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Public Procurement and Remedies

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Public Procurement and Remedies

I. Introduction

The most important changes brought by the adoption of Directive 2007/66/EC refer to the standstill provisions, the remedy of ineffectiveness and the alternative sanctions meant to complement or replace the solution of rendering a contract ineffective¹. Settled case-law shows that the purpose of the EU directives coordinating procedures for the award of public contracts is to avoid the risk of preference being given to national tenderers, whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by non-economic considerations².

The main objective of the supranational public procurement law is to ensure that the economic actors in all 28 Member States of the EU as well as Iceland, Norway and Liechtenstein have full and equal access to contract awards throughout the EEA area, ensuring a level playing field within the public procurement market. The substantive directives apply to all contracts above certain thresholds³. The CJEU has emphasized the principal objective of the supranational rules in this legal field, namely the free movement of services and the opening-up to the widest possible undistorted competition in all Member States⁴.

1 /* SEC/2006/0557 */ The most important problems identified during the consultation process and in case law were (i) the lack of effective Remedies against the practice of illegal direct awards of public contracts (i.e. public contracts awarded in a non-transparent and non-competitive manner to a single tenderer) and (ii) the race to signature of public contracts by Awarding Authorities which actually deprives economic operators participating in formal tender procedures of the possibility to bring Remedies actions effectively, i.e. at a time when infringements can still be corrected.

2 See, in particular, Case C-380/98, *University of Cambridge*, [2000] I-8035 paragraph 17, Case C-237/99 *Commission v France* [2001] I-00939 paragraph 42, and Case C-470/99, *Universale-Bau and Others*, [2002] I-11617 paragraph 52

3 Commission Regulation(EU) No 1251/2011 of 30 November 2011 amending Directives 2004/17/EC (OJ L 134, 30.4.2004, p. 1–113), 2004/18/EC (OJ L 134, 30.4.2004, p. 114–240) and 2009/81/EC ('substantive directives') of the European Parliament and of the Council in respect of their application thresholds for the procedures for the awards of contract Text with EEA relevance, OJ L 319, 2.12.2011, p. 43–44

4 Case C- 26/03, *Stadt Halle and RPL Lochau*, [2005] I- 00001 paragraphs 44 and 47

Based on the principle of non-discrimination and preserving a liberalisation pact, a bilateral agreement between the EU and Switzerland was signed in order to secure reciprocal access to purchases of products and services, including construction services, by telecommunications operators, railway operators, entities active in the field of energy other than electricity and private utilities of both parties⁵. Through its bilateral relations the Union advocates within the context of the WTO an ambitious opening of international public procurement markets of the Union and its trading partners, in a spirit of reciprocity and mutual benefit.

The objectives of the EU directives coordinating the award procedures would nevertheless be unattainable, if the economic operators were unable to effectively ensure that the rights granted by the Union procurement law were observed everywhere in the EU. Directives 89/665/EEC⁶ and 92/13/EEC⁷ were consequently adopted as flanking measures in order to guarantee access to rapid and effective procedures for seeking redress in cases where the economic operators have reasons to believe that a public contract has been unfairly awarded.

On 21 June 2007 the European Parliament having regard to the Commission proposal and the Article 47 of the Charter approved the proposal for a new remedies directive. For ease of reference I will use two generic nominations: '*substantive directives*' for the rules on coordinated procedures for the award of public contracts and '*procedural directives*' for the rules on coordinated review procedures. The Directive 2007/66/EC (hereinafter referred to as '*Remedies Directive*') was adopted on 15 November 2007 by the European Council at first reading with a view to adoption by means of codecision procedure. On 11 December 2007 the named codecision procedure took place and the directive was published on 20 December 2007.

An improved access of the economic operators established in the EU to public procurement markets of certain third countries protected by restrictive procurement measures and the preservation of equal conditions of competition within the Internal Market require the harmonization of the rules governing the treatment of third-country goods and services not yet covered by specific international commitments of the Union⁸.

5 Agreement between the European Union and the Swiss Confederation on certain aspects of government procurement, OJ L114, 30/04/2002, p. 430

6 Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ L 395, 30.12.1989, p. 33–35

7 Council Directive of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Union rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ L 76, 23.3.1992, p. 14–20

8 Proposal for a Regulation on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries COM(2012) 124 final 2012/0060 (COD) Brussels, 21.3.2012

II. The definition of decisions for judicial review

The provisions of the Remedies Directive apply to all decisions taken by contracting authorities who are subject to the rules of Union law on public procurement⁹ and no limitation regarding the nature and content of those decisions is allowed¹⁰. The directive lays down nevertheless only the minimum conditions to be satisfied by the review procedures established in domestic law in order to ensure compliance with the requirements of Union law on public procurement¹¹. Where one activity carried out by a body falls within the scope of the public procurement directives, all the other activities carried out by that body, irrespective of their possible industrial or commercial character, are also covered by those directives¹².

It must be said also that the system established by the Union legislature for contracts relating to non-priority services i.e. services falling within the ambit of Annex II B of the substantive directives, endorses the application of the principles deriving from Articles 49 TFEU and 56 TFEU or, therefore, of the requirements designed to ensure transparency of procedures and equal treatment of tenderers, if such contracts are nevertheless of certain cross-border interest¹³. The previously established distinction between priority and non-priority services should be nevertheless abolished according to the Commission proposals for new substantive directives on public procurement¹⁴.

The obligation to provide effective and rapid remedies against decisions taken by contracting authorities includes the decisions taken outside a formal award procedure and the decisions prior to a formal call for tenders, in particular the decision on whether a particular contract falls within the personal and material scope of the substantive directives. The possibility of review shall not depend on the fact that the public procurement procedure in question has formally reached a particular stage. The expression of will formulated in a manner capable of producing legal effects must be open to review¹⁵. An invitation to tender and its allegedly unlawful clauses must be made subject to review¹⁶. The withdrawal of an invitation to tender also must be open to review and its examination cannot be reduced to determining whether the decision to withdraw was arbitrary¹⁷.

9 See inter alia Case C-92/00, *HI*, [2002] I-5553 paragraph 37, and Case C-57/01, *Makedoniko Metro and Michaniki*, [2003] I-1091 paragraph 68

10 Case C-81/98, *Alcatel Austria*, [1999] I-07671 paragraph 35, and *HI*, cited supra footnote 9, paragraph 49

11 See, inter alia, Case C-327/00, *Santex*, [2003] I-1877 paragraph 47, and Case C-315/01, *GAT*, [2003] I-6351 paragraph 45

12 Case C-44/96, *Mannesmann Anlagenbau*, [1998] ECR I-73 paragraphs 25 and 26

13 Case C-226/09, *Commission v Ireland*, [2010] I-11807 paragraphs 29, 31

14 COM/2011/0895 final - 2011/0439 (COD) and COM/2011/0896 final - 2011/0438 (COD) The EESC is in favour of maintaining the difference between A and B Services under the condition of legal certainty and the possible extension of cross-border contracts of B Services.

15 *Stadt Halle*, cited supra footnote 4

16 Case C-448/01, *EVN AG*, [2003] I-14527

17 *HI*, cited supra footnote 9

Decisions of other public authorities than the contracting authorities themselves can be made subject to review under public procurement law. The exclusion of the tenderer in *Club Hotel Loutraki* resulted from a decision taken by a Greek public authority, ESR, whose activities were in principle not governed by the review system laid down by the procedural directives. However the decisions of ESR could lead to the exclusion of a tenderer, who individually was characterised by one or another of the incompatibilities stipulated by the relevant national rules. Therefore the decisions of ESR were not devoid of interest in respect of the uniform and accurate application of Union law in the field of public procurement procedure and the right to effective judicial protection, precludes a national rule that deprives a tenderer in a public procurement procedure of the possibility of seeking, individually, compensation for the loss suffered as a result of a decision adopted by an authority, other than the contracting authority, involved in that procedure in line with the applicable national rules, which is such as to influence the result of that procedure¹⁸.

In *Nachrichtenagentur* the CJEU provided the definitions of the terms *awarded* and *awarding* in order to determine under which conditions an amendment brought to a contract may imply that a new award is granted. A transfer of services between the initial service provider and a limited liability company fully owned and controlled by the named service provider is not covered by the definition of an award. A modification of the initial contract in order to accommodate external changes is not an award. The use of a supplementary agreement during the period of validity of a contract concluded for an indefinite period, through which the contracting authority agrees with the contractor, to renew for a period of three years a waiver of the right to terminate the contract by notice and agrees to lay down higher rebates than those initially provided for with respect to certain volume-related prices within a specified area of supply are not covered by the definition of award¹⁹. In conclusion there are many rules of substantive nature that can determine the content and the scope of a decision for judicial review.

III. Two levels of enforcement

According to Article 17 TEU the Commission is the guardian of the Treaties. The supranational level of enforcement relates to the competencies retained by the Commission to supervise the compliance of the Member States with their obligations under EU law. It follows from Article 258 TFEU that the Commission can bring a Member State before the Court, if it considers that it has failed to fulfil an obligation under the Treaty including compliance with specific provisions of secondary law. A tenderer who submits a complaint to the Commission will not be party to the proceedings brought by the latter under Article 258 TFEU²⁰.

18 Joined Cases C-145/08 and C-149/08, *Club Hotel Loutraki*, [2010] I-04165 paragraph 80; The Greek Council for Radio and TV ('ESR') was the authority in question.

19 Case C-454/06, *presstext Nachrichtenagentur*, [2008] I-04401

20 Article 258 TFEU corresponds to article 31 of the SCA

In practice there are three distinct situations in which an infringement takes place: non-communication of measures transposing directives, non-conformity of national measures i.e. incorrect transposition and thirdly, an inaccurate application of EU law meaning that the specific application of certain secondary provisions is not compliant. In the third situation, the parallel application of both national and supranational rules on public procurement is possible.

The Commission recommends the prior use of such national means of redress, whether administrative, judicial or other, before lodging a complaint with the Commission, because of the advantages they may offer for complainants. By using national remedies complainants may assert their rights more directly and more personally than by using the infringement procedure, which usually also takes more time. In contrast with the case of national proceedings, any person has *locus standi* to lodge a complaint under Article 258 TFEU concerning a specific breach of Union law by a Member State and may enjoy the benefit of anonymity. It isn't necessary to demonstrate a formal interest in bringing proceedings. Neither do complainants have to prove that they are principally and directly concerned by the infringement. Anonymity is an advantage for a complainant who needs to entertain excellent business relations with the contracting authority in question.

In fact, before referring a case to the CJEU, the Commission shall hold a series of contacts with the Member State concerned to try to terminate the infringement. Moreover, any finding of an infringement by the CJEU has no impact on the rights of the complainant, since it does not serve to resolve individual cases. It merely obliges the Member State to comply with Union law and in particular, any individual claims for damages would have to be brought by complainants before the national courts²¹.

Iceland, Liechtenstein and Norway, have notified as well the full implementation of the Remedies Directive²². EFTA's Surveillance Authority (hereinafter referred to as 'ESA') is according to article 23 of Surveillance and Court Agreement (hereinafter referred to as 'SCA') responsible for the supervision of compliance with the obligations concerning public procurement assumed under the EEA Agreement²³. Under article 31 SCA, the ESA is competent to bring actions before the EFTA-Court against an EEA-member for failing to fulfil an obligation under the EEA Agreement²⁴. Switzerland, founding member of the EFTA, rejected the adherence to the EEA Agreement via a referendum in 1992, thus the Government Procurement Agreement of the WTO represents the cornerstone of the Swiss international procurement legislation.

21 Commission Communication to the Council and Parliament updating the handling of relations with the complainant in respect of the application of Union law, COM/2012/0154 final

22 Compliance date for the obligation to incorporate the Remedies Directive stipulated by the Decision of the Joint Committee No. 83/2011 was 1 November 2012. See annex XVI, 5, 5a of the EEA Agreement

23 The Surveillance and Court Agreement, OJ L 344, 31.1.1994, p. 3; and EFTA States' official gazettes, article 5(1)(a); Article 23 SCA corresponds in substance with articles 3 and 8 of Directive 2007/66/EC entitled '*Corrective mechanisms*'.

24 The Surveillance and Court Agreement, cited supra footnote 23, article 31(2)

In *Aleris Ungplan*, a subsidiary of a Swedish company, contested under Article 36 SCA²⁵ the decision of ESA not to initiate procedures under article 31 SCA²⁶, as regards an award of youth care services and the exclusion of commercial operators according to Norwegian law. The relevant substantive law for the contested ESA decisions relied on the freedom of establishment, the principle of non-discrimination and articles 31 EEA, 65 EEA and 109 EEA, and the article 2 of Directive 2004/18/EC with specific reference to the regime of non-priority services. The ESA decided that there were no grounds to further pursue the cases under article 31 SCA²⁷ and the EFTA Court maintained this decision, since the application submitted by the plaintiff under article 36 SCA was manifestly inadmissible²⁸. The findings under Article 31 SCA resulting from the contested examination performed by ESA are not binding on national courts, though they constitute a factual element, which a national court seized to rule on the dispute may certainly take into account²⁹. There is a connection between the national and the supranational procedures, even if the character of an ESA decision, exactly as in the case of a corresponding Commission decision under article 258 TFEU, is not compulsory law.

Article 260 TFEU allows the Commission to bring an action against a Member State, who failed to comply with a prior ruling of the Court. If the Court finds that the Member State has indeed failed to comply with its judgment, it may impose a lump sum or a periodic penalty payment. In case of a serious and persistent failure to comply with Union law a Member State may be ordered to pay both a periodic penalty and a lump sum. According to third paragraph of Article 260 TFEU, an action under Article 258 TFEU on the grounds that a Member State has failed to notify measures transposing a directive adopted under legislative procedure can incur a payment obligation for the Member State in question. Necessary interim measures may be prescribed in all cases pursuant to the provisions of Article 279 TFEU.

An order for interim measures can be obtained providing that prima facie case is presented in the application and by this means the imminent character of serious and irreparable damage of irreversible nature may be anticipated. According to the case-law, a prima facie case is present where at least one of the applicant's pleas appears at first sight to be too weighty to be discounted, or cannot be discounted without a detailed examination, which is reserved for the decision on the merits³⁰. Moreover, according to consistent case-law, the risks of each of the possible solutions must be balanced against each other in interim relief proceedings. It must particularly be examined whether the interest of the applicant to suspend the effect of the contested decision weighs more heavily than the interest in the immediate implementation of that decision³¹.

25 Article 36(2) SCA corresponds to Article 263(4) TFEU

26 Article 31 SCA corresponds to Article 258 TFEU.

27 College Decision 248-10-COL to close a case against Norway for failure to comply with the EEA procurement rules

28 Case C-29/92, *Asia Motor France*, [1992] I-03935 paragraphs 19 to 21, and the case-law cited, and Case T-29/93, *Calvo Alonso-Cortès*, [1993] II-1389 paragraph 55, and Case T-58/09, *Schemaventotto*, [2010] II-03863 paragraphs 125 and 126

29 Case E-13/10, *Aleris Ungplan*, EFTA Ct. Rep [2011] p. 3 paragraph 28

30 Order of the President of the Court of Justice, Case C-149/95 P(R), *Commission v Atlantic Container Line and Others*, [1995] I-2165 paragraphs 26-7

31 *Commission v Atlantic Container Line and Others*, cited supra footnote 30, paragraph 50

Preliminary ruling proceedings conducted under Article 267 TFEU are based on a clear separation of functions between the national courts and the CJEU. It is the national court alone, before which the dispute has been brought, and which must assume responsibility for the judicial decision to be made, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it refers to the Court. Where the questions submitted by the national court concern the interpretation of Union law, the CJEU is bound to give a ruling³².

A preliminary ruling does not create or alter the law, but is purely declaratory, with the consequence that in principle it takes effect from the date on which the rule interpreted entered into force³³. In EFTA law we can find a weaker device stipulated by Article 34 SCA that only gives to the national courts a right to request advisory opinions on the interpretation of the EEA Agreement. Three categories of situations subject to preliminary or advisory rulings can be distinguished depending on whether the contract has been concluded before or after the time limit for transposition and whether the directive has been implemented in time.

- A. If the implementation is carried on within the prescribed transposition period, then the national implementing provisions become applicable on the public contracts according to the transitional provisions of the implementing act, but no later than 20 December 2009 for the EU member states and 1 November 2012 for the other EEA members;
- B. If the implementation is delayed³⁴, then certain provisions of the directive, which are unconditional and sufficiently clear and precise, incur direct vertical effect and individuals can rely on them before the national courts³⁵. The public procurement directives are undeniably intended to confer rights on individuals.
- C. If the implementation is incongruous with the provisions of the directive, the national court must do its best to interpret the domestic law in agreement with Union law, if not possible to deliver such an interpretation, it must disapply the incongruous provisions of national law and finally if it's not possible to disapply them, an action for damages for state liability remains the only available means of redress.

The principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of EU law for which the State can be held responsible is inherent in the legal system established by the Treaties. However we can observe that most commonly a case of incorrect implementation of a directive is dealt with under the procedures stipulated by article 258 TFEU and not brought before the national courts relying on the *Francovich* doctrine.

32 See, in particular, Case C- 379/98, *PreussenElektra*, [2001] I-2099 paragraph 38; Case C- 341/05, *Laval un Partneri*, [2007] I-11767 paragraph 45; and Case C- 450/06, *Varec*, [2008] I-00581 paragraph 23

33 Case C- 2/06, *Kempter*, [2008] I- 411 paragraph 35

34 See to that effect Case 148/78, *Ratti*, [1979] I-01629

35 See to that effect, Case 41-74, *Van Duyn*, [1974] I-01337

The State may nevertheless be held responsible for damage caused to individuals by infringements of EU law, where the rule which has been infringed is intended to confer rights on them, the breach of that rule is sufficiently serious, and there is a direct causal link between the breach and the loss or damage sustained by the individuals.

...it is for the internal legal order of each Member State, once those conditions have been complied with, to determine the criteria on the basis of which the damage arising from an infringement of EU law on the award of public contracts must be determined and estimated, provided the principles of equivalence and effectiveness are complied with³⁶

Whatever the case may be an infringement of EU law will be sufficiently serious, where the decision concerned was made in manifest breach of the case-law of the CJEU on the subject matter³⁷. Other factors for determining the serious character of an infringement comprise above all the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Union institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under Article 267(3) TFEU³⁸.

In my view the provisions of a directive that are sufficiently clear and precise and confer individual rights must be enforceable before the national court after the expiry of the transposition period and must be given full effect in any event. If the application of these provisions is rendered impossible under national law, as it is the case of *contra legem* interpretation, the degree of erroneousness of the implementation must be deemed as being sufficiently serious, because in this case the requisite solution must be legislative i.e. the adoption of new legislation and the repeal of the manifestly unlawful provisions.

Additionally, it must be reminded that the implementation in accordance with a directive's provisions by the authority vested with the power to adopt regulations, cannot in itself achieve the clarity and precision needed to meet the requirement of legal certainty³⁹. The named requirement ensures, that individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and, where appropriate, to rely on them before the national courts⁴⁰.

36 Case C-568/08, *Combinatie Spijker*, [2010] I-12655 paragraph 92

37 See, inter alia, to that effect Joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, [1996] I-01029 paragraph 57; Case C-118/00, *Larsy*, [2001] I-5063 paragraph 44; and Case C-224/01, *Köbler*, [2003] I-10239 paragraph 56

38 *Köbler*, cited supra footnote 37, paragraph 55

39 See, to this effect, Case C-236/95 *Commission v Greece* [1996] I-4459, paragraphs 12 and 13, and Case C-144/99 *Commission v Netherlands* [2001] I-3541, paragraph 21

40 See to this effect, in particular, Case C-236/95 *Commission v Greece* [1996] I-4459 paragraph 13, and Case C-177/04 *Commission v France* [2006] I-2461 paragraph 48

A reference for a preliminary ruling cannot determine the outcome of the case, the decision in the main proceedings being taken by the referring court, the interpretation and application of the relevant rules of domestic law is limited by general principles of law and it cannot serve as the basis for an interpretation of national law *contra legem*. The appreciation of the gravity of the infringement has been left to the national courts ignoring thus the fact that the rights of individuals deriving from Union law will most probably be rendered ineffective, if the viability of the ultimate prescribed solution of an action for damages relying on the *Francovich* ruling is not assumable in any sense.

IV. National enforcement of Union procurement rules

The effectiveness of Union law shall also be preserved by the national courts through the available mechanism for preliminary rulings. The main rule is that the principles of national procedural autonomy and of the uniform application of Union law are applicable, if the national courts deal with a case comprised within the spectrum of Union law rights and obligations⁴¹. The exercise of national procedural autonomy must respect the principles of equivalence and effectiveness. Article 1(3) of the Remedies Directive imposed an obligation on the Member States to ensure, under their own detailed rules, that review procedures are accessible at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement⁴².

The Member States are not obliged to make those review procedures available to any person wishing to obtain a public contract, but they may require that the person concerned has been or risks being harmed by the infringement he alleges⁴³. A potential claimant for damages is also a person who has *locus standi* to lodge a complaint against an award decision before the review body or the national court.

...in the absence of [Union] rules governing the matter, it is for the domestic legal system of 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 directly from [Union] law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by [Union] law (principle of effectiveness)⁴⁴.

41 Directive 2007/66/EC, OJ L 335, 20.12.2007, p. 31–46, recital (34)

42 See also Directive 2007/66/EC, cited supra footnote 41, recital (17)

43 Case C-249/01, *Hackermüller*, [2003] I-6319 paragraph 18

44 Case C-453/99, *Courage & Crehan*, [2001] I-06297 paragraph 29; See also Case C-91/08, *Wall AG*, [2010] I-02815 paragraph 65

From the beginning it is important to distinguish between two situations. The *Teleaustria* type of situation, where coordinated rules on remedies were not applicable and the legal protection of individual rights derived directly from provisions of primary law and the *Stadt Graz* type of situation, where the applicable remedies are harmonized meaning that the right to be awarded civil damages for infringements of public procurement law is specifically stipulated, thus not left to the discretion of the Member States⁴⁵.

*... a declaration that an application for damages, brought by the unsuccessful tenderer following the annulment of that decision by an administrative court, is well founded cannot – contrary to the wording, context and objective of the provisions of Directive 89/665 which establish the right to such damages – depend, for its part, on a finding that the contracting authority involved is at fault*⁴⁶.

The aim of the Remedies Directive is to guarantee judicial remedies, which are as rapid as possible and effective against decisions taken by contracting authorities in violation of the law on public contracts and the principle of effectiveness underlies the objectives pursued by that directive. In theory, the national provisions implementing a directive come under the procedural autonomy of the Member States, limited by the principles of equivalence and effectiveness, however it is also necessary to examine whether the implementation is correct.

In addition, when hearing a case between individuals, a national court, which is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objectives pursued by it⁴⁷. If certain remedies are explicitly required, the scope of the procedural autonomy is accordingly reduced.

Member States shall not apply their procedural rules in such a manner as to undermine Union interests such as the effectiveness of anti-infringement policies in the area of public procurement, unless such restriction is based on overriding reasons, necessary and proportional in relation to the contemplated aim⁴⁸. The rationale of the Remedies Directive is to achieve full effectiveness of Union law and, above all, to ensure the *effet utile* of the prohibitions stipulated by the directives. Unless the prescribed remedies are actually made available and enforceable before the national courts, the rationale of the Remedies Directive would be disconcerted.

45 Case C-314/09, *Stadt Graz v Strabag AG*, [2010] I-08769; See also *Hackermüller* cited supra footnote 43, and Case C-213/07, *Michaniki* [2008] I-09999 concerning the rule that the grounds for exclusion must be open to review and *Universale-Bau*, cited supra footnote 2 and Case C-241/06, *Lämmerzahl*, [2007] I-08415 concerning the compulsory content of a contract notice or of the tender documents. C-314/01, *Siemens AG Österreich*, [2004] I-02549 requires that clauses of a tender invitation must be open to review.

46 *Stadt Graz*, the paragraph cited supra footnote 45

47 Joined cases C-397/01 to C-403/01, *Pfeiffer*, [2004] I-08835 paragraph 119

48 Directive 2007/66/EC, cited supra footnote 41, recitals 22-24 and article 2d3

The scope of the national procedural autonomy has been considerably reduced, by the very adoption of specific harmonized remedies. The following remedies are generally made available not only in the EEA area, but also worldwide:

- ⌘ Setting aside a decision of award partially or fully or amending it;
- ⌘ Setting aside any other decision for public procurement;
- ⌘ Interim measures against the procurement procedure, an automatic interim bar is available in some countries, but in most countries the suspension is not automatic but a proportionality test is required;
- ⌘ Annulment of a concluded contract
- ⌘ Damages are granted if the following standard criteria are met: loss suffered by the claimant, a breach of the law by the contracting authority or entity, causality. The negative contract interest is redressed in all the EEA states, in contrast damages for lost profits are seldom available since it is difficult to provide the evidence required for the positive contract interest⁴⁹.
- ⌘ Pecuniary penalties and periodic penalty payments form part of the public procurement remedy systems.

A directive does not offer a complete cover of the subject matter and therefore what has been left outside the scope of the coordinated rules must be regulated by the Member States in the spirit of sincere cooperation and effectiveness. Matters like the actual determination of limitation periods, access to file, effect of the national decisions, quantification of harm and rules on evidence and burden of proof have been left to the discretion of the Member States with the amendment that the national choices must be equivalent and effective.

A. Independent review bodies

Certain features are generally adopted by the domestic laws that regulate the activity of the national review bodies in all member states: the existence of a legal prescription, the type of outcome of the proceedings, the legal standing of claimants and the imposition of fees and deposits.

The scope of review is nevertheless different, in 15 Member States⁵⁰ the same system applies to all public contracts. In Germany, Ireland and the UK the system is applicable only to contracts over the thresholds, while the other 9 Member States⁵¹ have two distinct systems. Moreover some countries have different rules for contracting entities. The amount of fees to be paid is in some countries only symbolic and in other countries very onerous like in Germany and in Czech Republic.

49 See for that effect, Case T 2883-04, *Ishavet v Municipal Council of Gothenburg*, Judgment of Supreme Court of Sweden, 31 May 2007

50 Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Hungary, Italy, Lithuania, Portugal, Poland, Romania Slovak Republic, and Sweden

51 Bulgaria, Cyprus, Greece, Latvia, Luxembourg, Malta, Netherlands, Slovakia, Slovenia

According to settled case-law, in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent⁵².

When a body of first instance, independent of the contracting authority reviews a contract award decision, Member States shall ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures or for review⁵³. Members of such an independent body shall be hired and removed from office under the same conditions as members of the judiciary as to the authority in charge with their appointment, their period of office, and their dismissal. In any case the President of an independent review body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding⁵⁴.

In Denmark, not only tenderers and candidates have standing rights before the review body, but also the Competition Authority and the Ministry of the Economy, Finances and Industry as well as the corresponding authorities from any EU or EFTA state. The Danish review body has the authority to suspend, annul or modify the award decisions, to impose economic sanctions and to award compensation for damages suffered by the complainant. A decision of the review body can be contested within 8 weeks from the notification of the parties⁵⁵. The Danish review body is composed by a board of 7 judges, a vice-president and a president. Moreover a number of legal experts are hired as auxiliary staffs⁵⁶. Denmark has a unique system allowing the choice between bringing the case before an ordinary court and submitting it to the attention of the specialised body. Moreover, the Competition Authority may provide advisory support concerning the interpretation and the application of the rules on public procurement and it deals with the control and review on public procurement procedures⁵⁷.

52 Case C-118/09, *Koller*, [2010] paragraph 22; See, inter alia, Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23; Case C-53/03 *Syfait and Others* [2005] I-4609, paragraph 29; Case C-246/05 *Häupl* [2007] I-4673, paragraph 16; and order in Case C-109/07 *Pilato* [2008] I-3503, paragraph 22

53 Directive 2007/66/EC, cited supra footnote 41, article 2(3)

54 Directive 2007/66/EC, cited supra footnote 41, article 2(9)

55 On 1 June 2013 a new Danish Act No 511 of 27 May 2013 came into force giving the review body the power to reject fully or partially a complaint for reasons of lacking jurisdiction on the subject matter, not paying the fee or where the complaint is manifestly unfounded or with no actual prospect of success.

56 Specialised review body: *Klagenævnet for Udbud*; Relevant law: Act 492 of 12 May 2010 entered into force on 1 July 2010 (*Lov om håndhævelse af udbudsreglerne*)

57 Danish Competition Authority: *Konkurrencestyrelsen*; See also *The Comparative Survey on the national procurement systems across the PPN*, Roma December 2010, p. XX

In Romania the specialised review body, the National Council for Solving Complaints, has 36 members, among which at least half must hold an academic degree in law. The judges are public clerks with special status, assigned to their positions by the decision of the prime minister at the proposal of the Council president as a result of a pre-employment exam. A complaint is always examined by a panel of three judges. The auxiliary personnel allocated to each panel are represented by a legal adviser, an engineer, an economist and a public procurement expert. The competence of the Council comprises the review of legality of both ex-ante and ex-post award decisions in relation to the date of concluding the contract⁵⁸.

In Iceland the specialised review panel is composed by 3 members, one judge president, an engineer and an attorney⁵⁹. In the event that a plaintiff, a defendant or another party with a legitimate interest deserving protection is dissatisfied with a ruling of the Icelandic review body, such party may initiate an action for annulment before a court of law. Such proceedings shall be initiated within six months from the date that the party obtained, or could obtain, knowledge of the ruling in question.

In Norway the review body was established in 2002 by Royal Decree and consists of ten highly qualified lawyers appointed by the King for a period of four years. Three members of the body partake in the examination of each complaint. According to the Norwegian Act of public procurement the role of the national body is only advisory. Although the decisions of the body are not legally binding, due to the high quality of the recommendations, the body's opinions are followed by the parties in nearly all cases. If a complaint is submitted within the standstill period, the review body asks the contracting authority to defer the signing of the contract until the conclusion of the case. The principle of transparency is respected by allowing interested parties access to the complaint file. The body shall give priority to complaints, where the contracts have not yet been signed⁶⁰.

In the UK, all actions concerning public procurement must be brought before the High Court⁶¹. Proceedings in a high-level court may be costly, time-consuming, and detached from the region of the procurement contract. On the contrary, proceedings in a low-level, first-instance court may be less expensive, faster, and closer to the region of the procurement contract, though these bodies may lack experience and expertise.

58 Specialised review body: Consiliului Național de Soluționare a Contestațiilor ; Relevant law: G.E.O. 34/2006 of 19 April 2006 approved by Law 337/2006 of 17 July 2006 as amended by G.E.O. 72/2009 of 17 June 2009 entered into force on 26 June 2009; See also the amendments brought by Law no. 279/2011 published on 12 December 2011

59 Specialised review body: Kærunefnd útboðsmála; Relevant law: Act 84/2007 amended by Act 58/2013 of 11 April 2013 (Ný lög um breytingar á lögum um opinber innkaup)

60 Specialised review body: Klagenemnda for offentlige anskaffelser; Relevant law: Act 2006-06-30-41 amended by Act (2012-05-11-25) entered into force 1 July 2012; See also The Comparative Survey on the national procurement systems across the PPN, Roma December 2010, p. XXI

61 Relevant law: Public Contracts Regulations 2009 No 2992 applicable on contract award procedures commenced from 20 December 2009 onwards. Article 47C(2)

In France an application for judicial review can be requested also by a public prosecutor in cases where the European Commission notified reasons for which it considered that a breach of obligations related to the publication of a contract notice or a call for competition has been committed⁶². France, exactly like UK and Sweden has not established any specialised review body, the litigation taking place before the administrative tribunals according to the code of civil procedure.

Effective redress systems for challenging procurement decisions should provide well-timed access, autonomous review, efficient and judicious resolution of complaints and adequate remedies. The system of specialised review bodies provides in addition also a more professionally informed decision-making and increases the level of competence on public procurement matters in general through publishing the opinions and clarifying the interpretation of the rules and principles. The statistics show that in member states where a specialised review body was instituted by law, the number of litigations is higher than in countries where review of the irregularities is a matter for the ordinary or administrative courts. The availability of the review is lower in the latter case, if the long period of trial and the higher cost of litigation are to be considered⁶³.

B. Temporal restrictions

B.1. Interim protection

The most important function of interim measures relates to the possibility to suspend an award procedure, especially prior to the conclusion of the contract. Member States shall guarantee that the measures concerning the review procedures include provision for powers to take, at the first opportunity and by way of interlocutory procedures, interim measures on the pursuit of correcting the alleged violation or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority.

62 Art. 1441-2.-III/ Code de procédure civile (Part III, Title IV, Chapter VI : Litigation related to the award of public contracts) ; Décret n° 2009-1456 du 27 novembre 2009 relatif aux procédures de recours applicables aux contrats de la commande publique ; Ordonnance no 2009-515 du 7 mai 2009 relative aux procédures de recours applicables aux contrats de la commande publique, art. 9

63 Commission Staff Working Paper, Evaluation Report Impact and Effectiveness of EU Public Procurement Legislation, SEC(2011) 853 final, Brussels, 27.6.2011

Member States may provide that the body responsible for review procedures may consider the plausible result of interim measures for all interests likely to be injured, as well as the public interest, and may decide not to grant such measures, when their negative outcome could exceed their benefits⁶⁴. An order for interim protection does not form part of the judicial process that leads to a final decision. The CJEU has admitted some actions for failure to fulfil obligations brought by the Commission in relation to national proceedings for interim measures of merely ancillary character instead of an actually autonomous procedure separated from the main proceedings⁶⁵.

The preparatory nature of the act against which the action is brought is one of the grounds of inadmissibility of an action for annulment, and a ground which a court may examine of its own motion⁶⁶. However, acts or decisions adopted in the course of the preparatory proceedings, which in their turn are the culmination of a special procedure being distinct from those intended to empower the institution to take a decision on the substance of the case, must be open to challenge⁶⁷.

The national court in *Combinatie Spijker* carried out an erroneous interpretation of the relevant substantive directive in order to adopt an order on interim measures. The ruling of the CJEU underlined that it is inherent in the review system that the court hearing the substance may adopt an interpretation of EU law, which is different from that of the court hearing an application for interim measures. Such a divergence in assessment does not entail that a court system such as that at issue in the main proceedings does not comply with the requirements of the procedural directives⁶⁸.

B.2. Time limits to enact review proceedings

Member States are entitled in the light of the objective of swiftness pursued by the procedural directives to combine the legal remedies enabling the annulment of a decision of a contracting authority with reasonable limitation periods for bringing proceedings, in an attempt to prevent the candidates and tenderers from being able, at any moment, to invoke infringements of that legislation, thus obliging the contracting authority to restart the entire procedure in order to correct such infringements⁶⁹.

64 Directive 2007/66/EC, cited supra footnote 41, article 2(3)-(4)

65 For example, in Case C- 236/95 *Commission v Greece* [1996] ECR I- 4459, paragraph 11, and Case C- 214/00 *Commission v Spain* [2003] ECR I- 4667, paragraph 98, from which it is clear that it must be possible to take interim measures, independently of any prior action.

66 Case 346/87 *Bossi v Commission* [1989] ECR 303

67 Joined Cases 8/66 to 11/66 *Cimenteries CBR* [1967] 75, 92, and Case 60/81 *IBM v Commission*, [1981] 2639 paragraph 11

68 *Combinatie Spijker*, cited supra footnote 36, paragraph 79

69 *Stadt Graz*, cited supra footnote 45, paragraph 37

An interested person should have a reasonable minimum period within which to refer to the competent review body before the conclusion of the contract, in the event that that person would wish to challenge the reply or lack of reply from the contracting authority or contracting entity. As the duration of the standstill period varies from one Member State to another, it is also important that the tenderers and candidates concerned should be informed of the effective period available to them to bring review proceedings. An independent minimum standstill period is required that should not end before the review body has taken a decision on the application⁷⁰.

Four cases are important in the field of time limits: *Universale-Bau*, *Santex*, *Lämmerzahl*, and *Uniplex*. In *Universale-Bau* the CJEU stated that the setting of reasonable limitation periods for bringing proceedings must be regarded as generally satisfying the requirement of effectiveness, since it is an application of the fundamental principle of legal certainty. In *Santex* the conduct of the contracting authority misled the harmed tenderer and rendered excessively difficult the exercise of the rights conferred on him by Union law. Since the matter of reasonable limitation periods belongs to the area of national procedural autonomy, the CJEU informed that the following steps must be followed in order to ensure observance of the principle of effectiveness:

- i. The national court must first apply domestic law, while interpreting it in a way which accords with the requirements of Union law⁷¹;
- ii. If a congruent application is not possible, the national court must set aside any provision in so far as its application would, in the circumstances of the case, lead to a result contrary to Union law⁷²;
- iii. If disapplying the incongruent provisions of domestic law is not possible, then the rules on state liability provide the only possible remedy⁷³.

In *Lämmerzahl* the failure of the contracting authority to inform the tenderer concerning total quantity or scope of the contract implied that the limitation period was not triggered in relation to a decision on the choice of procedure for awarding a public contract or on the estimated value of that contract. In any case the limitation period does not concern the review of decisions of the contracting authority, including those occurring in stages of an award procedure after the end of that limitation period.

In *Uniplex* the CJEU established that the period for bringing proceedings seeking to obtain a declaration on the existence of an infringement of the public procurement rules or to obtain damages for the infringement of those rules should start to run from the date on which the claimant knew, or ought to have known, of that infringement. The national court is obliged to extend the limitation period in such a manner as to ensure that the claimant has a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement⁷⁴.

70 Directive 2007/66/EC, cited supra footnote 41, recitals (11)-(12)

71 Case C-165/91, *Van Munster*, [1994] I-4661 paragraph 34, and Case C-262/97, *Engelbrecht*, [2000] I-7321 paragraph 39

72 Case C-347/96, *Solred*, [1998] I-937 paragraph 30, and *Engelbrecht*, cited supra footnote 71, paragraph 40

73 *Combinatie Spijker*, cited supra footnote 36, paragraph 92

74 Case C-406/08, *Uniplex*, [2010] I-00817 paragraph 50

Where the duration of a limitation period is placed at the discretion of the competent court, the predictability of its effects cannot be apposite. Consequently, the British regulation 47D (2) did not ensure an effective transposition of the relevant EU directives and as a result, it had to be amended in August 2011⁷⁵. The previous version of the Public Procurement Act provided that ‘*such proceedings must be started promptly and in any event within 3 months beginning with the date when rounds for starting the proceedings first arose*’ and after the amendment that came into force on 1 October 2011 the wording has become the following:

*... such proceedings must be started within 3 months beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen*⁷⁶.

In *CS Communications* the CJEU decided that the effectiveness of the rights conferred by the procedural directives and, in particular, of the right to effective and rapid remedies is not undermined by a national provision stating that the body responsible for review is bound or, as the case may be, authorised to take account of the prospects of success of an application for a decision of a contracting authority to be set aside on the ground of illegality⁷⁷.

Regarding remedies other than compensation for damages, the time limits serve to attain a balance between the private interests of tenderers on the one hand and the public interest in legal certainty and the need to commence the execution of the contract as soon as possible. The national court shall interpret the domestic provisions establishing a limitation period to the extent that it's possible trying to attain harmony with the objectives pursued by the Remedies Directive⁷⁸.

B.3. Standstill provisions

A contract may not be concluded subsequent to a decision to award a contract falling within the scope of the substantive directives before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision⁷⁹.

⁷⁵ The Public Procurement (Miscellaneous Amendments) Regulations 2011; See to this effect *Uniplex*, cited supra footnote 74, paragraphs 42-43

⁷⁶ Regulation 47D(2) of Public Contracts Regulations Act 2009 No 2992 as amended by Act 2011 No 2053; see also Regulation 47(7)(b) of the Public Contracts Regulations 2006 ('the 2006 Regulations'), adopted in order to implement Directive 89/665 into domestic law

⁷⁷ Case C-424/01, *CS Communications*, [2003] I-03249 paragraph 32

⁷⁸ *Santex*, cited supra footnote 11, paragraph 63

⁷⁹ Directive 2007/66/EC, cited supra footnote 41, article 2a2

Derogations from the standstill period apply where prior publication of a notice in the Official Journal is not required; in the case of specific contracts based on a framework agreement as provided for in Article 32 of Directive 2004/18/EC or on a dynamic purchasing system as provided for in Article 15 of Directive 2004/17/EC or Article 33 of Directive 2004/18/EC; or if the only tenderer concerned is the one who is awarded the contract and there are no candidates concerned. In the latter case there is no other person remaining in the tendering procedure with an interest in receiving the notification and in benefiting from a standstill period to allow for effective review⁸⁰.

Seeking review shortly before the end of the minimum standstill period should not result in depriving the body responsible for review procedures of the minimum time needed to act, but the standstill period should be accordingly extended. An independent minimum standstill period is necessary that should not end before the review body has taken a decision on the application. This should not prevent the review body from making a prior assessment of whether the review as such is admissible.

Member States may provide that this period shall end, either when the review body has taken a decision on the application for interim measures, including on a further suspension of the conclusion of the contract, or when the review body has taken a decision on the merits of the case, in particular on the application for the setting aside of a unlawful decision⁸¹. The recital (4) has established that it is necessary to provide for a minimum standstill period during which the conclusion of the contract in question is suspended, irrespective of whether the conclusion occurs at the time of signature of the contract.

The suspension of the execution of the awarded contract shall end no earlier than the expiry of the standstill period referred to in Article 2a(2) and Article 2d(4) and (5)⁸². It followed from the old procedural directives that a reasonable time must elapse between the time, when the award decision is notified to the unsuccessful tenderers and the conclusion of the contract as to enable them to submit an application for suspending the execution of the contract. The possibility of applying for interim protection is not sufficiently guaranteed by the existence of a judicial verification in the main proceedings. Indeed, if the contract had already been entered into, the review of an unlawful decision of the contracting authority could no longer rectify the infringement in question by setting aside the award decision and according to *Alcatel* rule the only possibility was to apply for damages⁸³. The Remedies Directive filled the gap by introducing the possibility to apply for a declaration of ineffectiveness.

80 Directive 2007/66/EC, cited supra footnote 41, recital 8, article 2b

81 Directive 2007/66/EC, cited supra footnote 41, recital (12)

82 Directive 2007/66/EC, cited supra footnote 41, article 2(1)a and 2(3)

83 C- 327/08, *Commission v France*, [2009] I-00102 paragraphs 56, 58

C. Ineffectiveness

The recital 13 of the Remedies Directive informs that ineffectiveness entails in essence that *'the rights and obligations of the parties under the contract should cease to be enforced and performed'*. The ineffectiveness should not be automatic, but should be determined by or should be the result of a decision of an independent review body. A review body autonomous of the contracting authority or contracting entity should analyse all relevant aspects in order to ascertain whether overriding reasons relating to a general interest require that the effects of the contract should be maintained⁸⁴.

Member States may provide that application for review with a view on obtaining a declaration of ineffectiveness must be made before 30 calendar days after the publication of a contract award notice, known under the abbreviation C.A.N., provided that this notice includes justification of the decision of the contracting authority to award the contract without prior publication of a contract notice in the Official Journal or in any case, before expiry of a period of at least six months after the conclusion of the contract⁸⁵.

There are three grounds for ineffectiveness (a) if the contracting authority has awarded a contract without prior publication of a contract notice in the Official Journal without this being permissible in accordance with the provisions of the substantive directives; (b) in case of an infringement of the standstill provisions⁸⁶, if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of the substantive directives, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract; (c) in the cases referred to in the second subparagraph of Article 2b(c) of Remedies Directive, if Member States have invoked the derogation from the standstill period for contracts based on a framework agreement and a dynamic purchasing system.

According to the proposal for a regulation on international public procurement, contracts concluded with an economic operator in violation of a Commission decision on intended exclusions notified by contracting authorities or in violation of measures limiting access of non-covered goods and services should be declared ineffective within the meaning of article 2d of the Remedies Directive⁸⁷. The proposal supported by Commissioners De Gucht and Barnier maintains the use of the corrective mechanism that can be applied by the Commission as provided by the old procedural directives for the case of misapplication by contracting authorities/entities of exceptions to measures limiting access of non-covered goods and services⁸⁸.

84 Directive 2007/66/EC, cited supra footnote 41, recital (13)

85 Directive 2007/66/EC, cited supra footnote 41, article 2f1

86 Article 1(5), Article 2(3) or Article 2a(2)

87 Proposal, cited supra footnote 8, article 16(2)

88 Proposal cited supra footnote 8, Article 16(1) that refers to article 13 of Directive 89/665/EEC, article 8 of Directive 92/13/EEC, respectively articles 3 and 8 of Directive 2007/66/EC. Recital (28) states that the corrective mechanism should be refocused on serious infringements of Union law on public procurement.

It is improbable that a contracting authority would simply fail to publish a contract notice in relation to a tender that fell within the scope of the public procurement laws and an exception to the strict obligation to publish a contract notice may apply only where there is some reasonable element of doubt as to whether the procurement rules apply, for example: the inappropriate use of the negotiated procedure without a prior contract notice; the inaccurate classification as a non-priority service falling within the ambit of annex II B; or an amendment of an existing contract that is sufficiently material as to lead to a new procurement. An illegal direct award⁸⁹ cannot be defined as an award procedure or a decision to award a public contract in the meaning of Union procurement law. Where the conditions for exceptional or special arrangements are met under the substantive provisions⁹⁰, a direct award is not precluded by Union law⁹¹.

Contracting authorities which have awarded a public contract or concluded a framework agreement shall send a notice of the results of the award procedure no later than 48 days after the award of the contract or the conclusion of the framework agreement. The same applies for the award of contracts based on a dynamic purchasing system, though the contracting authorities may group such notices on a quarterly basis and send them within 48 days of the end of each quarter. The application for a declaration of ineffectiveness must be made before the expiry of at least 30 calendar days with effect from the day following the date on which the C.A.N. was published.

In cases in which the contracting authority considers that a direct award is permissible and publishes a notice concerning its intention to conclude a contract as provided by Article 3a and does not conclude it before the expiry of at least 10 calendar days with effect from the day following the date of the publication of the notice, the sanction of ineffectiveness may be avoided. The voluntary publication of a notice in the Official Journal expressing the intention to conclude a contract, which triggers a standstill period allowing for effective remedies, does not imply any extension of obligations deriving from the substantive directives⁹². This form of notification is known as V.E.A.T., a voluntary ex-ante transparency notice. It should contain the following information in accordance with article 3a of the Remedies Directive:

- i. the name and contact details of the contracting authority;
- i. a description of the object of the contract;
- ii. a justification of the decision of the contracting authority to award the contract without prior publication of a contract notice in the Official Journal;
- iii. the name and contact details of the economic operator in favour of whom a contract award decision has been taken; and

89 Direct awards within the meaning of Directive 2007/66/EC should include all contract awards made without prior publication of a contract notice in the Official Journal of the European Union within the meaning of Directive 2004/18/EC (OJ L 134, 30.4.2004, p. 114–240). This corresponds to a procedure without prior call for competition within the meaning of Directive 2004/17/EC (OJ L 134, 30.4.2004, p. 1–113).

90 Article 5(2), Articles 18 to 26, Articles 29 and 30 or Article 62 of Directive 2004/17/EC (OJ L 134, 30.4.2004, p. 1–113) in conjunction with Article 40(3) of Directive 2004/17/EC (OJ L 134, 30.4.2004, p. 1–113) or in the case of an award of a service contract in accordance with Article 32 of Directive 2004/17/EC (OJ L 134, 30.4.2004, p. 1–113)

91 Directive 2007/66/EC, cited supra footnote 41, recitals 15-16

92 Directive 2007/66/EC, cited supra footnote 41, recital 26 and article 3a

- iv. where appropriate, any other information deemed useful by the contracting authority.

V.E.A.T. provides means to avoid a declaration of ineffectiveness in cases, where no manifest error of assessment in applying the substantive rules has been committed and no contract has been concluded by the contracting authority before the expiry of a period of at least 10 calendar days with effect from the day following the date of the publication of this notice⁹³.

The interpretation of article 2d(4) of the Remedies Directive allowing that a contract is not rendered ineffective was required by a reference lodged on 15 January 2013 by the Consiglio di Stato in case C-19/13, *Ministero dell'Interno v Fastweb*, still pending for a preliminary ruling before the Court⁹⁴. The application refers to the assessment of compatibility of V.E.A.T. exception rule with the principles of equality of the parties, of non-discrimination and protection of competition, and the right to an effective remedy enshrined in Article 47 of the Charter.

Article 2d(1) induces a duty to consider the contract ineffective and Article 2e(1) gives the possibility to replace the ineffectiveness with alternative sanctions in specific situations. The ineffectiveness may be circumvented, if overriding reasons relating to the general interest require that the effects of the contract should be maintained. The economic reasons directly linked to the contract concerned, such as the costs resulting from the delay in the execution of the contract, the costs resulting from the launching of a new procurement procedure, the costs resulting from the change of the economic operator performing the contract and the costs of legal obligations resulting from the ineffectiveness cannot be used as appropriate justifications.

D.Damages

Anyone who has suffered harm caused by an infringement of Union procurement law shall be able to claim full compensation for that harm. Full compensation shall place anyone who has suffered harm in the position in which that person would have been, had the infringement not been committed. It shall consequently take account of compensation for actual loss and for loss of profit, and payment of interest from the time the harm occurred until the compensation in respect of that harm has in fact been paid. The Member States shall ensure that an injured tenderer can in effect exercise the right to be awarded damages⁹⁵.

93 Directive 2007/66/EC, cited supra footnote 41, article 2d4

94 Case C-19/13, *Fastweb*, application: OJ C 86 from 23.03.2013, p.11

95 See to that effect Case C-271/91, *Marshall*, [1993] I-4367 paragraphs 24-32 and Case C-568/08, *Combinatie Spijker*, Opinion of AG Villalón, [2010] I-12655 points 109-111

Member States may provide that where damages are claimed on the grounds that a decision was taken illegally, the contested decision must first be set aside by a body having the necessary powers. Excepting the cases where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(5)(3) or Articles 2a-2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement⁹⁶.

Article 2(1)(c) of the Remedies Directive stipulates that the Member States shall ensure that the measures taken concerning the review procedures include provisions granting powers to award damages to persons harmed by an infringement. Moreover, Article 2e states that the award of damages does not constitute an appropriate penalty for the purposes of replacing ineffectiveness with an alternative sanction.

The Remedies Directive must be interpreted as precluding national legislation, which makes the right to damages for an infringement of public procurement law conditional on the culpable character, including where the application of that legislation rests on a presumption that the contracting authority is at fault and on the fact that the latter cannot rely on a lack of individual abilities, hence on the defence that it cannot be held liable for the alleged infringement⁹⁷.

A court responsible for hearing review procedures connected with an action for damages is not precluded from raising of its own motion the unlawfulness of a decision of the contracting authority other than the one contested by the complainant. In this case the court may dismiss the application for damages, because the award procedure was in any event unlawful and the harm, which the tenderer may have suffered, would have been caused even in the absence of the unlawfulness alleged by the tenderer⁹⁸.

It is unclear from the wording of the Remedies Directives, whether damages are available for all violations of the Union public procurement rules or only for certain serious violations that entail the ineffectiveness of the contract. In *Alcatel* it has been established that the Member States are not allowed to restrict the powers of the review bodies to merely awarding damages, but decisions taken by the contracting authority during the public award procedure that occur before the conclusion of the contract must be open to review and if necessary, the contract must be set aside regardless of the possibility to obtain damages⁹⁹.

96 Directive 2007/66/EC, cited supra footnote 41, article 2(6)

97 Case C 314/09, *Strabag and Others*, [2010] I-0000 paragraph 45

98 *GAT*, cited supra footnote 11, paragraph 56

99 *Alcatel Austria*, cited supra footnote 10, paragraph 43

Furthermore, the principle of effectiveness requires that the time limits with regard to an application for a declaration of illegality having the effect of dissolving the contract made in preparation for bringing an action for damages should not start to run before the plaintiff was aware or ought to have been aware of the injury¹⁰⁰. Moreover, where no alternative methods of achieving knowledge about the occurrence of an injury and subsequently of producing the supporting evidence are available to a potential claimant for damages, a refusal to grant him access to the procurement documents renders nugatory the right to compensation, which they derive from Union law¹⁰¹.

D.1. Access to tender documents and confidentiality duties

According to the provisions of the substantive directives, the contracting authority shall not disclose information forwarded to it by economic operators, which they have designated as confidential; such information includes, in particular, technical or trade secrets and the confidential aspects of tenders¹⁰². The right to the protection of confidential information is substantial in nature and the protection of business secrets is a general principle of law, while the maintenance of fair competition in the context of contract award procedures is an important public interest, the protection of which is acknowledged in the case-law¹⁰³.

...the adversarial principle does not mean that the parties are entitled to unlimited and absolute access to all of the information relating to the award procedure concerned which has been filed with the body responsible for the review. On the contrary, that right of access must be balanced against the right of other economic operators to the protection of their confidential information and their business secrets¹⁰⁴.

The body responsible for the review must necessarily be able to have at its disposal the information required in order to decide in full knowledge of the facts, including confidential information and business secrets¹⁰⁵. It is for that body to decide to what extent and how to safeguard the confidentiality and secrecy of that information, having regard to the requirements of effective legal protection and the rights of defence of the parties to the dispute and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 267 TFEU, so as to ensure that the proceedings overall concur with the right enshrined in Article 47 of the Charter.

100 Case C-454/06, Opinion of Advocate General Kokott delivered on 13 March 2008, *APA Austria Presse*, [2008] I-04401 point 167

101 By analogy, Case C-536/11, *Donau Chemie*, [2013] I-00000, paragraph 32

102 See Directive 2004/18/EC, OJ L 134, 30.4.2004, p. 114–240, article 6, Directive 2004/17/EC, OJ L 134, 30.4.2004, p. 1–113, article 13

103 *Varec*, cited supra footnote 32, paragraphs 47, 50

104 *Varec*, cited supra footnote 32, paragraph 51

105 See, by analogy, Case C-438/04, *Mobistar*, [2006] I-06675 paragraph 40

Any request for access to documents contained in the file of national review body must be assessed on a case-by-case basis, taking into account all the relevant factors in the specific case. It is for the national courts to weigh up, firstly, the interest of the requesting party in obtaining access to those documents in order to prepare its action for damages, especially in the light of other possibilities it may have. Secondly, the national courts must consider the actual harmful consequences ensuing from such access with reference to the public interests or the legitimate interests of other private parties¹⁰⁶.

Having regard to the adversarial principle that forms part of the rights of the defence, enshrined in Article 47 of the Charter, the parties to a case must have the right to scrutinize all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them¹⁰⁷. A rule of general access under which any document relating to the review proceedings must be disclosed to a claimant requesting it on the sole ground that that party is intending to bring an action for damages is not indispensable in order to ensure effective protection of the right to compensation, as it is highly implausible that the action for damages must be anchored in all of the evidence in the related file. In addition, that rule could entail the violation of other rights conferred by Union law, i.a., on the successful supplier, such as the right to protection of professional secrecy or of business secrecy and the protection of legitimate expectations, or on the individuals concerned, such as the right to protection of personal data¹⁰⁸.

In all communication, exchange and storage of information, contracting authorities and contracting entities shall ensure that the integrity of data and the confidentiality of tenders and applications are preserved. They shall examine the content of tenders and applications only after the time limit set for submitting them has expired. Without prejudice to the obligations relating to the advertising of awarded contracts and to the information of candidates and tenderers set out in the substantive directives, the contracting authority shall not disclose information forwarded to it by economic operators, which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders¹⁰⁹.

After *Donau Chemie* and *Varec*, it has become clear that the review bodies and national courts must carry out a proportionality test between the means and the goals involved in each and every particular case, where the full effectiveness of the individual rights derived from Union law and the protection of private or public interest may collide. The contracting authorities should mention on the transmitted documents whether or not they contain business secrets or other confidential material, while the review bodies and courts must verify the secretive or confidential character of those documents.

D.2. Disclosure of evidence and burden of proof

106 See, by analogy, *Donau Chemie*, cited supra footnote 101, paragraphs 43-45

107 *Varec*, cited supra footnote 32, paragraph 45; Case C-300/11, *ZZ v Secretary of State*, [2013] I-00000 paragraph 55

108 See by analogy, *Donau Chemie*, cited above footnote 101

109 COM/2011/0897 final - 2011/0437 (COD)

Requirements of equivalence and effectiveness illustrate the general obligation of the Member States to ensure judicial protection of an individual's rights under Union law and apply both with regard to the appointment of the courts and tribunals having jurisdiction to hear and determine actions founded on Union law and regarding the definition of comprehensive procedural rules¹¹⁰. Member States should provide that the court be granted the power to assess the amount of harm and ensure that the limitation period shall not begin to run before an injured party knows, or can reasonably be expected to have knowledge of the conduct constituting the infringement, for instance a form of undue preferential treatment and the qualification of such conduct as an infringement of Union procurement law and the fact that the infringement caused injury to him¹¹¹.

Injured parties should be able to seek compensation not only for the actual loss suffered, *damnum emergens*, but also for the gain of which they have been deprived, *lucrum cessans*, plus interest. The actual loss is easy to calculate in the case of public procurement law, because it refers to the tender preparation and related costs, while the loss of profit requires being able to prove that the tenderer would have won the contract, if the contracting authority hadn't failed to follow the law¹¹².

However in the case of a single tender award i.e. an illegal form of direct award, a supplier can neither attest any costs for preparation nor can claim that it would have won the contract, because it could not know about the lost opportunity. In most cases exactly because no form of financial effort has been made by the potential tenderers, they are less prone to react and bring an action against this form of illegality.

The finding that a Member State has failed to fulfil its obligations does not depend on a finding as to the damage flowing from that failure¹¹³. Moreover, an action for failure to fulfil obligations makes possible not only an examination of the compatibility of a Member State's laws, regulations and administrative provisions with Union law, but also a determination that there has been an infringement of Union law by the national bodies in a specific individual case¹¹⁴.

110 Joined cases C-317/08, C-318/08, C-319/08 and C-320/08, *Alassini*, [2010] I-02213

111 See to that effect, *Uniplex*, cited supra footnote 74, paragraph 47; See also, by analogy Article 10 of 2013/0185 (COD)

112 Case C-568/08, *Combinatie Spijker*, Opinion of AG Cruz Villalón, point 109; See Chapter 11 in Bovis, *EC Public Procurement: Case Law and Regulation*, OUP, 2006

113 Case C-263/96 *Commission v Belgium* [1997] I-7453 paragraph 30, and Joined Cases C-20/01 and C-28/01 *Commission v Germany* [2003] I-3609 paragraph 42

114 See, concerning the award of public contracts, *Commission v Germany*, cited supra footnote 113, paragraph 30, and Case C-275/08, *Commission v Germany*, [2009] I-00168 paragraph 27

In this sense there is a connection between the infringement procedure conducted under Article 258 TFEU against the Member State and a potential action for damages brought before a national court against the national bodies in question. As long as the validity of a public contract is maintained despite the fact that it has been awarded in breach of EU law, the named breach is not cured. However, the CJEU is responsible for determining whether or not the alleged breach of obligations exists, even if the State concerned no longer denies the breach and recognises that any individuals who have suffered damage because of it have a right to compensation¹¹⁵.

D.3. Locus standi

According to *Hackermüller* a tenderer shall be able to contest the ground of exclusion on the basis of which, the review body intends to conclude that he neither has been nor risks being harmed by the decision he alleges to be unlawful¹¹⁶. In a recent preliminary ruling, *Fastweb*, the situation was that both bids, the successful and the unsuccessful one, did not meet the technical requirements and the public award should have been recommenced. The contracting authority awarded a public contract relating to voice and data telephony to Telecom Italia and Path- Net in disregard of the tender specifications.

However the Italian procedural law gave temporal priority to the counterclaim challenging the *locus standi* of the unsuccessful tenderer, who brought an action for review on the grounds that the defendant, Telecom Italia had been unlawfully admitted to the award procedure. The initial examination made by the Italian court showed that neither Fastweb nor Telecom Italia would have won the contract, if the tender specifications had been respected. The preliminary ruling confirmed that both tenderers had a legitimate interest in the exclusion of the bid submitted by the other, which may have led to a finding that the contracting authority was unable to select a lawful bid¹¹⁷. Member States have the right to provide, in addition to the explicit grounds for exclusion, for other grounds designed to ensure observance of the principles of equal treatment and transparency¹¹⁸.

According to *Michaniki* these additional grounds of exclusion must be proportionate and open to review. A systematic rule of exclusion, which also involves an absolute obligation on the contracting authorities to exclude a tenderer runs counter to the Union's interest in ensuring the widest possible participation by tenderers in a call for tenders, and goes beyond what is necessary to attain the objective pursued by the principles of equal treatment and transparency¹¹⁹.

115 Case C-243/89, *Commission v Denmark*, [1993] I-3353 paragraph 30

116 *Hackermüller*, cited supra footnote 43, paragraph 29

117 Case C-100/12, *Fastweb*, [2013] I-00000 paragraph 33

118 See, to that effect, Case C- 213/07 *Michaniki* [2008] I- 9999 paragraphs 43, 44 and 47, and Case C- 538/07 *Assitur* [2009] I- 4219 paragraphs 20 and 21

119 Case C-376/08, *Serrantoni*, [2009] I-12169 paragraph 40

Also in *CoNISMa* a tenderer was excluded from the award of public service contracts with a value greater than the threshold for the application of the relevant directives, because it did not have a particular legal form, even if under the law of the Member State of establishment it had the right to provide the services in question. Entities, such as universities and research institutes being primarily non-profit-making were precluded from taking part in a procedure for the award of a public contract on grounds related to the observance of the principles of equal treatment and transparency. By narrowing the concept of ‘*economic operator*’, the notion of ‘*public contract*’ was consequently restricted, since contracts between contracting authorities and such non-profit entities could be awarded by mutual agreement. The grounds of exclusion were deemed inconsistent with the rules of equal treatment and transparency¹²⁰.

Article 1(8) of Directive 2004/18/EC defines the status of ‘*economic operator*’ not only to any natural or legal person, but also, specifically, to any ‘*public entity*’ or group consisting of such entities offering services on the market. The concept of ‘*public entity*’ includes bodies, which are not primarily profit-making, are not structured as an undertaking and do not have a continuous presence on the market¹²¹ and other contracting authorities¹²².

The detailed rules on disclosure, burden and level of proof, *locus standi*, access to file and choice of competent courts are all matters comprised within the area of national procedural autonomy. Member States shall ensure that the burden and the level of proof and of fact pleading required for the quantification of harm does not render the exercise of the injured tenderer’s right to damages nearly impossible or excessively difficult¹²³.

In conclusion any type of absolute hindrance or automatic ground for denying access to justice in any shape or form results in an infringement of the proportionality principle and brings about the incompatibility of the national procedural rules with Union law. Union law imposes hence an obligation on Member States to disapply rules that hinder the exercise of an examination of both sides of the balance and empowers the national courts and review bodies to perform a proportionality test and consider always the necessity, suitability and proportionality of a measure that impedes the access to justice of a tenderer.

E. Case law on public procurement

120 Case C-305/08, *CoNISMa*, [2009] I-12129 paragraph 43

121 *CoNISMa*, cited supra footnote 120, paragraph 30

122 Case C-159/11, *Azienda Sanitaria Locale di Lecce*, [2012] I-00000 paragraph 26

123 See, in particular, Case 33/76, *Rewe-Zentralfinanz and Rewe-Zentral*, [1976] 1989 paragraph 5; Case C-432/05, *Unibet*, [2007] I-2271 paragraph 43; Case C-268/06, *Impact*, [2008] I-2483 paragraph 46; and Case C-246/09, *Bulicke*, [2010] I-07003 paragraph 25; *Combinatie Spijker*, cited supra footnote 36, paragraph 91

On 7 July 2013 the only application pending for preliminary ruling that requested the interpretation of the Remedies Directive was case C-19/13, *Ministero dell'Interno v Fastweb Spa*. No more than two preliminary rulings on the interpretation of the named directive have been published in the register: case C-348/10, *Norma-A SIA* and case C-100/12, *Fastweb SpA v Azienda Sanitaria Locale di Alessandria*. Seven cases of preliminary ruling and three Commission actions have been handled by the CJEU and published in the ECR since the expiry of the transposition period prescribed by the Remedies Directive. According to *Norma-A SIA* the new remedies directive applies on contracts concluded after the date of 20 December 2009, but the adoption of a new directive must have had an anticipatory influence on all awards handled during the period of transposition.

E.1. Before adoption

Competition promotes economy, efficiency and effectiveness in public expenditure and also contributes to the competitiveness of contractors. The objectives of the directives on procurement awards are the opening-up of public contracts to competition within the European Union under conditions of transparency and non-discrimination. Since these directives do not contain specific provisions allowing their effective application to be guaranteed, the Remedies Directive fulfils that role by requiring the Member States to establish effective and rapid review procedures.

The rationale of the Remedies Directive is to allow, by the establishment of appropriate review procedures, the effective application of the substantive provisions of European Union law on public contracts, which seek to ensure, for traders established in the Member States, the opening-up to competition which is undistorted and as wide as possible¹²⁴.

E.2. The anticipatory effect before expiry

By definition, legal rules arising from the treaties are intended from their adoption to alter the legal orders of the Member States, a fact which justifies the removal of obstacles to such integration. However, as regards directives, the difficulty stems from the fact that the obstacle is constituted by a failure on the part of Member States, when the very nature of that category of measures implies that their effectiveness depends on the adoption of a measure of domestic law. Before the period for transposition of a directive has expired, Member States cannot be reproached for not having yet adopted measures implementing it in national law¹²⁵.

124 See *mutatis mutandis*, Case C-337/06, *Bayerischer Rundfunk and Others*, [2007] I-11173 paragraphs 38 and 39 ; See also Case C-348/10, *Norma-A SIA*, [2011] I-00000 paragraph 31

125 See Case C-129/96, *Inter-Environnement Wallonie*, [1997] ECR I-7411 paragraph 43

It follows from the second paragraph of Article 4(3) TEU in conjunction with the third paragraph of Article 288 TFEU and the directive in question itself that, during the period prescribed for transposition of a directive, the Member States to which it is addressed must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by it¹²⁶.

Given that all the authorities of the Member States are subject to the obligation to ensure that provisions of Union law take full effect¹²⁷, the obligation to refrain from taking measures applies also to national courts. It follows that, from the date upon which a directive has entered into force, the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive¹²⁸.

It is clear from settled case law that, under the principle of cooperation in good faith laid down in Article 4(3) TEU, Member States are required to nullify the unlawful consequences of a breach of Union law¹²⁹. Such an obligation is owed, within the sphere of its competence, by every public body of the Member State concerned¹³⁰. However the obligations incurred by the Member States before the expiry of the transposition period make reference to the anticipated effect of the directive, not to the specific means of achieving it.

E.3. Delayed transposition

Where a directive is transposed belatedly, the general obligation owed by national courts to interpret domestic law in conformity with the directive exists only once the period for its transposition has expired. An interesting aspect of the public procurement law is the fact that the obligations owed to economic actors are incumbent on public authorities i.e. on the state itself and it has already been established that in relation to the state any directive incurs direct effect that is to say, that individuals have the right to invoke before the courts the effect of a unconditional and sufficiently precise, but not yet transposed directive in relation to the Member State.

126 *Inter-Environnement Wallonie*, cited supra footnote 125, paragraph 45; Case C-14/02 *ATRAL* [2003] ECR I-4431, paragraph 58; and Case C-144/04, *Mangold*, [2005] I-09981 paragraph 67

127 Joined Cases C 6/90 and C-9/90, *Francovich and Others*, [1991] I-5357 paragraph 32; Case C-453/00 *Kühne & Heitz* [2004] I-837 paragraph 20; and *Pfeiffer*, cited supra footnote 47, paragraph 111

128 Case C-212/04, *Adeneler*, [2006] I-06057 paragraph 123

129 See, i. a., Case 6/60 *Humblet v Belgian State* [1960] 559, p. 569, and *Francovich and Others*, cited supra footnote 127, paragraph 36

130 Case C-8/88 *Germany v Commission* [1990] I-2321 paragraph 13, and Case C-201/02, *Wells*, [2004] I-00723 paragraph 64 and the case-law cited

A Member State, which has not adopted the implementing measures required by the directive during the prescribed period, may not rely, as against individuals, on its own failure to perform the obligations which the directive entails¹³¹. The obligation to interpret national law in conformity with Union law concerns all provisions of national law, whether adopted before or after the directive in question¹³². The effectiveness of Union law required at the very least that, taking account of the limits imposed by the nature of directives and by the content of the relevant provisions of the directive in question, parties who considered they had suffered injury as a result of failure to transpose a directive that conferred rights on them whilst leaving Member States a certain margin of discretion should be granted the ability to plead consistent interpretation¹³³.

Case C-76/97, *Tögel* clarifies the situation of delayed transposition and makes the distinction between provisions with direct effect and other provisions of secondary law. It must be obvious from an individual examination of the wording of the provisions in question that they are unconditional and sufficiently clear and precise in order for an individual to be able to rely on them before the national court during the period of delay. A contracting authority is not obliged to intervene in existing legal situations concluded for an indefinite or long term previously to the end of the transposition period of a substantive law directive. The opposite is true in the case of awards made after expiry of the transposition period provided for by that directive.

The provisions of substantive directives have direct effect although the CJEU also commented that there may be some exceptions. The conditions for direct effect imposed on the provisions of a directive are to be unconditional, sufficiently clear and precise in order to create rights for individuals which may be relied on before a court. Some EU rules on public procurement might not have direct effect, because they do not meet the condition that they are intended to create rights for individuals¹³⁴. On the other hand, certain obligations do not have direct effect, as they require a choice by Member States over how their obligations are to be given effect. CJEU has considered that the rules requiring Member States to make statistical reports to the European Commission might not be considered to create rights for individuals, even though they impose legally binding obligations on Member States¹³⁵.

131 *Ratti* cited supra footnote 34, paragraph 22. Conversely, the right of individuals to rely on a directive against a defaulting Member State before the courts is, in the view of the Court of Justice, a minimum guaranty resulting from the binding nature of directives (Case 102/79, *Commission v Belgium*, [1980] I-01473 paragraph 12).

132 Case C-106/89, *Marleasing*, [1990] I-4135 paragraph 8, and *Pfeiffer*, cited supra footnote 47, paragraph 115

133 Case C-287/98, *Grand Duchy of Luxemburg v Berthe Linster*, [2000] I-06917 point 61

134 Case C-76/97, *Walter Tögel*, [1998] I-05357 paragraphs 41-47

135 *Tögel*, cited supra footnote 134, paragraphs 21-28

Some of the obligations in the procedural directives do meet the conditions for direct effect, for example a requirement concerning the duration of the minimum time-limits for challenge in conjunction with the requirement of effectiveness. In *Santex* the CJEU stated that the Italian courts were required to disapply a time limit in national legislation for bringing proceedings in public procurement, which the CJEU considered was too short to comply with EU law requirements to provide reasonable time limits for aggrieved firms to bring proceedings¹³⁶.

The fact that a directive has direct effect does not relieve states of the obligation to implement those rules by means that give third parties enforcement rights within the domestic legal system¹³⁷. Furthermore, the fact that legislation that does not appear to confer the required rights is given a creative interpretation by national courts in order to secure those rights does not mean that the Member State has complied with its obligation to implement the coordinated rules; rights conferred in this way are not sufficiently clear¹³⁸. At last it should be noted that, where certain conditions are met, an individual who suffers loss from the failure of a Member State, may obtain damages from the Member State concerned¹³⁹. This avenue is available under certain conditions.

- i. the directive was intended to confer rights on individuals;
- ii. the breach of EU law in not implementing the directive was ‘*sufficiently serious*’ based on
 - a. whether the breach was intentional, and
 - b. whether the relevant legal rule as interpreted in the case law was clear and precise; and
- iii. a causal link exists between the breach and the loss with the detailed rules on causation e.g. the nature of proof required and the probability with which loss must be proven, being left to the legal systems of Member States.

It is for the national court to interpret domestic law, so far as possible, in the light of the wording and the purpose of the relevant directive with a view to achieving the results sought by the latter, favouring the interpretation of the national rules which is the most consistent with that purpose and thus aiming to achieve an outcome compatible with the provisions of the directive, setting aside, if necessary, any contrary provision of national law¹⁴⁰.

E.4. After full transposition

136 *Santex*, cited supra footnote 11, paragraph 64

137 Case C-433/93, *Commission v Germany* [1995] I-02303 paragraph 24; Case 102/79, *Commission v Belgium*, [1980] I-01473 paragraph 12

138 Case C-236/95, *Commission v Greece*, [1996] I-04459 paragraphs 12-13

139 *Francovich*, cited supra footnote 127

140 Case C-414/07, *Magoora*, [2008] I-0000 paragraph 44

Remedies Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second subparagraphs of Article 47 of the Charter¹⁴¹. The provisions of directives must be implemented with undeniable binding force, and the specificity, precision and clarity are necessary to satisfy the requirements of legal certainty¹⁴².

The incompatibility of national legislation with Union provisions can be remedied for good only by means of binding national provisions having the same legal force as those which must be amended¹⁴³. Administrative practices, which by their nature are modifiable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting fulfilment of the obligations owed by the Member States in the context of transposition of a directive¹⁴⁴.

The Member States are required, within the bounds of the freedom left to them by the third paragraph of Article 288 TFEU, to choose the most appropriate forms and methods to ensure the effectiveness of directives, in the light of their objective¹⁴⁵. This provision relates to matters such as the choice between retroactive or proactive ineffectiveness and the possibility to apply specific procedural rules on public procurement proceedings.

The requirement for national law to be interpreted in conformity with Union law is inherent in the system of the Treaties, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of Union law, when they determine the disputes before them¹⁴⁶. The obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is nevertheless limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem*¹⁴⁷.

Under its second subparagraph of Article 19(1) TEU, it falls to the Member States to ‘provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’. This provision gives momentum, direction and sense to the tasks of the Member States flowing from the Treaties. Since private individuals do not have direct access to a supranational court, excepting the case of an action for annulment of a Union act as stipulated by Article 263(4) TFEU, the right to an effective judicial protection is preserved via a mechanism of indirect access as provided by the preliminary ruling procedure.

141 Directive 2007/66/EC, cited supra footnote 41, recital (36)

142 See, particularly, Case C-225/97, *Commission v France*, [1999] I-3011 paragraph 37

143 See, particularly, Case C-160/99, *Commission v France*, [2000] I-6137 paragraph 23

144 See, particularly, Case C-508/04 *Commission v Austria*, [2007] I-3787 paragraph 80

145 Case 48/75, *Royer*, [1976] 497 paragraph 75, and Joined Cases C-58/95, C-75/95, C-112/95, C-119/95, C-123/95, C-135/95, C-140/95, C-141/95, C-154/95 and C-157/95, *Gallotti and Others*, [1996] I-4345 paragraph 14

146 *Pfeiffer and Others*, cited supra footnote 47, paragraph 114

147 See, by analogy, Case C-105/03, *Pupino*, [2005] I-5285 paragraphs 44 and 47

Considering the matter of judicial proceedings and especially the adversarial principle that forms part of the rights enshrined in Article 47 of the Charter, the parties to a case must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them¹⁴⁸. Since the right to an effective remedy before a tribunal is not absolute, it must be considered in relation to its function. Restrictions may be imposed, provided that they meet objectives of general interest and do not constitute a disproportionate and intolerable interference impairing the very substance of the rights¹⁴⁹.

V. Transparency and effectiveness

The obligation of transparency imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed¹⁵⁰. It derives directly from the Union law, in particular Articles 49 TFEU and 56 TFEU¹⁵¹ and it is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority¹⁵². Transparency is both a corollary of equality principle and a guarantor of access to justice.

*the fundamental rules and the general principles of the FEU Treaty, in particular the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency apply, provided that the contract concerned has a certain cross-border interest in the light, inter alia, of its value and the place where it is carried out*¹⁵³

Article 47 of the Charter is mentioned in the preamble of the Remedies Directive stating that the directive respects fundamental rights and observes the principles recognised in particular by the Charter and seeks to ensure full respect for the right to an effective remedy and to a fair hearing¹⁵⁴. Article 47 of the Charter gives expression to the principle of effective judicial protection and provides means of interpretation for rights and obligations resulting from the implementation of EU law as established by a constant jurisprudence.

148 *Varec*, cited supra footnote 32, paragraph 45; Case C-89/08 P *Commission v Ireland and Others* [2009] I-11245 paragraph 52; and Case C-472/11 *Banif Plus Bank* [2013] I-0000 paragraph 30

149 Case C-450/06, *Varec*, Opinion of AG Sharpston, [2008] I-00581 point 49

150 Case C-324/98, *Telaustria*, [2000] I-10745 paragraph 62

151 *Wall AG*, cited supra footnote 44, paragraph 68

152 See, to that effect, Case C-496/99 P *Commission v CAS Succhi di Frutta* [2004] I-3801 paragraph 111

153 Joined Cases C-147/06 and C-148/06 *SECAP and Santorso* [2008] I-3565 paragraphs 20, 21 and 31

154 Directive 2007/66/EC, cited supra footnote 41, Recital (36)

[I]t must be observed that, under Article 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing Union law. Under Article 51(2), the Charter does not extend the field of application of Union law beyond the powers of the Union, or establish any new power or task for the Union or modify powers and tasks as defined in the Treaties. Accordingly, the Court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it¹⁵⁵.

Decentralisation in the enforcement and application of public procurement law aimed to provide for more litigation before the competent national courts and ensure an acceptable degree of compliance of Member States and contracting authorities. Moreover, an increased transparency and more accountability in the award of public contracts were meant to improve the justiciability of public contracts redress¹⁵⁶. In the working document preceding the proposal for a new directive on public procurement remedies, the Commission has put forward an analogy between the regime of civil damages for antitrust infringements as established by *Courage* doctrine and the right to claim damages for loss caused by serious violations of the public procurement rules¹⁵⁷.

...the existence of such a right strengthens the working of the [Union] competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the [Union]¹⁵⁸.

An increased level of justiciability could also lead in part to speculative litigation and consequently to delayed procurement processes, reluctance in engaging with the private sector from the side of contracting authorities and finally, to increased procurement costs as a result of the latent risks involved by the newly implemented remedies¹⁵⁹. The lack of effectiveness of an illegally awarded public contract was designed by the EU law-makers as an exceptional consequence applicable merely on serious violations of law.

155 Case C-370/12, *Pringle v Government of Ireland*, [2012] I-00000 paragraph 179

156 Bovis, Christopher: *Legal Redress in Public Procurement Contracts*, p. 21

157 Commission staff working document - Annex to the Proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts {COM(2006) 195} - Impact assessment report – Remedies in the field of public procurement, Brussels, 4.5.2006

158 *Courage & Crehan*, cited supra footnote 44, paragraph 27

159 Bovis, idem supra footnote 156

The regulatory guarantees established by the procedural directives may constitute a necessary, but not a sufficient condition to break down the barriers to cross-border participation in public procurement markets. In its study from 2011, the Commission concluded that the direct cross-border procurement has not increased so far as was expected, although it is usual in smaller Member States. Many economic operators still appear to be deterred from competing for tenders in other Member States by a mix of competitive, structural and legal or administrative factors.

The Commission evaluation suggested that there might be circumstances where the costs of running regulated procedures were disproportionate in relation to the anticipated benefits, but in general the positive cost-benefit analysis was favourable. A degree of unfairness is incumbent to any regulated systems and it can be mitigated only by having clear rules, effective policies and efficient enforcement. The adverse effects of such unenforceability should be nevertheless mitigated, if necessary and appropriate by substituting restitution in kind with restitution in value. In addition, the unenforceability of a contract could still be avoided, if the review body or the national court considered that overriding reasons based on the general interest justified an exception¹⁶⁰.

The right of access to file under national law is also interrelated in substance with the general legal principles of transparency and good administration. Since the objective of the substantive directives is the opening-up of public contracts to competition within the Union under conditions of transparency and non-discrimination, and those directives do not contain specific provisions allowing their effective application to be guaranteed, the Remedies Directive fulfils that role by requiring the Member States to establish effective and rapid review procedures.

It is for the domestic legal system to regulate the legal procedures for safeguarding the rights, which individuals derive from that obligation of transparency in such a way that those procedures are no less favourable than similar domestic procedures and do not make the exercise of those rights practically impossible or excessively difficult. The national court shall interpret and apply the national law, where possible, in agreement with the requirements of Union law and foremost by observing the obligation of transparency¹⁶¹.

No matter if we talk about time limits, alternative resolutions, access to file, burden of proof, interim provisions or quantification of harm, the same type of reasoning applies when the full effectiveness of a right derived from Union law is balanced against a public or a private interest legitimately protected by national law. Neither the right, nor the interest may enjoy absolute protection, but the Court is first required to ensure that the exercise of the EU right is not rendered ineffective and secondly that a proportionality test is performed and any restriction that is unnecessary or disproportionate shall be precluded.

160 Commission staff working document, cited supra footnote 63

161 *Santex*, cited supra footnote 11, paragraph 63

I have mentioned in the beginning that the decentralised approach pursues to increase the litigation and enhance the effectiveness of the rights enjoyed by individuals under EU public procurement law, while maintaining a degree of swiftness and allowing the contracting authorities and the successful tenderer to be able to benefit from the protection of their legitimate expectations. Transparency has two aspects, a primordial one substantive in nature related to the right to be informed and the corresponding obligations of the contracting authorities under EU law such as the duty of prior publication, correct notification, clarity of the grounds of exclusion and the exactness and completeness of tender specifications, but also a national procedural aspect, namely the disclosure rules, the right of access to documents, the right to intervene in a procedure and all the measures connected to the relevant rules enshrined in the national legal order.

Certain areas in which the lack of clarity is incumbent can be identified such as diffused boundaries between works and supply/services contracts; the application of the '*aggregation rules*', both regarding the level at which products or services should be aggregated and the treatment of discrete operating units within the same entity; the use of '*framework agreements*' in the public sector; the more relaxed criteria for short listing in the public sector; the extent to which renewals, extensions or amendments to existing contractual agreements constitute new contracts; the extent to which modifications of a bid are permitted in open and restricted procedures; the rules on criteria and evidence for assessing qualification in the utilities sector. A concrete example of lack clarity in the case of national procedural provisions is offered by the *Uniplex* rule stating that '*proceedings are brought promptly*' without specifying what was meant by '*promptly*'.

Transparency is a matter of quality and availability of the information provided by the contracting authorities and the availability in its turn has both a temporal and a spatial dimension. The spatial dimension has to do with the media used to disseminate the information, while the temporal dimension refers to the time interval during which the information is made available. The date on which the claimant knew, or ought to have known, of the infringement of the public procurement rule marks the beginning of the period during which an action for setting aside an award decision, declaration of ineffectiveness of a public contract or an action for damages may be brought before a court. Transparency is a measure of equality of opportunity, but also a measure of the possibility to obtain legal redress in case that a violation of the equality principle has been committed.

Swiftness on the other hand has a dual nature and in the case, when the transparency duty was disregarded by a contracting authority, the limitation of the time interval during, which a tenderer may react against an infringement does not serve the pursuit of effectiveness. Just the opposite, once an infringement has been revealed, a swift and operative review procedure enhances the effectiveness of the EU directives on public procurement. Direct awards within the meaning of the Remedies Directive should include all contract awards made without prior publication of a contract notice in the Official Journal within the meaning of Directive 2004/18/EC. This corresponds to a procedure without prior call for competition within the meaning of Directive 2004/17/EC.

With the intention of counterbalancing the legal uncertainty, which may result from ineffectiveness, Member States should provide for an exemption from any finding of ineffectiveness in cases, where the contracting authority or contracting entity deems that the direct award of any contract without prior publication of a contract notice in the Official Journal is allowed in accordance with the substantive directives and has applied a minimum standstill period allowing for effective remedies.

VI. Conclusions

The key principles enshrined in the proposal preceding the Remedies Directive were more clarity, transparency and legal certainty throughout the selection process. The tenet of transparency provides economic operators with the assurance that all tender applications will be treated equally and elevates the principles of equal treatment and non-discrimination on grounds of nationality. Another well-settled dimension of transparency is its value of corollary of democratic governance and good administration. A third dimension of transparency has been less explored, i.e. transparency as a guarantor of an effective judicial protection, allowing that the impartiality of procurement procedures can be reviewed.

Ubi jus ibi remedium is a Roman law dictum that affirms that a right without a remedy is a vain thing. The article 47 of the Charter states that everyone whose rights and freedoms under Union law are violated, has a right to an effective remedy before a tribunal. The substantive directives governing the coordinated rules on award of public contracts define the rights of tenderers and candidates and the corresponding obligations of the contracting authorities.

Moreover the procedural directives have introduced also a procedural type of protection in the form of standstill and suspension rules and their importance is emphasized by the consequences related to the breach of a standstill provision. However the applicability of these consequences depends on the established violation of certain substantive provisions that may produce an injury to the right holder. The remedy of ineffectiveness is applicable, only if the breach of a standstill provision occurs in conjunction with a breach of a substantive rule affecting the chances of the tenderer applying for a review to obtain the contract.

Strengthening the effectiveness of national review procedures should persuade those concerned to employ predominantly the possibilities for review by way of interlocutory procedure before the conclusion of a contract. The rationale of interlocutory procedures is to prevent serious and irreparable harm to be caused to the unsuccessful tenderer during the pendency of a lawsuit and to enhance judicial economy.

Member States shall take the measures required to ensure that award decisions concerning contracts falling within the scope of the substantive directives may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in articles 2-2f of the Remedies Directive, on the grounds that such decisions have infringed Union law in the field of public procurement or national rules transposing that law. The rapidity of the review and the ability to rely on the precontractual remedies or interlocutory procedures depend on the actual possibility to be informed in good time about the named breach that might affect one's chances to apply for a review to obtain the contract.

In order to safeguard the efficient exercise of the rights conferred on individuals by Union law, the Remedies Directive has introduced provisions meant to ensure that the opportunity to submit a tender benefits from a sufficient level of advertising and that the lack of clarity and the incomplete character of specifications or of the necessary justifications are sanctionable by not triggering the relevant time limits. The interest of the contractual partners to be able to rely on the protection of legal certainty and legitimate expectations has been considered by allowing the possibility to resort, where appropriate, to alternative forms of publicity, such as the V.E.A.T. and by providing for an allowance in money for cases of ineffective contracts, where the restitution in kind is not possible. The public interest can, in exceptional circumstances afford protection by maintaining the validity of a public contract obtained as a result of an unlawful award procedure.