 2018) 1011 ff.

<sup>18</sup> See A. Sanchez-Graells, 'Territorial extension and case law of the Court of Justice: Good administration and access to justice in procurement as a case study' (2018) 2 *Europe and the World: A law review* 18.

analysed next (section 3). The case law concerning the remedies themselves is somewhat surprisingly much less developed, but worth attentive scrutiny (section 4). Conclusions will sum up the findings and provide an assessment of the evolution of the case law (section 5).

## 2. The scope of judicial review: standing and justiciability.

The Court of Justice has usually been generous in requiring the Member States to afford standing in public procurement cases and even more so in defining the decisions that may be challenged.<sup>19</sup>

### 2.1. Standing

Concerning standing, under Article 1(3) of Directive 89/665 the Member States must ensure that review procedures are available at least to any person having or having had an interest in obtaining a public contract who has been or risks being harmed by an alleged infringement. In addressing the cases concerning standing brought to it, the Court of Justice has usually reasoned based on the text and the *effet utile* of the remedies directive, only occasionally referring to the general principle of effective judicial protection.

In a number of situations the question was whether standing was lost due to some omission on the part of the economic operator or for some other reasons. Some of those situations have been analysed as cases concerning the conformity to EU law of deadlines to bring actions rather than as cases focusing on standing. As such they are analysed in the following section even if the distinction turns very much more on how the preliminary questions were framed by the national court rather than on any systematic logic.

An early case was *Hackermüller*.<sup>20</sup> Hackermüller challenged the award of an architectural design contract to a competitor. In its rejoinder, the contracting authority argued that the action was inadmissible because the claimant should have been himself excluded from the procedure. According to the Court of Justice, the objective of the directive to strengthen the mechanisms to ensure the effective application of the public procurement directives would however be compromised if it were permissible to deny standing to a tenderer on the ground that the contracting authority was wrong not to eliminate its bid.<sup>21</sup> Since the decision to exclude a tenderer must be amenable to judicial review under

<sup>19</sup> See also A. Sanchez-Graells and C. de Koninck, *Shaping EU Public Procurement Law* (Kluwer 2018) 35.

<sup>20</sup> Case C-249/01 *Hackermüller* [2003] EU:C:2003:359.

<sup>21</sup> *Ibid.*, para. 23.

Article 1(1) of Directive 89/665/EEC, to a minimum the claimant must be allowed to challenge the validity of the ground of exclusion raised in its rejoinder by the contracting authority.<sup>22</sup>

*Hackermüller* was followed in the first *Fastweb* case.<sup>23</sup> The relevant Italian legislation provided that a challenge against an award based on the argument that the chosen tenderer should have been excluded from the procedure was deemed inadmissible if the court was satisfied that the claimant too should have been excluded. The Court of Justice recalled that in *Hackermüller* standing was recognised to an economic operator even if doubts were raised as to whether it should have been excluded.<sup>24</sup> Unsurprisingly the Court found that ‘That approach is also called for, as a rule, where the preliminary plea of inadmissibility is raised, not by the review body of its own motion, but in the context of a counterclaim brought by a party to the review procedure, such as the successful tenderer which has intervened lawfully in that procedure’.<sup>25</sup> In the case at hand both tenders should have been excluded for not complying with all the technical rules under the tender specifications. According to the Court, under Article 1(3) of Directive 89/665/EEC, ‘each competitor can claim a legitimate interest in the exclusion of the bid submitted by the other, which may lead to a finding that the contracting authority is unable to select a lawful bid’.<sup>26</sup>

It is worth noting that the Court’s reasoning focuses here on the wording of the directive and even more so on its own precedents. Neither *effet utile* nor the principles of effectiveness or effective judicial protection do come into play. *Fastweb I* was closely followed in *Puligienica Facility Esco SpA (PFE)* in which the Court of Justice simply added that it was immaterial whether there were more than two tenderers and claimants.<sup>27</sup>

*Fastweb I* was instead distinguished in *Bietergemeinschaft Technische Gebäudebetreuung GesmbH*.<sup>28</sup> Two economic operators had submitted a tender in a negotiated procedure with prior publication, but the applicant’s was rejected because of the lack of a document. The consortium challenged the exclusion, which was upheld by the court. The consortium also challenged the award decision in a separate proceeding. The Court of Justice held that the case at hand was ‘clearly distinguishable’ from *Fastweb I*. In that precedent (a) none of the

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<sup>22</sup> Ibid, paras 27 ff.

<sup>23</sup> Case C-100/12 *Fastweb* [2013] EU:C:2013:448.

<sup>24</sup> Ibid, para. 29.

<sup>25</sup> Ibid, para. 30.

<sup>26</sup> Ibid, para. 33.

<sup>27</sup> Case C-689/13 *PFE* [2016] EU:C:2016:199, paras 23 ff. See also Case C-333/18 *Lombardi* [2019] EU:C:2019:675, paras 23 ff.

<sup>28</sup> Case C-355/15 *Technische Gebäudebetreuung and Caverion Österreich* [2016] EU:C:2016:988; see critically A. Sanchez-Graells and C. de Koninck (n 19) 36 ff.

concerned economic operators had been excluded, and (b) the validity of the two tenders was adjudicated in one and the same judicial procedure.<sup>29</sup>

Apparently the consortium was prejudiced by the absence of – or missed recourse to – some national judicial mechanism allowing to join in one and the same review procedure both the action against the exclusion and the one against the award. The first review procedure was dealt with so expeditiously that it had already reached appeal stage when the second one was launched. No issue however was raised concerning those procedural arrangements.

In *Archus sp. z o.o. and Gama Jacek Lipik* the precedent in *Bietergemeinschaft Technische Gebäudebetreuung* was distinguished and *Fastweb I* and *PFE* followed.<sup>30</sup> The Court of Justice read narrowly *Bietergemeinschaft Technische Gebäudebetreuung*, finding its *ratio decidendi* on the fact that the legality of the exclusion in that case was already covered by *res judicata*.<sup>31</sup> The interesting point here is that once again the whole reasoning of the Court focuses on the precedents, without *effet utile*, effectiveness or effective judicial protection being even mentioned. Effectiveness was instead used to reinforce the precedent-based reasoning in *Lombardi*, the latest (so far) judgment issuing from the Italian rules.<sup>32</sup>

In some other cases, the issue was whether it was possible for a claimant to challenge an award procedure without first taking part in it.

In *Grossmann Air Service* the plaintiff challenged the contract award of non-scheduled passenger transport services by air claiming that the technical specifications were discriminatory so that only one Austrian economic operator – the one having been awarded the contract – could meet them.<sup>33</sup> *Grossmann* had neither challenged the discriminatory specifications when invited to tender nor submitted a tender. Following *Hackermüller*, the Court of Justice first reiterated that the Member States may require that the person concerned has been or risks being harmed by the infringement.<sup>34</sup> Not submitting a tender would make it difficult to show an interest in challenging an award decision.<sup>35</sup> However, it would be too much to require an economic operator allegedly harmed by discriminatory clauses in the invitation to tender ‘to submit a tender, before being able to avail itself of the review procedures provided for by Directive 89/665/EEC against such specifications, in the award procedure for the contract at issue, even though its chances of being awarded the contract are non-existent

<sup>29</sup> Ibid, paras 31 ff.

<sup>30</sup> Case C-131/16 *Archus and Gama* [2017] EU:C:2017:358.

<sup>31</sup> Ibid, para. 57. See also Case C-333/18 *Lombardi* [2019] EU:C:2019:675, para. 31.

<sup>32</sup> Case C-333/18 *Lombardi* [2019] EU:C:2019:675, para. 33 (the referring court had relied on the procedural autonomy of the Member States).

<sup>33</sup> Case C-230/02 *Grossmann Air Service* [2004] EU:C:2004:93.

<sup>34</sup> Ibid, para. 26.

<sup>35</sup> Ibid, para. 27.

by reason of the existence of those specifications'.<sup>36</sup> Since under Article 2(1)(b) it must be possible to 'set aside decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications', an economic operator might well 'seek review of such discriminatory specifications directly, without waiting for the contract award procedure to be terminated'.<sup>37</sup>

According to the Court of Justice, this is not just a right to challenge the aggrieving procurement decision, but a duty. The fact that 'a person does not seek review of a decision of the contracting authority determining the specifications of an invitation to tender which in his view discriminate against him [...], but awaits notification of the decision awarding the contract and then challenges it before the body responsible, on the ground specifically that those specifications are discriminatory, is not in keeping with the objectives of speed and effectiveness of Directive 89/665'.<sup>38</sup> Denying standing in such circumstances does not impair the effectiveness of the directives.<sup>39</sup> Once again the focus is on the text and the *effet utile* of the remedies directive, but *effet utile* encompasses the speed of judicial proceedings even at the cost of limiting economic operators' rights of action.

A more complex case is the recent *Amt Azienda Trasporti e Mobilità SpA* case.<sup>40</sup> The Court of Justice very much followed *Grossmann* in holding that participation in the contract award procedure cannot be made a requirement when an economic operator has not submitted a tender because of allegedly discriminatory specifications 'which have specifically prevented it from being in a position to provide all the services requested'.<sup>41</sup> However, 'since it is only in exceptional cases that a right to bring proceedings is given to an operator which has not submitted a tender, it cannot be regarded as excessive to require that operator to demonstrate that the clauses in the call for tenders make it impossible to submit a tender'.<sup>42</sup> Even this evidential requirement might in some circumstances lead to an infringement of the right to bring proceedings derived from the remedies directives.<sup>43</sup>

A different line of cases addressed the question whether the remedies directives preclude a national rule under which, when a consortium without legal personality has participated as such in a procedure for the award of a public

<sup>36</sup> Ibid, para. 29.

<sup>37</sup> Ibid, para. 30.

<sup>38</sup> Ibid, para. 37. See also paragraph 38: 'Such conduct, in so far as it may delay, without any objective reason, the commencement of the review procedures which Member States were required to institute by Directive 89/665 impairs the effective implementation of the Community directives on the award of public contracts'.

<sup>39</sup> Ibid, para. 39.

<sup>40</sup> Case C-328/17 *Amt Azienda Trasporti e Mobilità and Others* [2018] EU:C:2018:958.

<sup>41</sup> Ibid, para. 47.

<sup>42</sup> Ibid, para. 53.

<sup>43</sup> Ibid, para. 54.



contract and has not been awarded that contract, an action may be brought against the decision awarding the contract only by all the members of that consortium acting together. In *Espace Trianon SA*<sup>44</sup> the Court of Justice held that, under Article 1(3) of Directive 89/665/EEC, standing is given to a person who, in tendering for the public contract at issue, has demonstrated his interest in obtaining it.<sup>45</sup> However, it is ‘the consortium as such which tendered and not its individual members’.<sup>46</sup> The national rule is therefore found not to be in conflict with EU law.<sup>47</sup>

The question was referred again to the Court of Justice in *Hotel Club Loutraki*.<sup>48</sup> The referring court asked whether, interpreting the remedies directives in the light of Article 6 of the ECHR, the rule laid down *Espace Trianon SA* also held good for other remedies, such as damages. The Court of Justice opened the relevant part of its reasoning by recalling that ‘the principle of effective judicial protection is a general principle of European Union law’.<sup>49</sup> While, in the absence of Community rules governing the matter, it is for each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, those detailed procedural rules must ‘be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by European Union law (principle of effectiveness)’.<sup>50</sup> Concerning the principle of equivalence, the Court remarked that denying standing to individual participants to sue for damages would create an exception to the general domestic rules on compensation for loss caused by an unlawful act of a public authority.<sup>51</sup> With regard to the principle of effectiveness, the Court of Justice noted first that applying the national restrictive rule for standing would deprive the applicant of any opportunity to claim compensation for damages suffered by reason of a breach of EU law.<sup>52</sup> Moreover, the Court of Justice distinguished *Hotel Club Loutraki* from *Espace Trianon* holding that, while the precedent concerned ‘an action for annulment against a contract award decision which deprived the tendering consortium as a whole of the contract, the present case concerns an application for compensation for loss allegedly caused by an unlawful decision of an administrative authority which

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<sup>44</sup> Case C-129/04 *Espace Trianon and Sofibail* [2005] EU:C:2005:521.

<sup>45</sup> *Ibid.*, para. 19.

<sup>46</sup> *Ibid.*, para. 20.

<sup>47</sup> *Ibid.*, paras 21 ff.

<sup>48</sup> Joined Cases C-145/08 and C-149/08 *Club Hotel Loutraki and Others* [2010] EU:C:2010:247.

<sup>49</sup> *Ibid.*, para. 73.

<sup>50</sup> *Ibid.*, para. 74.

<sup>51</sup> *Ibid.*, para. 77.

<sup>52</sup> *Ibid.*, para. 78.

found that such an incompatibility existed, under the relevant national rules, in the case of the only applicant tenderer'.<sup>53</sup>

*Hotel Club Loutraki* is clearly a landmark case. While all the precedents concerning standing strictly focused on the provisions of the remedies directives and their *effet utile*, in *Hotel Club Loutraki* the Court of Justice goes beyond secondary law and assesses the case against the principles of equivalence, effectiveness and, but the two are not really distinguished in the judgment,<sup>54</sup> the right to effective judicial protection. Two explanations may be advanced for this change in track. On the one hand, the Court needed some additional support to distinguish a precedent depriving the remedies directives of their *effect utile*. *Espace Trianon* clearly denies an individual member of a consortium of the possibility to challenge a decision possibly taken in breach of EU law. On the other hand, referring to the general principles of EU law might have been a way not to address the issue of the possible breach of Article 6 of the ECHR raised by the referring court. This attitude is consistent with the Court of Justice diffidence towards other courts or dispute settlement mechanisms.<sup>55</sup> 'Domesticating' the legal question clearly helps in avoiding applying 'foreign' rules. It is telling that the only precedent in which the Court of Justice went beyond the remedies directive was *Santex*, again a case in which the national court referred to Article 6 ECHR.<sup>56</sup>

## 2.2. Justiciability

As already anticipated, the Court of Justice follows a very broad approach in defining which decisions in the procurement procedure may be challenged under the remedies directives.

The leading case is *Alcatel Austria AG* from 1999.<sup>57</sup> The case was an easy one and provides an excellent demonstration of why Directive 89/665/EEC was needed in the first place. Austria had implemented the public procurement substantive rules. However, contracting authorities still used rules, forms and methods from civil law and did not provide any information as to the outcome of the procedure to tenderers different from the chosen one.<sup>58</sup> Moreover, Austria had availed itself of the option then foreseen in Article 2(6) of the directive (now

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<sup>53</sup> Ibid, para. 79.

<sup>54</sup> See for instance *ibid*, para. 78.

<sup>55</sup> See B. de Witte, 'A selfish court? The Court of Justice and the design of international dispute settlement beyond the European Union' in M. Cremona and A. Thies (eds), *The European Court of Justice and external relations law: constitutional challenges* (Hart Publishing 2014) 33.

<sup>56</sup> See below Section 3.1.

<sup>57</sup> Case C-81/98 *Alcatel Austria and Others* [1999] EU:C:1999:534.

<sup>58</sup> Ibid, para. 47.

2(7)) to exclude annulment and only allow damages after contract conclusion. Therefore, the award decisions could hardly be challenged.<sup>59</sup>

The Court of Justice remarked that the directive, while requiring effective remedies, did not in any way define or restrict the decisions reviewable.<sup>60</sup> On this basis, it held that the Austrian approach ‘might lead to the systematic removal of the most important decision of the contracting authority, that is to say the award of the contract, from the purview of the measures which, under Article 2(1) of Directive 89/665, must be taken concerning the review procedures referred to in Article 1, thereby undermining the purpose of Directive 89/665 which [...] is to establish effective and rapid procedures to review unlawful decisions of the contracting authority at a stage where infringements may still be rectified’.<sup>61</sup>

Like *Alcatel Austria*, *Stadt Halle* was another easy case solved based on the *effet utile* of the remedies directives.<sup>62</sup> It concerned the legality of a direct award to a company controlled by the contracting authority.<sup>63</sup> The question was whether the Member States’ obligation to ensure that effective and rapid remedies are available against decisions taken by contracting authorities extends also to decisions taken outside a formal award procedure and decisions prior to a formal call for tenders, in particular the decision on whether a particular contract falls within the personal or material scope of the substantive directives. The Court of Justice remarked that the expression ‘decisions taken by the contracting authorities’ in Article 1(1) of Directive 89/665/EEC is not expressly defined in the directive, so that its scope must be determined on the basis of the wording of the relevant provisions of the directive and the objective of effective and rapid judicial protection pursued by it.<sup>64</sup> According to the Court, by using the formulation ‘as regards ... procedures’, that provision assumes that ‘every decision of a contracting authority falling under the Community rules in the field of public procurement and liable to infringe them is subject to the judicial review’.<sup>65</sup> An approach according to which judicial protection is not required outside a formal award procedure, excluding the justiciability of the contracting authority’s decision not to initiate such a procedure would make ‘the application of the relevant Community rules optional, at the option of every contracting authority’ and could lead to ‘the most serious breach of Community law in the field of public procurement on the part of a contracting authority’. It would

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<sup>59</sup> Ibid, paras 21 ff.

<sup>60</sup> Ibid, paras 31 and 35.

<sup>61</sup> Ibid, para. 38. The findings of the Court were further developed into the requirement of a standstill period in Case C-212/02 *Commission v Austria* [2004] EU:C:2004:386.

<sup>62</sup> Case C-26/03 *Stadt Halle and RPL Lochau* [2005] EU:C:2005:5.

<sup>63</sup> Ibid, para. 50.

<sup>64</sup> Ibid, para. 27.

<sup>65</sup> Ibid, para. 28. See also para. 31.

substantially reduce the effective and rapid judicial protection aimed at by Directive 89/665.<sup>66</sup>

A tougher case was *Marina del Mediterráneo*.<sup>67</sup> The issue here was not whether a decision in the award procedure could be challenged, but whether Member States were under a duty to allow economic operators to immediately challenge a preparatory decision without waiting for the procedure to come to its end. The Court followed *Stadt Halle* reaffirming the broad construction of justiciable decision.<sup>68</sup> It recalled the principle of equivalence and the principle of effectiveness as limits to the national procedural autonomy,<sup>69</sup> but then jumped immediately back to *effet utile*: ‘In particular, the detailed procedural rules governing the remedies intended to protect rights conferred by EU law on candidates and tenderers harmed by decisions of contracting authorities must not compromise the effectiveness of Directive 89/665’.<sup>70</sup> According to the Court, requiring a tenderer to wait for a decision awarding the contract before applying for a review of a decision allowing another tenderer to participate in that procurement procedure infringes the provisions of Directive 89/665/EEC.<sup>71</sup>

The generous approach to the notion of reviewable decision has been recently confirmed in *Anodiki Services EPE*.<sup>72</sup>

### 2.3. Concluding remarks on the case law on standing and justiciability

What is remarkable about the many cases on both standing and justiciability is that, with the exception of *Hotel Club Loutraki* (and of the lip service paid to the principles of equivalence and effectiveness in *Marina del Mediterráneo*), the analysis of the Court of Justice focuses exclusively on the remedies directive and its *effet utile*. The early cases are from the heydays of the case law on effective judicial protection while the newer ones postdate the Charter. Still the horizon for both the referring national courts and the Court of Justice is almost always set by the remedies directives.

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<sup>66</sup> Ibid, para. 37.

<sup>67</sup> Case C-391/15 *Marina del Mediterráneo and Others* [2017] EU:C:2017:268.

<sup>68</sup> Ibid, paras 26 ff.

<sup>69</sup> Ibid, para. 32.

<sup>70</sup> Ibid, para. 33.

<sup>71</sup> Ibid, para. 34.

<sup>72</sup> Case C-260/17 *Anodiki Services EPE* [2018] EU:C:2018:864.

### 3. Hindering access to justice? Beyond standing and justiciability

A number of cases concerned whether domestic provisions conditioning access to justice (besides those relating to standing and justiciability which were analysed under the previous point), such as deadlines, conditions precedent to judicial action and court fees.

#### 3.1. Deadlines

A large number of cases focus on deadlines to bring the actions foreseen in the remedies directives.<sup>73</sup> In *Universale-Bau* the Court of Justice was called to answer the question whether Directive 89/665/EEC precludes national legislation which provides that any application for review of a contracting authority's decision must be commenced within a time-limit laid down to that effect and that any irregularity in the award procedure relied upon in support of such application must be raised within the same period.<sup>74</sup>

The case is of paramount importance for remedies in EU public procurement and concessions law. For the first time, the Court of Justice highlighted the *lacunae* in the provisions of the remedies directives and pointed the way to fill the gaps based on the *effet utile* of the same directives. On the first count, it held that 'whilst the objective of Directive 89/665 is to guarantee the existence, in all Member States, of effective remedies for infringements of Community law in the field of public procurement or of the national rules implementing that law, so as to ensure the effective application of the directives on the coordination of public procurement procedures, it contains no provision specifically covering time-limits for the applications for review which it seeks to establish. It is therefore for the internal legal order of each Member State to establish such time-limits'.<sup>75</sup> Concerning the compass that the Member States are to follow in filling the gaps, the Court held that the detailed domestic procedural rules governing remedies 'must not compromise the effectiveness of Directive 89/665'.<sup>76</sup>

The Court of Justice is recognising what is generally regarded as the residual procedural autonomy of the Member States, but it mentions in no way this concept. Also, the limits to that autonomy are found in the *effet utile* of the relevant directive rather than in the principles of equivalence and effectiveness.<sup>77</sup> The latter enters only obliquely – and in close embrace with *effet utile* – when

<sup>73</sup> See C. Bovis (n 8) 384 ff.

<sup>74</sup> Case C-470/99 *Universale-Bau and Others* [2002] EU:C:2002:746.

<sup>75</sup> *Ibid*, para. 71.

<sup>76</sup> *Ibid*, para. 72.

<sup>77</sup> See above Section 1.

the Court further considered it ‘appropriate to determine whether, in light of the purpose of that directive, national legislation such as that at issue in the main proceedings does not adversely affect rights conferred on individuals by Community law’.<sup>78</sup>

Because Article 1(1) of the directive requires the Member States to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible, according to the Court its effectiveness would be undermined ‘if candidates and tenderers were allowed to invoke, at any stage of the award procedure, infringement of the rules of public procurement, thus obliging the contracting authority to restart the entire procedure in order to correct such infringements’.<sup>79</sup> This part of the reasoning is very relevant because it lays the ground for future judgments to consider speed as a requirement in the interest of the contracting authority rather than of the economic operator wanting to challenge the decisions of the former. Moreover, according to the Court of Justice, setting reasonable limitation periods is in principle consistent with *effet utile*, since it is an application of the fundamental principle of legal certainty.<sup>80</sup>

In *Santex* the Court of Justice went beyond *effet utile* engaging in a right-based discourse.<sup>81</sup> Basically, Santex had not immediately challenged a discriminatory notice because the contracting authority had led it to believe that the notice could be construed as to avoid the discrimination. The referring court raised two questions, the first asking whether it had the power to set aside domestic procedural rules when the application of (then) Community law has been seriously impeded or in any event rendered difficult. The second was whether Article 6(2) EU Treaty which, by providing for respect of the fundamental rights safeguarded by the ECHR, ‘has adopted the principle of effective judicial protection enshrined in Articles 6 and 13 of that Convention’, leads to the same conclusion?<sup>2</sup>

The Court of Justice first addressed the question in the light of *Universale-Bau* confirming that time-limits set by national law must be reasonable so not compromise the effectiveness of Directive 89/665/EEC.<sup>82</sup> A 60-day limitation period running from the date of notification of the act or the date on which it is apparent that the party concerned became fully aware of it, is generally ‘in accordance with the principle of effectiveness since it is not in itself likely to render virtually impossible or excessively difficult the exercise of any rights

<sup>78</sup> Case C-470/99 *Universale-Bau and Others* [2002] EU:C:2002:746, para. 73.

<sup>79</sup> Ibid, para. 75.

<sup>80</sup> Ibid, para. 76. See also Case C-327/00 *Santex* [2003] EU:C:2003:109, para. 50; Case C-241/06 *Lämmerzahl* [2007] EU:C:2007:597, para. 50.

<sup>81</sup> Case C-327/00 *Santex* [2003] EU:C:2003:109.

<sup>82</sup> Ibid, paras 51 ff.

which the party concerned derives from Community law'.<sup>83</sup> To assess whether the general approach holds true on the case at hand, the Court of Justice referred to *Peterbroeck*, one of the 'hard' cases in which the limits to the residual autonomy of the Member States were tested: 'However, for the purpose of applying the principle of effectiveness, each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference, in particular, to the role of that provision in the procedure, its progress and its special features, viewed as a whole'.<sup>84</sup>

Concerning the special features of the *Santex* case, the Court of Justice remarked that, 'although the disputed clause was brought to the notice of the parties concerned at the time of the publication of the notice of invitation to tender, the contracting authority created, by its conduct, a state of uncertainty as to the interpretation to be given to that clause and that that uncertainty was removed only by the adoption of the exclusion decision'.<sup>85</sup> At that time, however, the period prescribed for bringing proceedings for review of that notice had already expired, so that the tenderer was deprived of any opportunity to challenge the exclusion decision.<sup>86</sup>

The conclusion, which allowed the Court to dispose of the case without going into the second preliminary question, was that 'the changing conduct of the contracting authority may be considered, in view of a limitation period, to have rendered excessively difficult the exercise by the harmed tenderer of the rights conferred on him by Community law'.<sup>87</sup>

*Santex* in many ways completes *Universale-Bau*. While the latter accepted that the remedies directives had *lacunae* that was in principle for the Member States to fill while preserving the *effet utile* of the same directives, *Santex* added effectiveness of the EU-based rights as a further constraint on the Member States.<sup>88</sup> The development is remarkable, including because the case could have been decided the same way simply by reasoning on *effet utile*.<sup>89</sup> Again, the reference by the national court to the ECHR might have prodded the Court of

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<sup>83</sup> Ibid, paras 54 ff.

<sup>84</sup> Ibid, para. 56. Case C-312/93 *Peterbroeck, Van Campenhout & Cie v Belgian State* [1995] EU:C:1995:437, para. 14, is referred to.

<sup>85</sup> Case C-327/00 *Santex* [2003] EU:C:2003:109, para. 59.

<sup>86</sup> Ibid, para. 60.

<sup>87</sup> Ibid, para. 61.

<sup>88</sup> *Santex* was followed by Case C-241/06 *Lämmerzahl* [2007] EU:C:2007:597, para. 52, again a case characterized by an unclear situation made worse by the evasive conduct of the contracting authority.

<sup>89</sup> Similarly Case C-406/08 *Uniplex (UK)* [2010] EU:C:2010:45, para. 40 (followed in C-538/13 *eVigilo* [2015] EU:C:2015:166, para. 52) and C-456/08 *Commission v Ireland* [2010] EU:C:2010:46, para. 61.

Justice to rather refer to the EU law general principles and the rights derived from them.<sup>90</sup>

*Cooperativa animazione Valdocco* is – so far – the last case arising by multiple attempts of the Italian lawmakers at limiting public procurement litigation by multiplying time bars.<sup>91</sup> The case is somewhat the reverse *Marina del Mediterraneo*. The relevant rules provided that both exclusions and admissions to the award procedure had to be challenged within 30 days from the publication in the contracting authority website of the information concerning which economic operators had been or not allowed in the procedure. Pleas of illegality could not be raised past the deadline even incidentally as a cross-appeal in a proceeding brought against the award decisions (like in *Fastweb*). The referring court asked whether such a rule was consistent with the effectiveness of judicial protection provided for in Articles 6 and 13 of the ECHR, Article 47 of the Charter and the remedies directives.

The Court of Justice decided the case by an order recalling that the remedies directives allow Member States to lay down time limits. The 30-day deadline exceeds the minimum time limits provided therein and therefore is, in principle, compatible with EU law, provided that the rules are sufficiently precise and that those decisions ‘contain a summary of the relevant reasons’.<sup>92</sup> Concerning the latter, the Court of Justice refers to some of the seminal case on effective judicial protection such as *Heylens*, to hold that ‘the effectiveness of the judicial review guaranteed by Article 47 of the Charter requires that the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining notification of those reasons, so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court with jurisdiction, and in order to put the latter fully in a position in which it may carry out the review of the lawfulness of the national decision in question’.<sup>93</sup>

Concerning specifically the impossibility to raise grounds relating to the admission to the procedure as a cross-argument in a proceeding brought against the award decision, which was obviously the real question here, the Court of Justice recalled that the normal consequence of the expiry of a EU-conform deadline is to prevent the issue from being raised again, thus potentially obliging the contracting authority to restart the entire award procedure.<sup>94</sup> Still, building

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<sup>90</sup> Above Section 2.1.

<sup>91</sup> C-54/18 *Cooperativa Animazione Valdocco* [2019] EU:C:2019:118.

<sup>92</sup> Ibid, paras 29 and 24 ff and 32 respectively.

<sup>93</sup> Ibid, para. 63. Case C-222/86 *Heylens* [1987] EU:C:1987:442, para. 15, and Case C-300/11 ZZ [2013] EU:C:2013:363, para. 53, are referred to.

<sup>94</sup> Ibid, paras 40 ff. Among the precedents referred to: Case C-230/02 *Grossmann Air Service* [2004] EU:C:2004:93, para. 38.



on *Fastweb* (and *eVigilo*), the Court charged the national court to make sure that the application of the national rules, including those on access to documents, did not, in the circumstances of the case hand, ‘exclude all possibilities for the Cooperativa Animazione Valdocco to learn of the illegality of the decision to allow the ad hoc consortium to participate [...] or to bring an action from the time at which it knew of that decision’.<sup>95</sup>

Generally speaking, EU law in all its facets, including *effet utile*, the principle of effectiveness and Art. 47 of the Charter, is consistently read as not precluding the operation of national rules foreseeing time bars to the possibility to bring an action, provided that the claimant has all the elements, including information, necessary to effectively plead its case.

### 3.2. Miscellaneous procedural constraints

*Fritsch, Chiari & Partner* is an early case concerning national provisions conditioning access to justice to the prior exhaustion of some remedy.<sup>96</sup> The applicable Austrian legislation provided for a conciliation mechanism to precede review. The Court of Justice recalled that the aims of Directive 89/665/EEC is to strengthen the existing mechanisms to ensure the effective application of Community directives relating to public procurement, in particular at a stage when infringements can still be remedied.<sup>97</sup> According to the Court, making access to the review procedures conditional on prior application to a conciliation commission is contrary to that directive’s objective of speed and effectiveness.<sup>98</sup>

In a number of cases procedural requirements hindered damages actions. The relevant contract in *MedEval* had been awarded without publication of a contract notice. Actions for declaration of unlawfulness were subject to a six-month limitation period from the day after the date of the award, irrespective of whether or not the applicant in that action was in a position to know of the unlawfulness affecting the decision of the awarding authority. Damages actions were subject to a prior finding that the public procurement procedure for the contract in question was unlawful, including because of the lack of prior publication of a contract notice.<sup>99</sup>

The Court of Justice recalled first that the minimum six-month deadline to bring actions claiming the ineffectiveness of a concluded contract is set in Article 2f(1) of Directive 89/665/EEC. The same directive provides, under Article 2(c), that the time-limits for all other remedies are determined by national law,

<sup>95</sup> Ibid, para. 47.

<sup>96</sup> Case C-410/01 *Fritsch, Chiari & Partner and Others* [2003] EU:C:2003:362.

<sup>97</sup> Ibid, paras 29 ff.

<sup>98</sup> Ibid, para. 31. See also the following paragraphs.

<sup>99</sup> Case C-166/14 *MedEval* [2015] EU:C:2015:779.

so that it is for each Member State to define them.<sup>100</sup> Also Article 2(6) of the directive empowers Member States to make annulment a condition precedent to damages actions. The detailed national procedural rules must, however, comply with the principles of equivalence and effectiveness.<sup>101</sup> Concerning the latter, the Court of Justice pointed out that ‘the degree of necessity for legal certainty concerning the conditions for the admissibility of actions is not identical for actions for damages and actions seeking to have a contract declared ineffective’.<sup>102</sup> Unlike ineffectiveness, damages action do not disrupt a concluded contract or its implementation. Also, ‘Making the admissibility of actions for damages subject to a prior finding that the public procurement procedure for the contract in question was unlawful because of the lack of prior publication of a contract notice, where the action for a declaration of unlawfulness is subject to a six-month limitation period, irrespective of whether or not the person harmed knew that there had been an infringement of a rule of law, is likely to render impossible in practice or excessively difficult the exercise of the right to bring an action for damages’.<sup>103</sup>

*MedEval* is specifically relevant here because it is one of the very few cases in which the principle of effectiveness was actually used by the Court of Justice to limit the procedural autonomy that a literal interpretation of Directive 89/665/ECC would have left to the Member States.

*MedEval* was distinguished in the (first) *Hochtief* case.<sup>104</sup> According to the Court of Justice, in the absence of exceptional circumstances, deadlines and foreclosures contribute to a rapid adjudication of procurement cases, itself an objective pursued by Directive 89/665/EEC.<sup>105</sup> In this framework, the parties bear the burden to identify the grounds of illegality to base their actions upon.<sup>106</sup> In the end, ‘EU law, and in particular Article 1(1) and (3) of Directive 89/665, read in the light of Article 47 of the Charter, must be interpreted as meaning that, in the context of an action for damages, it does not preclude a national procedural rule, such as that at issue in the main proceedings, which restricts the judicial review of arbitral decisions issued by an arbitration committee responsible at first instance for the review of decisions taken by contracting au-

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<sup>100</sup> Ibid, paras 30 ff.

<sup>101</sup> Ibid, para. 37. Case C-538/13 *eVigilo* [2015] EU:C:2015:166, para. 39 and Case C-61/14 *Orizzonte Salute* [2015] EU:C:2015:655, para. 46, are referred to.

<sup>102</sup> Ibid, para. 39. See also para. 40.

<sup>103</sup> Ibid, para. 41.

<sup>104</sup> Case C-300/17 *Hochtief* [2018] EU:C:2018:635.

<sup>105</sup> Ibid, para. 51. See also para. 38.

<sup>106</sup> Ibid, para. 52. Case C-430/93 *Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] EU:C:1995:441 and Case C-431/93 *van Veen* [1995] EU:C:1995:441, paras 20-21 and Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2018] EU:C:2007:318, paras 34-35, are referred to.

thorities in public procurement procedures to examine only the pleas raised before that committee'.<sup>107</sup>

Interestingly, the Court in this case used the standard set by Article 47 of the Charter, but calling this provision into play did not lead to any widening of the judicial protection afforded under the remedies directives.<sup>108</sup>

### 3.3. Court fees

Recently some Member States have introduced or raised court fees to bring procurement and concession cases to courts or imposed other costs on those bringing such cases. In *Orizzonte Salute* the referring court asked the Court whether Italian provisions having considerably raised court fees specifically for procurement cases were in line with the principles derived from the remedies directives.<sup>109</sup>

Following a top down approach which departs from the previous case law, the Court of Justice recalled first the principle of procedural autonomy of Member States in laying detailed rules, next the limits to that discretion and only in the end the *effet utile* of Directive 89/665/EEC. Bringing together the principle of effectiveness and that of judicial protection, the Court of Justice states that the principle of effectiveness 'implies a requirement of judicial protection, guaranteed by Article 47 of the Charter, that is binding on the national court'.<sup>110</sup> Therefore, 'Article 1 of Directive 89/665 must be interpreted in the light of the fundamental rights set out in the Charter, in particular the right to an effective remedy before a court or tribunal, laid down in Article 47 thereof'.<sup>111</sup>

The application of this compact of EU rules did not help the applicant.<sup>112</sup> According to the Court, the standard fee is proportional to the value of the public contracts and, as a whole, degressive in nature.<sup>113</sup> The court fees, which do not exceed 2% of the value of the contract, 'are not liable to render practically impossible or excessively difficult the exercise of rights conferred by EU public procurement law'.<sup>114</sup>

<sup>107</sup> Case C-300/17 *Hochtief* [2018] EU:C:2018:635, para. 58.

<sup>108</sup> *Hochtief* has brought another case, this time asking for damages for failure to refer the original case to the Court of Justice: Case C-620/17 *Hochtief Solutions Magyarországi Fióktelepe* [2019] EU:C:2019:630.

<sup>109</sup> Case C-61/14 *Orizzonte Salute* [2015] EU:C:2015:655. See also J. Krommendijk (n 10). A similar case was Case C-495/14 *Tita and Others* [2016] EU:C:2016:230, disposed with by simple order.

<sup>110</sup> *Ibid.*, para. 48. The Court refers to Case C-169/14 *Sánchez Morcillo and Abril García* [2014] EU:C:2014:2099, para. 35 and the case law cited.

<sup>111</sup> Case C-61/14 *Orizzonte Salute* [2015] EU:C:2015:655, para. 49. The Court refers to Case C-212/13 *Ryneš* [2014] EU:C:2014:2428, para. 29, a data protection case.

<sup>112</sup> See critically A. Sanchez-Graells and C. de Koninck (n 19) 42.

<sup>113</sup> Case C-61/14 *Orizzonte Salute* [2015] EU:C:2015:655, para. 56.

<sup>114</sup> *Ibid.*, para. 58; neither is the principle of equivalence breached; paras 66 ff. See also the opinion of AG Sharpston, para. 41. Arguably the Court's analysis is departing from the approach preferred by the then AG Mancini in the seminal *San Giorgio* case: equivalence should not be

The fact that the standard court fee was also to be paid for cross-claims and supplementary pleas introducing new claims in the course of the same proceeding was not considered in principle contrary to ‘Article 1 of Directive 89/665, read in the light of Article 47 of the Charter, or to the principles of equivalence and effectiveness’.<sup>115</sup> According to the Court, a court fee ‘contributes to the proper functioning of the judicial system, since it amounts to a source of financing for the judicial activity of the Member States and discourages the submission of claims which are manifestly unfounded or which seek only to delay the proceedings’.<sup>116</sup> However, those objectives justify the multiple application of court fees ‘only where the subject-matter of the actions or supplementary pleas are in fact separate and amount to a significant enlargement of the subject-matter of the dispute that is already pending’.<sup>117</sup> Otherwise, the multiplication of fees ‘is contrary to the availability of legal remedies ensured by Directive 89/665 and to the principle of effectiveness’.<sup>118</sup>

*Orizzonte Salute* is of extraordinary importance since for the first time the Court of Justice gave a holistic reading of both the Charter, the general principle of effectiveness and of the remedies directives. It is however doubtful that going beyond the remedies directives contributed in any way to the effectiveness of judicial protection.

A final case to be analysed in this section is *SC Star Storage SA*. The Romanian legislation in *SC Star Storage SA* imposed a “good conduct guarantee” on those seeking to challenge procurement decisions.<sup>119</sup> The referring courts wondered whether this requirement was in line with the remedies directives, one of them also pointing out to a possible breach of Article 47 of the Charter. When the preliminary reference procedure was pending, the Romanian Constitutional Court struck down the legislation as far as it did not foresee that the guarantee had to be refunded whatever the outcome of the action. The Court of Justice referred to close a dozen of precedents to stress once again that the remedies directives only lay down minimum conditions to be satisfied by the national review procedures which must in any case ensure that the effectiveness of the remedies directives is not undermined nor is the protection of rights conferred on individuals by EU law.<sup>120</sup> Furthermore, according to the Court, the remedies directives ‘seek to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second paragraphs

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analysed with reference to small sectors, Case C-199/82 *San Giorgio* [1983] EU:C:1983:247, para 11.

<sup>115</sup> Case C-61/14 *Orizzonte Salute* [2015] EU:C:2015:655, para. 72.

<sup>116</sup> *Ibid*, para. 73.

<sup>117</sup> *Ibid*, para. 74.

<sup>118</sup> *Ibid*, para. 75.

<sup>119</sup> Case C-439/14 *Star Storage* [2016] EU:C:2016:688.

<sup>120</sup> *Ibid*, paras 42 ff.

of Article 47 of the Charter. Accordingly, when they set out detailed procedural rules for legal actions intended to ensure the protection of rights conferred by Directives 89/665 and 92/13 on candidates and tenderers harmed by the decisions of contracting authorities, the Member States must ensure compliance with the right to an effective remedy and to a fair hearing, enshrined in Article 47 of the Charter'.<sup>121</sup>

The analysis of the Court is however exclusively grounded on Article 47 of the Charter. The good conduct guarantee, being a pre-condition for accessing courts, is a limitation to the right to an effective remedy before a tribunal within the meaning of that provision. Under Article 52(1) of the Charter it may be justified only 'if it is provided for by law, if it respects the essence of that right and, subject to the principle of proportionality, if it is necessary and genuinely meets objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others'.<sup>122</sup> The first condition is clearly met. Concerning the last condition, the guarantee is mainly intended to facilitate the conduct of award procedures for public contracts by preventing the improper use of remedies and any delays to the conclusion of the contract. This is a legitimate objective that contributes not only to the attainment of the objectives pursued by the remedies directives but more widely to the proper administration of justice.<sup>123</sup> As far as proportionality is concerned, the Court of Justice is almost lamenting that the obligation to provide a good conduct guarantee 'is a less dissuasive measure in its current version than in its initial version', but finds it still able to achieve the objective of combating frivolous actions.<sup>124</sup>

Compared to *Orizzonte Salute*, in *SC Star Storage* the Court of Justice basically abandons any consideration of *effet utile* when analysing the domestic provisions at issue, focusing exclusively on the Charter.<sup>125</sup> On that sole basis, the Court of Justice is perfectly fine with the limitations imposed by the national law on the exercise of the right of access to court.<sup>126</sup>

<sup>121</sup> Ibid, paras 45 ff. The Court refers to Recital 36 of Directive 2007/66/EC.

<sup>122</sup> Case C-439/14 *Star Storage* [2016] EU:C:2016:688, para. 49.

<sup>123</sup> Ibid, para. 53.

<sup>124</sup> Ibid, paras 56 ff. See also paragraphs 61 ff, where unsurprisingly on this basis the measure is considered not going beyond what is necessary; this approach echoes the opinion of AG Sharpston in Case C-439/14 *Star Storage* [2016] EU:C:2016:307, para. 56, which however, based on the lack of dissuasive character, found that the national rules failed the proportionality test.

<sup>125</sup> See critically A. Sanchez-Graells and C. de Koninck (n 19) 42.

<sup>126</sup> Reading the more articulate opinion of AG Sharpston in Case C-439/14 *Star Storage* [2016] EU:C:2016:307, Opinion of AG Sharpston, paras 40 ff, who is applying Article 52 (of the Charter) test to assess the legality of domestic rules; one might be excused for thinking that such test is much laxer than both *effet utile* and the old principle of effective judicial protection.

### 3.4. Concluding remarks on the case law on constraints to legal actions

Possibly because more recent, the cases analysed in this section often go beyond *effet utile* to refer to the principle of effectiveness and, in some instances, to the right under Article 47 of the Charter. *Santex* and *MedEval* bear witness to the fact that indeed the principle of effectiveness may be used as a tool to steer the interpretation of the remedies directives in the sense of widening the procedural rights of economic operators. In no case so far reference to Article 47 has played in the same way. In all the cases in which that provision was referred to, the Court of Justice found no harm in the national provisions brought to its attention.

## 4. Clarifying the remedies?

One might have expected that most of the cases would have focused on the actual remedies foreseen in the EU secondary law, especially given the very scant details in their design in so far as Directives 89/665/EEC and 92/13/EEC are concerned. This is not the case. Besides a number of cases focusing on damages, there are limited (albeit precious) clarifications in that respect.

### 4.1. Ineffectiveness

A most relevant judgment was given in another *Fastweb* case, this time concerning ineffectiveness, one of the new remedies introduced by Directive 2007/66/EEC.<sup>127</sup> Under Article 2d(4) of Directive 89/665/EEC as amended by Directive 2007/66/EEC ineffectiveness is ruled out in case a voluntary ex ante transparency notice (VEAT) has been published in the OJ and the standstill period provided therein has been abided to. VEAT notices are routinely published in some Member States either as a precaution or as a way to short-circuit ineffectiveness.<sup>128</sup>

This led the Italian *Consiglio di Stato* to ask whether Article 2d(4) is to be construed as precluding national courts from declaring the contract to be ineffective even when the direct award breached EU rules. In the affirmative, the Italian court doubted of the consistency of the provision with both the principles

<sup>127</sup> Case C-19/13 *Fastweb* (II) [2014] EU:C:2014:2194.

<sup>128</sup> S. Troels Poulsen, 'Denmark', in U. Neergaard, C. Jackson and G.S. Ølykke (eds), *Public Procurement Law: Limitation, Opportunities and Paradoxes. The XXVI FIDE Congress in Copenhagen, 2014 Congress Publications Vol.3* (DJØF 2014) 323.

of equality of the parties, of non-discrimination and of protecting competition, and with the right to an effective remedy enshrined in Article 47 of the Charter.

The Court of Justice made clear that the conditions laid down in Article 2d(4) must have been fulfilled for the VEAT to play its effects. These conditions are that the contracting authority considered it permissible under EU law to award the contract without prior publication of a contract notice and that the VEAT notice must state the justification for the contracting authority's decision. More specifically, the 'justification' 'must disclose clearly and unequivocally the reasons that moved the contracting authority to consider it legitimate to award the contract without prior publication of a contract notice, so that interested persons are able to decide with full knowledge of the relevant facts whether they consider it appropriate to bring an action before the review body and so that the review body is able to undertake an effective review'.<sup>129</sup> Interpreted in this way, no conflict between Article 2d(4) of Directive 89/665/EEC and Article 47 of the Charter can be found.<sup>130</sup>

This judgement is remarkable not so much because the solution given to the preliminary question is grounded on the *effet utile* of the remedies directives, but because this allows to rule out any conflict of the remedies directives with the Charter in what was partly a preliminary reference on the validity of a provision of EU secondary law.

#### 4.2. Annulment cases

A first case, *eVigilo* focused on the burden to prove that a decision was illegal.<sup>131</sup> *eVigilo* claimed that the specialists referred to as part of the project team in the tender submitted by the successful tenderers were colleagues of three of the six experts the contracting authority had commissioned to both draw up the tender documents and to evaluate the tenders. The Court of Justice places the burden to investigate the existence of such a conflict of interest on the contracting authority, thus much lessening the burden of proof of the applicant who is simply asked to present some 'objective evidence calling into question calling into question the impartiality' of the experts relied upon by the contracting authority.<sup>132</sup> Reasoning otherwise would 'be contrary to the principle of effectiveness and the requirement of an effective remedy laid down in the third subparagraph of Article 1(1) of Directive 89/665, in light, in particular, of the fact that a tenderer is not, in general, in a position to have access to information and evidence allowing him to prove such bias'.<sup>133</sup>

<sup>129</sup> Case C-19/13 *Fastweb* (II) [2014] EU:C:2014:2194, para. 48.

<sup>130</sup> *Ibid.*, para. 64.

<sup>131</sup> Case C-538/13 *eVigilo* [2015] EU:C:2015:166.

<sup>132</sup> *Ibid.*, para. 44.

<sup>133</sup> *Ibid.*, para. 43.

This approach, combining *effet utile* and effective judicial protection, is very much in line with continental administrative law traditions. In those traditions, considerable inquisitorial powers concerning both the discovery of facts and the choice of the rules applicable are recognised to courts charged with reviewing the legality of administrative action.

A more difficult and deeply troubling case is *Rudigier*.<sup>134</sup> The substantive law question was whether an open procedure for the supply of bus passenger transport services had to be preceded by the publication of a prior information notice (PIN) under Article 7(2) of Regulation No 1370/2007. The referring court was uncertain whether failure to comply with Article 7(2) might entail the unlawfulness of a call for tenders in circumstances in which the contracting authority otherwise complied with all the requirements of the public procurement directives. It observed that under Austrian law contracting authority's decisions must be annulled only if the unlawfulness has substantial influence on the outcome of the procurement procedure. It also considered that national legislation to be consistent with EU law, in so far as it does not make it impossible to exercise a right derived from EU law or infringe the principle of equivalence and this even more so because the applicant had been anyway aware for a long time of the forthcoming call for tenders.

The question really went to the heart of the annulment remedy, one of the three remedies originally imposed under Directive 89/665/EEC. The referring court was trying to find out whether a procedural breach could be condoned. This is not a minor point, since most substantive procurement rules are procedural in nature, in that they give contracting authorities directions on how to buy rather than what to buy.

The starting point for the Court of Justice is that 'EU legislation on the award of public contracts does not lay down a general rule that the unlawfulness of an act or omission at a given stage of the procedure renders unlawful all subsequent acts in that procedure and justifies their annulment. Only in specific well-defined situations does that legislation provide for such a consequence'.<sup>135</sup> This is said to be proven by the fact that the remedies directives provide a closed list of hypotheses in which 'contracts must be considered ineffective if they are vitiated by the cases of unlawfulness listed in those provisions'<sup>136</sup> and failure to publish a PIN is not among those hypotheses.<sup>137</sup> While the latter is true, for the rest the Court is confusing ineffectiveness with unlawfulness leading to annulment. The former remedy was introduced by Directive 2007/66/EC to strike the most egregious breaches of EU law such as direct awards. As such it was

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<sup>134</sup> Case C-518/17 *Rudigier* [2018] EU:C:2018:757.

<sup>135</sup> *Ibid.*, para. 57.

<sup>136</sup> *Ibid.*, para. 58.

<sup>137</sup> *Ibid.*, paras 59 ff.



intended as an exceptional remedy. Annulment is foreseen in Directives 89/665/EEC and 92/13/EEC as a general remedy for all breaches. Having blundered its approach, the Court of Justice goes from bad to worse. The mirage *lacuna* has to be filled by the Member States complying *inter alia* with the principle of effectiveness.<sup>138</sup> To assess compliance, the Court remarks that a PIN must be published so that economic operators have time to prepare to tender.<sup>139</sup> When the PIN is followed by a call for competition, such a breach does not in itself prevent an economic operator from being able to take part effectively in that competition.<sup>140</sup> Only where an economic operator shows that ‘the lack of prior information caused it a significant disadvantage compared to the operator who is already responsible for performance of the contract and therefore has exact knowledge of all the characteristics of the contract, a breach of the principle of effectiveness can be established, entailing the annulment of the call for tenders. Such a disadvantage may also constitute a breach of the principle of equal treatment’.<sup>141</sup>

Gravely misunderstanding the remedies directives, the Court of Justice has much limited the scope of annulment. It has thus opened a gaping hole in the system of judicial protection set up by those directives. It is almost paradoxical that this was achieved through the application of the principle of effectiveness. Unfortunately, the case was decided without benefiting from the opinion of the Advocate General.

#### 4.3. Damages

Damages deserve an *ad hoc* analysis given both their relevance in the evolution of the general principle of effective judicial protection<sup>142</sup> and the existence of a discrete number of public procurement specific cases.<sup>143</sup> The first relevant case is *GAT*.<sup>144</sup> *GAT* claimed it had been unlawfully excluded from one award procedure and asked for damages, but the national court found that the all award procedure was illegal, starting from the chosen award criteria, whose legality *GAT* had not challenged. The whole procedure should therefore be annulled and *GAT* could not be awarded the contract quite independently

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<sup>138</sup> Ibid, para. 61.

<sup>139</sup> Ibid, para. 64.

<sup>140</sup> Ibid, para. 67.

<sup>141</sup> Ibid, para. 69.

<sup>142</sup> See P. Aalto, *Public Liability in EU Law* (Hart Publishing 2011).

<sup>143</sup> See the contributions collected by D. Fairgrieve and F. Lichère, *Public Procurement Law. Damages as an Effective Remedy* (Hart Publishing 2011). See also S. Treumer, ‘Damages for Breach of the EC Public Procurement Rules – Changes in European Regulation and Practice’ (2006) *Public Procurement Law Review* 160.

<sup>144</sup> Case C-315/01 *GAT* [2003] EU:C:2003:360.

from the legality or otherwise of its exclusion. Therefore, according to the referring court, it had not suffered any damage from the exclusion.<sup>145</sup>

Following the early ‘Austrian’ cases and *Santex*, the Court of Justice both recalled the aim of the directive to strengthen the effectiveness of then EEC procurement law and the fact that the same directive only lays down ‘minimum conditions to be satisfied by the review procedures established in domestic law’.<sup>146</sup> Therefore it is for Member State to determine ‘whether, and in what circumstances, a court responsible for review procedures may raise *ex proprio motu* unlawfulness which has not been raised by the parties to the case brought before it’.<sup>147</sup> This however does not mean that the domestic court may dismiss an application by holding that the award procedure was in any event unlawful.<sup>148</sup>

A number of cases focused on whether an additional element – be it fault or a manifest and serious breach – may be required by national law as a condition for a successful liability action alongside illegality, causation and damages. The case law originated from an infringement procedure brought against Portugal decided in 2004.<sup>149</sup> National law made damages conditional upon the proof of the fault of the public authority, contracting authorities included. The judgment, which is not available in English, is much terse. The Court of Justice simply declared that conditioning the liability on the proof of fault did not amount to ‘adequate’ judicial protection.<sup>150</sup>

In 2010 the legality of national rules conditioning liability on fault was brought again in front of the Court of Justice in two cases which were decided based on different approaches at an interval of just a few months.

The first case was *Strabag*.<sup>151</sup> Even if the applicable Austrian legislation – unlike the Portuguese one – provided for a presumption of fault, the referring court was unsure how to fit that situation with the precedents. The Court of Justice, while conceding that the implementation of Article 2(1)(c) of Directive 89/665/EEC in principle comes under the procedural autonomy of the Member States,<sup>152</sup> noted that the directive allows for circumstances in which the contract is concluded and possibly implemented before the legality or otherwise of the award procedure has been definitively assessed, so that annulment is no more

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<sup>145</sup> Ibid, para. 43.

<sup>146</sup> Ibid, paras 44 ff.

<sup>147</sup> Ibid, para. 46. See also paras 48 ff, stressing that parties have to be heard on the issues raised *ex officio* before a decision on them is taken.

<sup>148</sup> Ibid, para. 51.

<sup>149</sup> Case C-275/03 *Commission v Portugal* [2004] EU:C:2004:632, not published in the ECR. See also Case C-70/06 *Commission v Portugal* [2008] EU:C:2008:3.

<sup>150</sup> Ibid, not published in the ECR, para. 31: ‘ne saurait néanmoins être considérée comme un système de protection juridictionnelle adéquat dans la mesure où elle exige la preuve d’une faute ou d’un dol commis par les agents’.

<sup>151</sup> Case C-314/09 *Strabag and Others* [2010] EU:C:2010:567.

<sup>152</sup> Ibid, para. 34.

possible or does not satisfy the claimant.<sup>153</sup> Therefore damages ‘can constitute, where appropriate, a procedural alternative which is compatible with the principle of effectiveness underlying the objective pursued by that directive of ensuring effective review procedures [...] only where the possibility of damages being awarded in the event of infringement of the public procurement rules is no more dependent than the other legal remedies provided for in Article 2(1) of Directive 89/665 on a finding that the contracting authority is at fault’.<sup>154</sup>

In *Strabag* the Court reasoned along the lines of both *effet utile* and effectiveness of tenderers’ rights. The *Brasserie du Pêcheur* line of cases is totally ignored. Only a few procurement specific cases were referred to in *Strabag*.

*Spijker* was the second 2010 damages case.<sup>155</sup> Not unlike in *Strabag*, in *Spijker* the Court of Justice moved from the recognition of the margins of discretion left by Article 2(1)(c) of Directive 89/665/ECC to the Member States.<sup>156</sup> Unlike in *Strabag*, however, in *Spijker* the Court rather referred to the *Brasserie du Pêcheur* line of cases. According to the Court Article 2(1)(c) gives ‘concrete expression to the principle of State liability for loss and damage caused to individuals as a result of breaches of EU law for which the State can be held responsible. According to case-law developed since the adoption of Directive 89/665, but which is now consistent, that principle is inherent in the legal order of the Union. The Court has held that individuals harmed have a right to reparation where three conditions are met: the rule of EU law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between the breach and the loss or damage sustained by the individuals’.<sup>157</sup>

Glossing over both *Strabag* and the Portuguese infringement cases, in *Spijker* the Court of Justice instead claimed that the case law had “not yet set out, as regards review of the award of public contracts, more detailed criteria on the basis of which damage must be determined and estimated” as compared to those flowing from the precedents on effective judicial protection.<sup>158</sup>

It is remarkable that on the basis of the general case law on effective judicial protection in *Spijker* the Court allowed Member States to set stricter conditions limiting the availability of damages compared to earlier judgements focusing solely on the remedies directives.<sup>159</sup>

<sup>153</sup> Ibid, paras 37 ff.

<sup>154</sup> Ibid, para. 39.

<sup>155</sup> Case C-568/08 *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others* [2010] EU:C:2010:751.

<sup>156</sup> Ibid, para. 88.

<sup>157</sup> Ibid, para. 87. *Francovich* and *Brasserie du Pêcheur* are duly referred to along with Case C-445/06 *Danske Slagterier* [2009] EU:C:2009:178, paras 19-20.

<sup>158</sup> Ibid, para. 88.

<sup>159</sup> Two recent and hard to reconcile EFTA Court opinions in the same case first followed *Strabag* in holding that a breach is enough to give rise to liability: Request for an Advisory Opinion from the EFTA Court by Frosating lagmannsrett dated 24 October 2016 in the case of Fosen-Linjen AS v AtB AS (Case E-16/16) [2017] OJ C123/10. (Critically, A. Sanchez Graells, ‘You Can’t

## 5. Conclusions

Proceduralisation has developed earlier and further in public procurement than in other sectoral areas of EU law.<sup>160</sup>

This does not mean that the remedies foreseen in EU secondary law do not have shortcomings or even gaps. Reliance on the procedural autonomy does not necessarily and always partake effective remedies. The question addressed in this article is whether and if so to what extent the principles of effectiveness, that of effective judicial protection and the right to fair and effective remedies do go beyond secondary law.

To try and read and possibly make sense of the rich case law on remedies in public procurements and concessions, a table is needed.

**Table 1: legality benchmarks referred to in the preliminary reference (PRef) or more rarely in the decision bringing an infringement procedure by the Commission (C) and in the decision by the Court of Justice (CJ) – chronological order of the judgments**

Legal issue: A: annulment; D: damages; I: ineffectiveness; Just: justiciability; PC: procedural conditions; S: standing; T: time limits

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*Be Serious: Critical Reflections on the Liability Threshold for Damages Claims for Breach of EU Public Procurement Law After the EFTA Court's Fosen-Linjen Opinion'* (2018) 1 *NJEL* 1; in Request for an Advisory Opinion from the EFTA Court by Norges Høyesterett dated 19 November 2018 in the case of Fosen-Linjen AS, supported by Næringslivets Hovedorganisasjon (NHO) v AtB AS (Case E-7/18) [2018] OJ C107/05, additionally that manifest and serious breach may be required by national law when loss of profit is sought.

<sup>160</sup> R. Caranta (n 8).

## THE INTERPLAY BETWEEN EU LEGISLATION AND EFFECTIVENESS

Case/year	Legal issue	Directive, incl. <i>effet utile</i> /effectiveness of EU law	Principle of equivalence	Principle of effectiveness	Principle of effective judicial protection, now Art. 47 Charter
<i>Alcatel Austria</i> 1999	Just	PReF; CJ			
<i>Universale-Bau</i> 2002	T	PReF; CJ			
<i>Santex</i> 2003	T	PReF (w/ Art. 6 ECHR); CJ		PReF?; CJ	
<i>Fritsch, Chiari &amp; Partner</i> 2003	PS	PReF; CJ			
<i>GAT</i>	D	PReF; CJ			
<i>Hackermüller</i> 2003	S	PReF; CJ			
<i>Grossmann Air Service</i> 2004	S/PS	PReF; CJ			
<i>Commission v Portugal</i> 2014	D	C; CJ			
<i>Stadt Halle</i> 2005	Just	PReF; CJ			
<i>Espace Trianon</i> 2005	S	PReF; CJ			
<i>Commission v Ireland</i> 2010	T	C; CJ		C; CJ	
<i>Uniplex (UK)</i> 2010	T	PReF; CJ		PReF; CJ	
<i>Commission v Ireland</i> 2010	T	CJ		CJ	
<i>Strabag</i> 2010	D	PReF; CJ			
<i>Spjiker</i> 2010	D	PReF; CJ		PReF; CJ	
<i>Hotel Club Loutraki</i> 2010	S	PReF (w/ Art. 6 ECHR)	CJ	CJ	
<i>Fastweb I</i> 2013	S	PReF; CJ			
<i>Fastweb II</i> 2014	I			PReF; CJ	PReF; CJ
<i>Orizzonte Salute</i> 2015	PC	PReF; CJ	PReF; CJ	PReF; CJ	PReF; CJ
<i>eVigilo</i> 2015	A/PC	PReF; CJ		PReF; CJ	
<i>MedEval</i>	PC/D	PReF	PReF	PReF; CJ	
<i>SC Star Storage</i> 2016	PC	PReF; CJ <i>obiter</i>			PReF; CJ
<i>Puligenica Facility Esco SpA (PFE)</i> 2016	S	CJ			
<i>Bietergemeinschaft</i> etc 2016	S	PReF; CJ			
<i>Marina del Mediterraneo</i> 2017	Just	PReF; CJ	CJ <i>obiter</i>	CJ <i>obiter</i>	
<i>Anodiki Services EPE</i> 2018	Just	PReF; CJ			
<i>Amt Azienda Trasporti</i> 2018	S	PReF; CJ			
<i>Hochtief (I)</i> 2018	PC/D	CJ			PReF; CJ
<i>Rudigier</i> 2018	A	CJ	PReF; CJ	PReF; CJ	
<i>Cooperativa Animazione Valdocco</i> 2019	T	PReF (w/ Artt. 6 and 13 ECHR) CJ		PReF; CJ	PReF; CJ
<i>Lombardi</i> 2019	S			CJ	

What comes immediately out of the table is the strong ‘insularity’ of the EU law of public procurement and concession remedies.<sup>161</sup> Until recently, the remedies directives were the only benchmark used by the Court of Justice to assess the legality of national remedial rules. The general principles of equivalence, effectiveness and effective judicial protection have been rarely invoked, and anyway only in recent years. Recourse to the Charter has been even rarer and has only exceptionally resulted in accrued judicial protection as compared to what is already provided by the remedies directives.

One reason why it is so is because more and more often cases are disposed of without hearing the opinion of the Advocate General. In a recent case, a simple order was issued.<sup>162</sup> This approach leads the Court of Justice to simply follow old precedents predating the Charter rather than asking itself whether the Charter, and the same principle of effective judicial protection, should or at least might add anything to the rights granted by the remedies directives on which those precedents are grounded.

More generally the Court of Justice has opted for a ‘peculiar collective understanding’ of the right to effective judicial protection under Article 47 of the Charter focusing more on ‘issues of general design of the system’ than on the effective protection of the economic operators’ rights.<sup>163</sup> In doing so the Court and walking backwards to more than 20 years ago, effective judicial protection is absorbed in *effet utile*.<sup>164</sup>

Moreover, and this is no improvement either for *effet utile* or for effective judicial protection, today the Court seems more worried about the speed of litigation and its consequences on the speed of the purchasing process than it is on the contribution effective remedies may give to enforce the free movement of goods and services through open and undistorted competition.<sup>165</sup> This is a misconstrued understanding of the aims of the remedies directives, for which ‘speed’ is instrumental to effective judicial protection rather than an end unto itself. Moreover, the objective of the efficiency of award procedures falls squarely outside the competence of the EU and therefore cannot be used in defining the *effet utile* of the remedies directives.<sup>166</sup>

If *Orizzonte Salute*, *Start Storage* and *Cooperativa animazione Valdocco* are of any guide, reference to Article 47 of the Charter is today actually strengthening

<sup>161</sup> See also A. Sanchez-Graells and C. de Koninck (n 19) 34 ff.

<sup>162</sup> C-54/18 *Cooperativa Animazione Valdocco* [2019] EU:C:2019:118.

<sup>163</sup> Again A. Sanchez-Graells and C. de Koninck (n 19) 42.

<sup>164</sup> See again U. Sadl (n 10) 28 ff.

<sup>165</sup> Case C-26/03 *Stadt Halle and RPL Lochau* [2005] EU:C:2005:5, para. 37.

<sup>166</sup> M.E. Comba, ‘Variations in the scope of the new EU public procurement Directives of 2014: Efficiency in public spending and a major role of the approximation of law’, in F Lichère, R Caranta and S Treumer (eds), *Modernising Public Procurement: The New Directive* (DJØF 2014) 46 ff. See also R. Caranta, ‘The changes to the public contract directives and the story they tell about how EU law works’ [2015] 52 *CMLRev* 404.

the procedural autonomy of the Member States. Reasoning in terms of proportionality along the lines of Article 52 of the Charter lessens the pursuit of *effet utile* of the existing provisions of EU secondary law.<sup>167</sup>

Paradoxically, ‘constitutionalisation’ and the application of the proportionality principle bring the Court to frame questions in terms of separation of competences between the EU and the Member States rather than as a question of effective protection of rights or even *effet utile*.

The Court seems in some cases to switch from being too focused on the remedies directives to becoming oblivious of their *effet utile*. If so, the effects of proceduralisation will be much limited, if not ditched.

With the Court of Justice very much stuck on its usual paths or worse going down slippery roads, only legislative reform might fill the still existing gaps in judicial protection. Unfortunately, in its report on the effectiveness of the public procurement remedies directives the Commission concluded that the situation does not demand urgent action.<sup>168</sup>

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<sup>167</sup> Case C-439/14 *Star Storage* [2016] EU:C:2016:307, Opinion of AG Sharpston, paras 40 ff.

<sup>168</sup> COM/2017/28 final. See also the accompanying staff working paper SWD/2017/13 final. See critically A. Sanchez-Graells, ‘Some initial comments On the Commission’s Report on the Effectiveness of the Public Procurement Remedies Directives’ (*How to Crack a Nut*, 2017) [howtocrackanut.com/blog/2017/2/7/some-initial-comments-to-the-commissions-2017-report-on-the-effectiveness-of-the-public-procurement-remedies-directives?rq=remedies%20commission](http://howtocrackanut.com/blog/2017/2/7/some-initial-comments-to-the-commissions-2017-report-on-the-effectiveness-of-the-public-procurement-remedies-directives?rq=remedies%20commission) accessed 20 October 2019.