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Winter December 23, 2013

The sanction regime applicable to an illegal direct award initiated before the Remedies Directive has taken full effect

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4/2013

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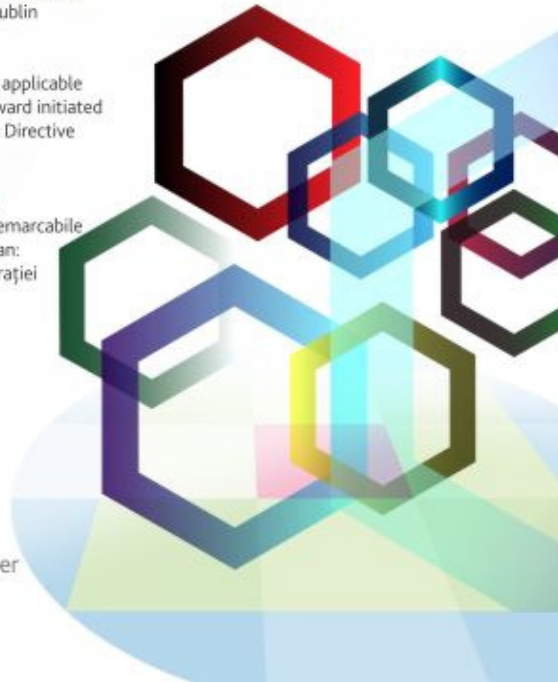
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Emanuela MATEI
The sanction regime applicable
to an illegal direct award initiated
before the Remedies Directive
has taken full effect

Julia LAFFRANQUE
FIDE – Unind minți remarcabile
ale dreptului european:
cei 50 de ani ai Federației
Internaționale
de Drept European

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Rezumat:

Respectul datorat principiului transparenței este materializat în dreptul achizițiilor publice de obligația a se conforma cerinței de a notifica în prealabil un anunț de participare. În Suedia o achiziție publică realizată cu încălcarea obligației mai sus numite face obiectul unui regim de penalizare mai strict introdus de legislația națională, deși aplicarea sancțiunii prescrise a fost limitată la achizițiile inițiate ulterior datei de 15 iulie 2010. Procedura judiciară în ultimă instanță a fost ținută și o sentință finală a fost acordată în favoarea autorității contractante.

Curtea Supremă Administrativă interpretează legea națională a achizițiilor publice făcând trimitere la jurisprudența Curții de Justiție, dar în pofida faptului că respectiva chestiune de fond nu este identică cu cele care fac obiectul unor hotărâri anterioare ale Curții, nu se face nici o cerere pentru pronunțarea unei hotărâri preliminare. Conceptele specifice dreptului achizițiilor publice trebuie interpretate uniform în toată Uniunea, independent de faptul că un stat membru deține dreptul de a face alegeri specifice, cum ar fi cea de a aplica un regim de sancțiuni mai stricte.

Este interpretarea dată legii naționale a achizițiilor publice de către Curtea Supremă a Suediei conformă cu dreptul Uniunii? Este îndeplinită obligația prevăzută la alineatul 3 al articolului 267 TFUE de a face o cerere având ca obiect pronunțarea unei hotărâri preliminare? Este protecția drepturilor particularilor decurgând din dreptul UE asigurată în mod corespunzător? Acestea sunt întrebările care fac obiectul prezentei dizertații.

Cuvinte cheie: *competența curții, interpretare uniformă, cerere de decizie preliminară, dialog judiciar, aplicarea retroactivă a unei dispoziții mai stricte prevăzute de legislația națională, transparența, accesul la justiție, căi de atac efective, aplicabilitatea deplină*

* Cercetător stagiar, Asociația Română de Drept și Afaceri Economice, iunie 2013

Abstract:

The respect due to the transparency principle in public procurement law is embodied by the obligation to publish in advance a contract award notice. In Sweden an award in breach of the named obligation is subject to a stricter regime of penalties according to national law, though the application of the prescribed sanction has been limited to awards being initiated subsequent to 15 July 2010. Judicial proceedings at last instance have been kept and a final judgment has been given in favour of the contracting authority.

The Supreme Administrative Court interprets the national public procurement law by making reference to the case-law of the Court of Justice, but despite the fact that material question in the present trial is not identical with any of the questions already decided, no reference for a preliminary ruling has been made. The concepts specific to public procurement law must be interpreted uniformly across the EU, irrespective of the Member States' right to make specific choices, such as the choice of applying a stricter regime of sanctions.

Is the interpretation given by the Supreme Court to the national public procurement law in line with Union law? Is the obligation in article 267(3) TFEU to refer for a preliminary ruling fulfilled? Is the protection of the individual rights arising from Union law ensured? These questions are approached by the present dissertation.

Keywords: *jurisdiction, uniform interpretation, reference for preliminary ruling, judiciary dialogue, retroactive application of a stricter provision of national law, transparency, access to justice, effective remedies, full effect*

The sanction regime applicable to an illegal direct award initiated before the Remedies Directive has taken full effect

I. Introduction

In Sweden the public sector accounts for a significant share of the economy and the distortions of competition related to illegal direct awards constitute a serious problem and a priority for the public policy enforcers. This priority laid the foundation of adopting a stricter regime of sanctions according to national law. In line with the third paragraph of the article 1, chapter 17 of the public procurement act (2007:1091), a public contract that is rendered null and void, because it has been granted in breach of the rule prohibiting the direct awards can be subject to an additional sanction in the form of a pecuniary penalty.

... for public contracts above a certain value, it is advisable to draw up provisions of Union coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition¹

The stricter regime of sanctions has been considered to constitute a special national interest falling outside the scope of the relevant Union law. It has been deemed to represent a purely internal situation in the meaning of *Dzodzi* doctrine².

Another important legal tenet for the examination of the ruling in question relies on *Marleasing* decision³ and the implementation of the Remedies Directive⁴ into Swedish legislation. The directive had a transposition period of two years and it has taken full effect in vertical relations from 20 December 2009.

Six months before the end of the transposition period a public authority engaged in negotiations leading to the conclusion of public contract on the 6 October 2010. The award has been organized without prior publication and its illegality is not contested. The material core of the case refers to the applicability of the stricter sanction introduced into Swedish law according to the provisions of the third paragraph of the article 1, chapter 17 of the public procurement act as amended by Act (2010:571).

¹ Directive 2004/18/EC of 31 March 2004, cited *infra* footnote 44, recital (2)

² The judgment made direct reference to *Leur-Bloem*, cited *infra* footnote 25, a ruling applying *Dzodzi*, cited *infra* footnote 23, paragraph 37

³ *Marleasing* ruling followed the line of *Van Duyn*, cited *infra* footnote 31, and has been reaffirmed by the ruling in *Faccini Dori* (Case C-91/92, [1994] ECR I-3325 paragraph 26) recognizing the direct vertical effect of directives during their transposition period. The appellant also proposed a *Marleasing* argument by referring to the ruling in *BMW*, cited *infra* footnote 64, paragraph 22

⁴ Directive 2007/66/EC, cited *infra* footnote 46

II. The obligation to refer and its limits

The preliminary ruling procedure instituted by article 267 TFEU aims to ensure the proper application and uniform interpretation of Union law in all the Member States and to prevent a body of national case-law that is not in accordance with the rules of Union law from coming into existence in any Member State⁵.

The judicial mechanism offered by article 267 TFEU is dual in nature. It grants the right to refer a question raised before them to any court or tribunal of a Member state, if the respective question is relevant in order to give judgment. Thus it implies an obligation for the Court of Justice to give a ruling thereon. The obligation implied by article 267(2) TFEU is explicitly uttered by article 19(3)(b) TEU.

Reversely, article 267(3) TFEU stipulates an obligation to refer a question of relevance for giving judgment for the national courts at last instance. The Court of Justice has the exclusive competence to review the lawfulness of EU acts and to give preliminary rulings on their interpretation. The main power attributed to the Court of Justice under article 19 TEU relates to the obligation to ensure that in the interpretation and application of the Treaties the law is observed. The main obligation of the member states is to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law and it relates to the monopoly of adjudication of disputes involving EU law that come before them retained by the national courts.

A court against whose decisions there is no judicial remedy available under national law is obliged to refer, if the question raised is relevant to give judgment and it is not materially identical with a question, which has been subject to a preliminary ruling or previous decisions of the Court in a similar case. Under these conditions naturally, even if the issues in dispute are not strictly identical and the nature of the procedures is different the national court would not be bound to refer⁶.

A question referred to the Court for a preliminary ruling is materially identical with other already referred questions, if the proper answer may be clearly deduced from existing case-law and it leaves no scope for any reasonable doubt⁷. The existence of such a possibility must be assessed in the light of the specific characteristics of Union law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Union⁸.

⁵ Case C-495/03, *Intermodal Transports*, [2005] ECR I-8151 paragraph 38, and Case C-458/06, *Gourmet Classic*, [2008] ECR I-4207 paragraph 32

⁶ Case 283/81, *CILFIT and Others*, [1982] I-3415 paragraphs 13-14; Case C-260/07, *Pedro IV Servicios SL v Total España SA*, [2009] I-02437 paragraph 36; Joined cases C-428/06 to C-434/06, *Unión General de Trabajadores de La Rioja (UGT-Rioja) and Others v Juntas Generales del Territorio Histórico de Vizcaya and Others*, [2008] I-06747 paragraph 42

⁷ See, to that effect, *Cilfit and Others*, cited supra footnote 6, paragraph 16

⁸ See, to that effect, *Cilfit and Others*, cited supra footnote 6, paragraph 17, and *Intermodal Transports*, cited supra footnote 5, paragraph 45

When carrying out a literal interpretation of a provision of Union law, it must be borne in mind that EU legislation is drafted in a number of languages and that the various language versions are all equally authentic. An interpretation of such a provision thus involves a comparison of the language versions⁹. The need for a uniform application and interpretation of the provisions of Union law means that the text of a provision must not be considered in isolation, but requires, on the contrary, that it be interpreted and applied in the light of the versions existing in the other official languages¹⁰. Moreover, where there is divergence between the various language versions of a Union text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part¹¹.

A legal concept such as transparency for instance may, in the context of Union law, have a peculiar meaning different from the meaning specific to the law of member states¹². Furthermore in one and the same legal sphere the Court interprets identically a concept which appears in different provisions¹³.

Every provision of Union law must be placed in its context and interpreted in the light of the provisions of Union law as a whole. Due regard must be paid to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied¹⁴. In conclusion there are several reasons that can motivate the decision not to refer a certain question for a preliminary ruling. The question raised might be irrelevant or its interpretation may be obvious, either because a question identical in substance has already been considered by the Court or the application of Union law is clear leaving no scope for reasonable doubt¹⁵.

On the other hand, a reference would be particularly useful if the question of interpretation of general interest for the uniform application of Union law in all the Member States is new or the existent case-law appears not to be applicable on the current set of facts¹⁶.

The Court of Justice may be still bound in principle, to give a ruling unless it is evident that the request for a preliminary ruling intends actually to induce the Court to give a ruling by means of a fictitious dispute, or to deliver advisory opinions on general or hypothetical questions, or that the interpretation of Union law requested bears no relation to the actual facts of the main action or its purpose, or that the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it¹⁷.

⁹ See, to that effect, *Cilfit and Others*, cited supra footnote 6, paragraph 18

¹⁰ Case C-63/06 *Profisa* [2007] ECR I-3239, paragraph 13

¹¹ See, to that effect, *Profisa*, cited supra footnote 10, paragraph 14

¹² See, to that effect, *Cilfit and Others*, cited supra footnote 6, paragraph 19

¹³ Case 53/81, *Levin v Staatssecretaris van Justitie*, [1982] I-1035 paragraph 6 et seq

¹⁴ See, to that effect, *Cilfit and Others*, cited supra footnote 6, paragraph 20

¹⁵ See, to that effect, *Cilfit and Others*, cited supra footnote 6, paragraph 21

¹⁶ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:297:0001:0006:EN:PDF>

¹⁷ Case C-217/05, *CEEES*, [2006] ECR I-11987 paragraph 17

Moreover those circumstances in no way prevent a national court from making a reference for a preliminary ruling to this Court and do not have the effect of depriving this Court of jurisdiction to rule on such a question¹⁸. The scope of the competence of the Court to give a preliminary ruling is larger than the scope of the obligation of the national courts at last instance to refer a question for preliminary ruling.

The competence of the Court of Justice does not include the application of relevant law on the factual situation underlying the main proceedings. It is for the national court to decide issues of fact, to resolve differences of opinion concerning the interpretation or application of rules of national law and finally to draw the necessary conclusions from the reply given by the Court of Justice. In order to conclude, it must be said that with 23 official and working languages in the EU, the actual possibility of a national judge to compare the nuances and context of a provision in all languages appear to be a thin one. In principle, the obligation of a court at last instance to refer a question considered to be relevant for giving judgment is a strict one.

III. State liability for non-compliance with the obligation to refer

A right to obtain redress will arise, if a manifest infringement of the applicable law has been substantiated, where it has been established that the rule of law infringed is intended to confer rights on individuals and there is a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties¹⁹.

Köbler brought an action in damages against Austria arguing that the state was liable in respect of the court's ruling on the grounds that it failed to refer the question while obliged to do so and had given a flawed ruling. The Court affirms that state liability for an infringement of Union law by a decision of a national court adjudicating at last instance can be incurred only in exceptional circumstances where the court has manifestly infringed the applicable law.

The relevant factors to determine the manifest character of the infringement are 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) TFEU²⁰. These criteria have been reaffirmed by *Traghetti* ruling²¹.

¹⁸ See, to that effect, *Cilfit and Others*, cited supra footnote 6, paragraph 15; Joined cases C-128/09 to C-131/09, C-134/09 and C-135/09, *Antoine Boxus and Willy Roua*, [2011] I-00000 paragraph 32

¹⁹ Case C-224/01, *Gerhard Köbler v Republik Österreich*, [2003] I-10239 paragraph 51

²⁰ *Köbler v Republik Österreich*, cited supra footnote 19, paragraph 55

²¹ Case C-173/03, *Traghetti del Mediterraneo SpA v Repubblica italiana*, [2006] I-05177 paragraph 43

We can observe again a certain dualism in this framework of state liability for non-compliance with EU law obligations, where a court adjudicating at last instance manifestly infringed the applicable law. On one hand there is a rationale of competing legal orders; on the other a stronger foundation for individual rights arising from EU law has been laid. There are scholars who see the introduction of article 19(1) TEU as an eve of a new revolution setting a clearer accent on the overarching link between grant of rights and provisions of remedies²².

IV. Dzodzi purely internal situations

The ruling in *Leur-Bloem* is of central importance in the assessment of the Swedish Court of Appeal and Supreme Administrative Court, fact that implies that the Swedish judicial authorities have interpreted the circumstances of a stricter sanction for an illegal public award as constituting a purely internal situation. Therefore I've considered necessary to examine the jurisprudence of the Court of Justice concerned with the matter of internal situations.

The ruling in *Dzodzi* concerns the interpretation of the EU secondary law provisions on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health²³. Mrs Dzodzi, a Togolese national and widow of a Belgian national entered Belgium in early 1987 and on 14 February 1987 married Mr Julien Herman and then applied to the administrative authorities for permission to remain in Belgian territory. The Belgian Law of 15 December 1980 treated the spouse of a Belgian national as a Union citizen.

There was no response to the application to remain and the couple left for Togo and resided there from April to July 1987 without informing the Belgian authorities. Mr Herman died on 28 July 1987, shortly after returning to Belgium and the subsequent applications for residence permit submitted by Mrs Dzodzi have been rejected. Mr Julien Herman had never worked or resided in the territory of a Member State other than his country of origin, therefore the cross-border element was not present and the provision of the named directive were neither directly nor indirectly applicable.

In the preliminary ruling the Court of Justice reminds that the procedure provided for in Article 267 TFEU is an instrument for cooperation between the Court of Justice and the national courts, whereby the Court of Justice provides the national courts with the criteria for the interpretation of Union law which they need in order to dispose of the disputes which they are called upon to resolve. Moreover, it does not appear either from the wording of Article 267 TFEU or from the aim of the procedure introduced thereby that the authors of the Treaty intended to exclude from the jurisdiction of the Court requests for a preliminary ruling on a Union provision in the specific case, where the national law of a Member State refers to the content of that provision in order to determine rules applicable to a situation which is purely internal to that State²⁴.

²² Chalmers (2010): European Union Law, second edition p.312

²³ Joined cases C-297/88 and C-197/89, *Massam Dzodzi v Belgian State*, [1990] I-03763

²⁴ *Dzodzi*, cited supra footnote 23, paragraphs 33, 36

In *Leur-Bloem*²⁵ the facts relate to a sole shareholder and director of two private Dutch companies, fully subject to Dutch legislation concerning mergers and taxation. Mrs Leur-Bloem planned to acquire the shares of a third Dutch company, a holding company and the payment was to be made by exchanging shares in the first two companies. In this manner Mrs Leur-Bloem would have controlled the two companies in an indirect manner.

Mrs Leur-Bloem required the Netherlands tax authorities to treat the proposed transaction as a ‘*merger by exchange of shares*’ within the meaning of the Netherlands legislation, which would allow her to receive a tax exemption on any gain made on the transfer of shares and to have the possibility of setting off any losses within the tax entity thus created. She has never contested that the transaction in question represented a purely internal situation.

However the Netherlands legislature sought to treat mergers between companies established in the Netherlands in the same way as mergers involving companies established in different Member States and therefore the referring court considered the necessity of a preliminary ruling having as object the interpretation of Directive 90/434/EEC on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States²⁶. The transaction in question concerned Dutch companies, hence no cross-border element was present and the Directive 90/434/EEC could not apply either directly or indirectly.

The Court of Justice has nevertheless jurisdiction to give preliminary rulings on questions concerning Union provisions in situations where the facts of the cases being considered by the national courts were outside the scope of Union law, but where those provisions had been rendered applicable either by domestic law or merely by virtue of terms in a contract²⁷. While transposing the provisions of a directive into domestic law the Dutch legislator has chosen to apply the same treatment to purely internal situations and to those governed by the directive, so that it has aligned its domestic legislation to Union law. Based on this ground the Court of Justice had jurisdiction to give a preliminary ruling.

It is obvious that the case of an illegal direct award as the one in question does not constitute in any sense a purely internal situation. It has never been contested that the infringement is covered by the Act (2007:1091) implementing the EU public procurement rules in Swedish law. It is not the Swedish law making reference to circumstances, where the cross-border element is absent and including them under the regime of EU procurement law in order to obviate the ‘*reverse discrimination*’.

According to article 7 of the Directive 2004/18/EC a public works contract of more than SEK 47,438,500 is covered directly by the EU regime of public procurement. The aspect of differentiation relies only on the fact that the Swedish law provides for a stricter regime of penalties than the general regime imposed by the Directive 2007/66/EC.

²⁵ Case C-28/95, *A. Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2*, [1997] I-04161

²⁶ Later replaced by Council Directive 2009/133/EC of 19 October 2009

²⁷ *Dzodzi*, cited supra footnote 23; Case C-231/89, *Gmurzynska-Bscher*, [1990] I-04003; Case 166/84 *Thomasdüngr* [1985] ECR 3001; Case C-384/89 *Tomatis and Fulchiron* [1991] ECR I-127

I will conclude by giving an example of a hypothetically internal situation. If the Swedish legislator had chosen to include the public works contract of less than € 5 million, but more than let's say € 3 million, this range of public awards could have been considered to constitute purely internal situations on which the EU public procurement regime would have been applicable merely due to a reference stipulated by the national law provisions.

However, the Articles 49 TFEU and 56 TFEU remain applicable on the type of restrictions that could significantly impede on the exercise of fundamental economic freedoms, subject to possible derogations related to Article 52 TFEU or to overriding reasons of public interest²⁸. In C-72/10, *Marcello Costa* an award of betting and gaming licences has been reviewed in relation to the duty to comply with the fundamental rules of the Treaties and, in particular, with Articles 49 TFEU and 56 TFEU, the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency²⁹. The recital (2) of the Directive 2004/18/EC states that:

The award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other entities governed by public law is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving there from, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency.

I took this example only as means to draw attention on the fact that the simple point that a certain situation is not covered by the EU secondary law does not mean that it falls outside the scope of the Treaties. In my opinion the Swedish Court misinterpreted the *Dzodzi* doctrine on purely internal situations and thereby the necessity to refer the questions for a preliminary ruling has been underestimated.

V. Implementation of EU directives

If a directive has not been implemented or correctly implemented, it will be necessary to consider the issue of direct enforcement. This is the state of affairs for the delay period between 20 December 2009 and 15 July 2010 in the Swedish case. After the 15 July 2010, if the implementation is correct, then the concerned individual rights flow from the implementing provisions and not immediately from the EU directive. In order to resume, when considering a case relating to enforcement of an EU directive in the national courts, the following three aspects must be taken into account³⁰.

²⁸ Joined Cases C-147/06 and C-148/06 *SECAP and Santorso* [2008] ECR I-3565, paragraphs 20, 21 and 31 and the case-law cited

²⁹ Joined cases C-72/10 and C-77/10, [2012] I-00000 paragraph 54

³⁰ Fairhurst(2010): Law of the European Union, 8th edition p. 297

1. Is the directive directly enforceable³¹ – after the 20 December 2009 – and is it sufficiently precise and unconditional³² and is it being enforceable against the state or an emanation of the state³³? If it is not directly effective, then
2. Is the directive indirectly effective i.e. will the national courts comply with the *Marleasing*³⁴ interpretative obligation and interpret the national law in the light of the wording and the purpose of that directive? If it's not indirectly enforceable, then
3. Is it possible to claim damages from the state according to *Francovich*³⁵, because of the state failure to implement or correctly implement the directive?

The right given to Member States to choose among several possible means of achieving the result required by a directive does not preclude the possibility for individuals to enforce before the national courts rights the content of which can be determined with sufficient precision on the basis of the provisions of the directive alone³⁶.

Individuals can rely on the provisions of a directive against a state who failed to implement the secondary law act within the prescribed period, since otherwise the state would benefit of an advantage by not complying with its own obligations under EU law³⁷. A provision is unconditional and sufficiently precise to be capable of being relied on before national courts, if it is worded in unequivocal terms and is not subject to any conditions or intervention of any other act on the part of the Union institutions or the Member States³⁸.

Marleasing has expanded the law of indirect effect in two ways. First, all national law regardless of whether it has been adopted before or after the directive and no matter if it implements or not the provisions of the directive shall be interpreted in the light of the wording and the purpose of that directive. Secondly, the national courts are required to interpret and give priority to the purposeful signification of a certain EU law obligation and then determine whether reconciliation between Union obligation and national law is possible. The ruling in *Marleasing* appears to institute a compromise. It is stronger than the mere giving effect to EU law compliant interpretation of national law, but weaker than requiring the overruling of national law³⁹.

³¹ Case 41-74, *Van Duyn*, [1974] I-01337

³² Case 148/78, *Ratti*, [1979] I-01629 paragraphs 22-23

³³ Case 152/84, *Marshall*, [1986] I-00723 paragraphs 48-49, 51 and Case C-188/89, *Foster*, [1990] I-03313 paragraphs 17-20; Directives only have vertical direct effect.

³⁴ Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion*, [1990] I-04135 paragraph 8

³⁵ Joined cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, [1991] I-05357

³⁶ Case C-138/07, *Belgische Staat v Cobelfret NV*, [2009] I-00731 paragraph 61

³⁷ *Ratti*, cited supra footnote 32, paragraph 22

³⁸ *Cobelfret NV*, cited supra footnote 36, paragraph 64

³⁹ Chalmers (2010), cited supra footnote 22, 2nd edition p. 295-6

The obligation to interpret all national law in the light of the wording and purpose of the directive does not require that a provision of national law shall be given a significance that contradicts its 'ordinary meaning'⁴⁰. The Directive 2007/66/EC has been published on 20 December 2007 and entered into force on the 20th day following its publication i.e. on the 9 January 2008. It follows from the article 4.3 TEU in conjunction with article 288(3) 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 to seriously compromise the attainment of the result prescribed by it.

The dispute in question involves two public authorities. Respondents in public procurement cases are the competent contracting authorities constituting public bodies per definition. We don't even need to think about the horizontal direct effect; no matter if we talk about an action for civil damages brought by competitors of the beneficiary of the illegal direct award or an action for administrative damages brought by the competition authorities, the respondent will always be a public body.

Such a respondent is supposed to refrain from taking measures liable to seriously compromise the attainment of the objectives of the directive. The fact that we discuss about a directive meant to introduce more effective remedies is also of significance, since the obligations related to transparency and equal treatment of all the potential bidders as such pre-existed the period of transposition. The directive only brings about means to enhance the effectiveness of the public enforcement of the named obligations.

In conclusion certain provisions of Directive 2007/66/EC being unconditional, sufficiently clear and precise and not requiring supplementary measures will have direct effect and individuals can invoke them in relation to the state already for the period between 20 December 2009 and 14 July 2010. Therefore the value of the transitional provisions provided by Act (2010:571) is drastically diminished for the case of obligations arising from a procurement directive and addressed to public authorities.

Moreover for the period 9 January 2008 and 20 December 2009, even if the obligations arising from the Directive do not yet have full effect, they still have major relevance, since an obligation not to compromise the attainment of the objectives of the directive is incumbent on the contracting authorities as representatives of the state.

As I will give a more detailed account, while resuming the case later on in this commentary, the issue considered by the Swedish Supreme Court makes reference to the transitional provisions in Swedish law. An extra complication is brought by the fact that the sanction required by the appellant is the stricter domestic penalty and not one of the sanctions arising directly from the implementation of the directive. What is the significance of these special circumstances?

⁴⁰ C-334/92, *Wagner-Miret*, [1993] I-6911

VI. Public procurement remedies

A public procurement damage fine may be imposed, if an illegal direct award of public contracts has been granted by the contracting authority and the Swedish Competition Authority (SCA) decided to apply for the imposition of such a pecuniary penalty⁴¹. SCA shall apply for a public procurement damage fine, if a court, when reviewing the effectiveness of an agreement, has deliberated that the agreement may continue to apply despite having been concluded in breach of the standstill provisions, or if a court, when reviewing the effectiveness of an agreement, has determined that the agreement ought to have been declared ineffective, but that it may continue to apply due to overriding reasons relating to the public interest⁴².

The first type of sanction is specific to Swedish law and it has been introduced by Act (2010:571) entering into force on the 15 July 2010. Older provisions apply for awards that have been commenced before the date of entry into force of the amendments brought to Act (2007:1091). The relevant contentious question relates to determining the meaning of '*initiated awards*'. What criteria must be satisfied in order to determine whether an award has already been commenced after the date of 15 July 2010?

It must be observed already as this point that the same time limit applies for both the new provisions arising immediately from the implementation of article 2 of the Directive 2007/66/EC and for the domestic provisions that establishes a stricter regime of sanctions in the case of an illegal direct award. According to Swedish law, an illegal direct award despite the fact that it has been declared ineffective can still be sanctioned with a public procurement damage fine⁴³.

While the sanctions provided for the breach of the stand-still provision and upheld effectiveness due to overriding reasons of public interest should have been implemented before the 20 December 2009, the public procurement damage fine for an illegal direct award stipulated by chapter 17, article 1, third paragraph has introduced a stricter domestic regime and was subject according to Act (2010:571) to transitional provisions setting the date of entry into force for the 15 July 2010. The recital (20) of the named directive stipulates that the application according to national law of such a stricter regime of sanctions is not excluded by EU procurement rules.

It must be mentioned that the sanction relates to the lack of compliance with the transparency duty and principle of equal treatment, since the main objective of the provisions on prior publication of a contract notice is to safeguard fair and non-discriminatory conditions of competition. Moreover the actual protection of the economic freedoms depends on the compliance with the transparency duty incurred by the contracting authorities and on the possibility to verify the impartiality of an award.

⁴¹ Chapter 17 article 1 third paragraph of Act (2007:1091) amended by Act (2010:571) and Act (2011:1030)

⁴² Chapter 17 article 1 first and second paragraphs of Act (2007:1091)

⁴³ Prop. 2009/10:180 published on 14 April 2010, p.187

The freedom of establishment and the freedom to provide services are enshrined in Articles 49 TFEU and 56 TFEU. Council Directive 2004/18/EC of 31 March 2004 setting in motion the coordination of the laws of the Member States on public procurement, had as its main purpose the attainment of the named fundamental freedoms and the opening-up of public procurement to competition, as stated in its second recital⁴⁴.

The article 7 of the Directive 2004/18/EC defines the scope of coordination of the laws on public procurement to € 5,000,000 and respectively SEK 47,438,500⁴⁵. The value of the contract discussed hereby amounts to SEK 68,850,000 meaning that the award falls within the scope of the EU procurement rules, including the Remedies directive⁴⁶.

Acknowledging the difference between a directive and a regulation, the closest similar provision that I can think about is enshrined in article 3(2) of the Regulation No 1/2003 stating that:

Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings⁴⁷.

The same authority to adopt and apply on the territory stricter national laws, which penalize the illegal award, is stipulated by recital (20) of the Directive 2007/66/EC. The scope of the named regulation covers as well the stricter regime of sanctions, but not the sanctions of a different nature, i.e. criminal law penalties imposed on natural persons, except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced⁴⁸.

By analogy I conclude that even if the sanction imposed by chapter 17 article 1 third paragraph introduces such a stricter penalty, its nature is comparable, since it constitutes means whereby procurement rules are enforced. Even the type of sanction is the same for all three paragraphs of the article 1 in chapter 17 of the Act (2007.1091).

⁴⁴ Directive of the European Parliament and Council of 31 March 2004, OJ L 134, 30.4.2004, p.114

⁴⁵ Communication from the Commission of 3 December 2011 - Corresponding values of the thresholds of Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council 2011/C 353/01; See also <http://rkrattsdb.gov.se/SFSdoc/11/111575.PDF>

⁴⁶ Directive of the European Parliament and Council 2007/66/EC of 11 December 2007, OJ L 335/31

⁴⁷ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 001 , 04/01/2003 P. 0001 - 0025

⁴⁸ Recital (8) of the Regulation No 1/2003

VII. Public procurement case law

The central EU case-law for the present ruling of the Supreme Court is *Stadt Halle*, C-26/03⁴⁹ falling under the scope of the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. It related to an award with no public call for tenders i.e. without formally opening an awarding procedure. The question related to determining the exact moment, when decisions taken by the contracting authorities can become subject with a judicial review. The ruling has established that purely preparatory phases cannot be subject to review.

It is ruled that the Member States are not allowed to make the possibility of review subject to the fact that the public procurement procedure in question has formally reached a particular stage⁵⁰.

...in accordance with the second recital in the preamble to that directive⁵¹, compliance with the [Union] rules must be ensured in particular at a stage at which infringements can still be corrected, it must be concluded that an expression of the will of the contracting authority in connection with a contract, which comes in whatever way to the knowledge of the persons interested, is amenable to review where that expression has passed the stage referred to in paragraph 35 above and is capable of producing legal effects. Entering into specific contractual negotiations with an interested party constitutes such an expression of will. The obligation of transparency, to which the contracting authority is subject in order to make it possible to verify that the [Union] rules have been complied with, should be noted in this respect⁵².

The stage named in paragraph 35 relates to ‘*internal reflections of the contracting authority with a view to a public award procedure*’. It must be observed that the ruling in *Stadt Halle* established that if the infringement in question can still be corrected, compliance with Union rules must be ensured in alternative ways. It is logical to conclude that the review of acts intended to produce legal effects vis-à-vis third parties is amenable only after the named effects have been produced.

The complexity of the issue can be revealed by the fact that AG Stix-Hackl in her Opinion from 23 September 2004 concludes that a decision not to conduct an award procedure is comparable to, and the counterpart of, a decision to terminate an award procedure and they should be reviewed effectively and as rapidly as possible. The Court disagrees as shown above.

⁴⁹ C-26/03, *Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* [2005] I-00001

⁵⁰ *Stadt Halle*, cited supra footnote 49, paragraph 38

⁵¹ Directive 2004/18/EC: *Whereas the existing arrangements at both national and Community levels for ensuring their application are not always adequate to ensure compliance with the relevant Community provisions particularly at a stage when infringements can be corrected*

⁵² *Stadt Halle*, cited supra footnote 49, paragraph 39

Another case of significance is Case C-337/98⁵³ related to the interpretation of public procurement procedures in the water, energy, transport and telecommunications sectors and the award of the contract for the Rennes urban district light railway project to the supplier Matra without a prior call for competition. In this case the Court ruled that the Directive was not applicable to the choice made by the contracting entity to use a negotiated procedure without a prior call for competition to award the contract for the Rennes urban district light railway project. The decision has been adopted well before the expiry of the period prescribed for transposition of Directive 93/38⁵⁴.

However in this case well before is accountable in years. The Council Directive 93/38 of 14 June 1993 had been published in the official journal on the 9 August 1993 and its transposition time limit was 1 July 1994⁵⁵. According to the resolution by the Committee of Sitcar of 19 July 1990 the negotiations were on their way at that moment already⁵⁶. The temporal difference between the initiation of negotiations and the coming into existence of the relevant act of secondary law is of three years prior to the adoption and respectively four years before the transposition time limit.

Applying Ratti and Marleasing doctrines on the circumstances of the case C-337/98, it must be said that Directive 93/38 neither was directly or indirectly effective at the time when the negotiations have been launched. Moreover the object of the Directive is different referring to public utilities. The conclusion is that the circumstances and judicial questions raised by the two named rulings supporting the judgment of the Swedish Supreme Court are dissimilar to a considerable extent. Hence the presented case-law would not provide a solid justification for a CILFIT type of exception.

VIII. Case 5766-12, SCA v Immigration Council

On the 17 June 2011 the SCA issued an application for public procurement damages fine against the Immigration Council for an illegal direct award amounting to a value of at least SEK 68,850,000. The fine had been calculated to SEK 5,500,000. The public contract in question was concluded on the 6 October 2010. The practice of illegal direct award is prohibited by chapter 7 article 1 and the sanction is stipulated by chapter 17, article 1 of the Act (2007:1091).

The beneficiary of the illegal direct award was Brinova AB and the object of the contract concerned a shelter for the accommodation of asylum seekers held in custody in the municipality of Åstorp. The contract is entitled '*Leasing contract*', but it constituted de facto a public works contract, because it involved works for building improvement and adaptation to the purpose of custody⁵⁷.

⁵³ Case C-337/98, *Commission v France*, [2000] I-08377

⁵⁴ *Commission v France*, cited supra footnote 53, paragraphs 41-2; Italic emphasis on 'well before' added by the author

⁵⁵ Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ L 199 , 09/08/1993 P. 0084 – 0138, article 45

⁵⁶ *Commission v France*, cited supra footnote 53, paragraph 23

⁵⁷ Application issued by SCA on the 17 June 2011, Case 435/2011, p. 6

While the SCA takes the date of 6 October 2010 as a reference date for an '*initiated award*', the Immigration Council maintains that the award has been initiated before the 15 July 2010 and refers to the travaux préparatoires according to which the contracting authority may bring evidence that an illegal direct award has been actually initiated before the conclusion of the public contract⁵⁸. We can observe already here the formal approach adopted by the respondent and the insistence to emphasize the importance of the transitional period without giving a clear account of the fact that the transition was in fact limited to a very short period of time: 15 June 2010 - 15 July 2010.

I will follow more closely the argumentation of the appellant, who adopts a more effect-based approach and underlines that the date of notification does not give any interpretative support in the case of a direct award without prior publication⁵⁹. Later on the SCA acknowledges that even if there is no direct guidance in the provisions of the directive in order to attain a consistent interpretation of the transitional conditions, it will be unreasonable to allow a further delay of the implementation of the directive⁶⁰. In point 44 in its application for procurement damages fine, the appellant has shown that the implementing provisions in chapter 16 and 17 make object to exactly the same transitional provisions.

An interpretation according to which a further delay in the adoption of the new remedies is allowed must be inconsistent with the objectives of the directive, but also with the intention of the Swedish legislator expressed in the travaux préparatoires. In point 48 the SCA emphasizes that the application of a sanction must have as temporal reference the time when the illegal deed has been accomplished in order to ensure compliance with the principles of legality and legal certainty. The only act subject to sanction is the very conclusion of the public award. Therefore the date of 6 October 2010 should be considered as the temporal reference for the initiation of the award.

On the 14 February 2012 the action for public procurement damages fine is presented before the Court of Linköping, who starts its legal assessment by pointing out that the contract is covered by the public procurement rules and its object is public works, not leasing, despite the title used on paper. Then the court of first instance pursues to determine whether the chapter 17 of Act (2007:1091) is applicable on the illegal award in question and comes to a conclusion based on the travaux préparatoires according to which as a general rule the date of the conclusion of the contract must be taken into account. The result is that the application is accepted and fines amounting to SEK 5.5 million have been prescribed.

On the 26 September 2012 the appeal brought by the Immigration Council is presented before the Court of Appeal of Jönköping, who adopts a formal approach according to which the focal temporal reference is the date of 15 July 2010 and the conclusion will be based on the exception rule enclosed by travaux préparatoires according to which the respondent could bring evidence that the award has been de facto initiated before the date of conclusion of the public contract. The Court of Appeal also makes the distinction between the provisions of chapter 17 article 1 first and second paragraphs i.e. the implementing provisions and the provisions of chapter 17 article 1 third paragraph engaging the stipulation of a stricter domestic sanction.

⁵⁸ Prop. 2009/10:180 published on 14 April 2010, pp. 310 and 374

⁵⁹ Application issued by SCA on the 17 June 2011, Case 435/2011, p. 9

⁶⁰ Application issued by SCA on the 17 June 2011, Case 435/2011, p. 10, point 43

The motivation for this stricter regime according to the travaux préparatoires was that ineffectiveness alone could not be sufficient as a remedy against the illegal direct awards and the fact that the competitors were not prone to bring an action for civil damages, where no prior publication has actually been made i.e. in case where no other suppliers have been involved in the award procedure⁶¹.

The Court of Appeal considers that the public award could have been initiated before the conclusion of the contract and it is up to the contracting authority to bring evidence on this matter. The date of 8 June 2009 when an application for consent for leasing has been sent by the Immigration Council to the Swedish government has been accepted as evidence of the fact that the award has been previously initiated. In this context the Court of Appeal makes reference to the ruling in *Leur-Bloem* thus implying that the situation at stake was a purely internal situation, although a consistent and uniform interpretation of the concepts deriving from EU law was apposite⁶².

The Court of Appeal mentions that new rules on ineffectiveness as a remedy prescribed by the Directive for the case of illegal direct awards have been introduced into Swedish law by the Act (2010:571) though with a certain delay. Moreover it has been established that there is no reason not to interpret the transitional provisions consistently with the Union law, even for the case of the chapter 17 article 1, third paragraph.

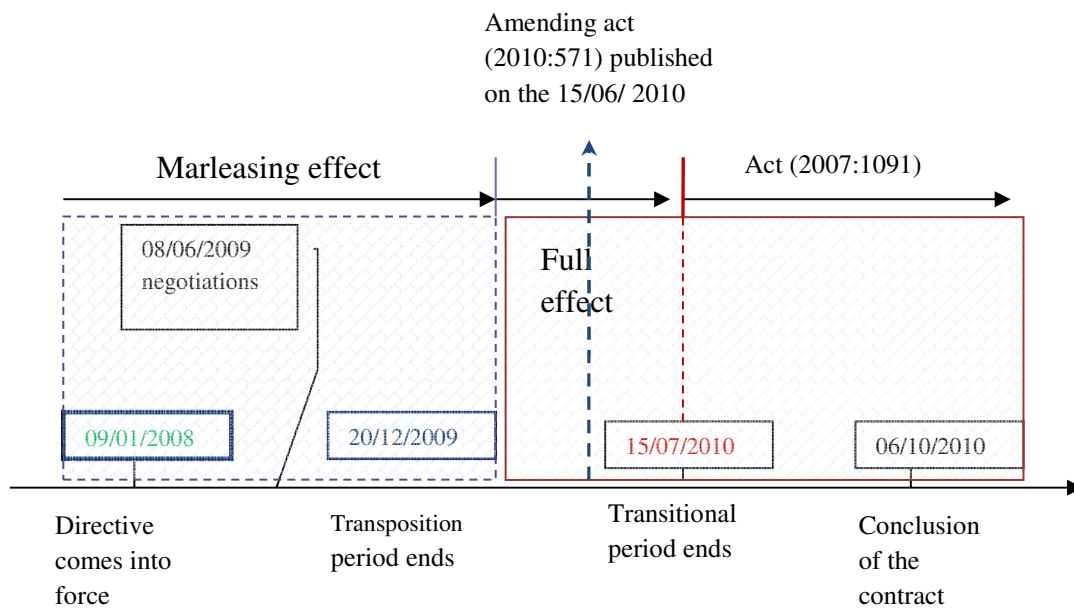
The date of 8 June 2009 is considered as milestone for the initiation of negotiations and thus it has been established that the award came into existence before the 15 July 2010. Adopting an EU law perspective I must once again underline that the significance of 15 July 2010 is to determine when the directive has been actually implemented in national law and subsequently that the rights of the individuals no longer arise immediately from the directive.

The date of 8 June 2009 is situated on a temporal scale after the adoption of the Directive on 9 January 2008, but before the transposition date of 20 December 2009. The *Marleasing* doctrine is applicable and in this meaning a contracting authority should not have acted in any way inconsistently with the duty of sincere cooperation enshrined in article 4.3 TEU and engage in an illegal award just six months prior to the transposition date.

Besides this point the national court must interpret the national law and find a solution to the question whether the stricter regime is applicable on the specific circumstances. I will follow the reasoning of the Supreme Court on this matter, but I must underline already that the answer to the question of EU law constitutes an intermediate support for the solution that the Supreme Court is seized to provide.

⁶¹ Prop. 2009/10:180 published on 14 April 2010, p. 188

⁶² Judgment of the Court of Appeal from 26 September 2012, p 12



On the 17 May 2013 the case reached the Supreme Court. The appellant emphasized that the EU case-law invoked and examined by the Court of Appeal does not deal with an identical question, but the obligation to refer enshrined in article 267(3) TFEU has not been mentioned at all⁶³. The question relevant for giving a judgment in the present case is the following: When a public award procedure shall be deemed to have been initiated? *Stadt Halle* ruling answers the question, at which moment during an awarding procedure the decision of the contracting authority becomes amenable to review. Neither are the travaux préparatoires to the Act (2010:571) conclusive for answering the pertinent question.

The appellant invokes a relevant ruling *BMW*⁶⁴ that follows the *Marleasing* doctrine. According to article 297 TFEU directives enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication. They have legal effect from that moment on⁶⁵. During the period allowed for transposition of a directive, the Member States must refrain from taking any measures liable seriously to compromise achievement of the result prescribed by the directive⁶⁶. Moreover directives become legally binding with regard to the purpose to be achieved, and are also binding on the courts in the Member States, right from the date on which they come into force⁶⁷.

⁶³ Judgment of Supreme Court of 17 May 2013, Case 5766-12, *SCA v Immigration Council*, p.2

⁶⁴ Case C-63/97, *Bayerische Motorenwerke AG (BMW) and BMW Nederland BV v Ronald Karel Deenik*, [1999] I-00905

⁶⁵ Case C-129/96, *Inter-Environnement Wallonie*, [1997] ECR I-7411 paragraph 41

⁶⁶ *Inter-Environnement Wallonie*, cited supra footnote 65, paragraph 45

⁶⁷ *Marleasing*, cited supra footnote 34, paragraph 8 ; See also Case C-318/98, *Fornasar and Others*, [2000] ECR I-4785 paragraphs 41 and 42

Where national laws, regulations and administrative provisions containing general terms and undefined legal concepts are already in existence prior to the adoption of a directive, the argument that courts should not anticipate the legislature's decision when transposing a directive must also be invalid since, in as much as a national court is simply exercising in conformity with a directive that discretionary power of interpretation already afforded to it by the legislature under pre-existing national legislation, it is simply performing its fundamental duty⁶⁸.

The obligation to interpret as far as possible, in the light of the wording and purpose of the directive in order to achieve the result pursued by the latter and thereby comply with article 288(3) TFEU applies equally to the transitional rules stipulated by national law. Thus the national court must interpret those rules, as far as possible, in such a way as to give full effect to Article 2 of the Directive 2007/66/EC in connection with illegal public awards subsequent to the date on which the directive ought to have been transposed⁶⁹. Moreover during the transposition period, 9 January 2008 - 20 December 2009, the member states must '*refrain from taking any measures liable seriously to compromise achievement of the result prescribed by the directive*'.

It is logical to deduce that the transitional rules stipulated by national law shall be interpreted in the light of the wording and the purpose of the directive, since the national courts must apply both the provisions of national law adopted before and those adopted after the directive by interpreting them consistently with the Union law⁷⁰.

The Marleasing line of argumentation proposed by the appellant has not been accepted by the Court. The appellant argued that the interpretation that an illegal direct award has been initiated at the conclusion of the public contract should have achieved a result consistent with the objectives of the Remedies Directive. The respondent follows the same line of argumentation as before emphasizing the importance of the transitional provisions and bringing evidence about the negotiations that had been started prior to 15 July 2010.

The question before the Supreme Court is whether the transitional provisions should be interpreted so the award is deemed to have commenced on the 6 October 2010, when the contract has been concluded with Brinova or already during the ante-contractual stages that occurred before the provisions for procurement damages fine came into force⁷¹.

⁶⁸ Opinion of AG Kokott delivered on 18 May 2004, Case C-313/02, *Nicole Wippel v Peek & Cloppenburg GmbH & Co. KG*, [2004] I-09483 point 62

⁶⁹ See to that effect, *BMW*, cited supra footnote 64, paragraphs 22-23

⁷⁰ See to that effect, *Marleasing*, cited supra footnote 34, paragraph 8

⁷¹ In original language: *Frågan i målet är om övergångsbestämmelsen ska tolkas så att upphandlingen ska anses ha påbörjats den 6 oktober 2010 när avtalet med Brinova ingicks eller redan genom de faktiska åtgärder för att möjliggöra avtalet som Migrationsverket vidtog innan bestämmelserna om upphandlingsskadeavgift trädde i kraft*

The Supreme Court will examine the context in which the Directive 2007/66/EC has been adopted and implemented. The importance of the ineffectiveness as a main remedy against the illegal awards has been underlined. The absence of any transitional provisions indicated by the directive has been noticed, but no link is made with the relevant case-law in relation to the interpretation of national law in a manner consistent with the objectives enshrined in the directive and the obligation of the state that arises in conformity with the provisions of article 297 TFEU.

Once again the difference between the implementing provisions and the provisions of chapter 17 article 1, third paragraph is marked⁷². The Supreme Court does not construe this difference in the light of *Marleasing* according to which all the relevant national legislation, including the non-implementing provisions and the ones adopted before the coming into existence of the directive must be interpreted in the light of the wording and the purpose of the directive. The interpretation of national law made in the light of the travaux préparatoires underlines though the fact that the same time limit applies for both implementing and non-implementing provisions.

The assessment of the Supreme Court starts by making reference to *Leur-Bloem* but the citation is placed out of the context. I will cite first the original text in English.

...where, in regulating purely internal situations, domestic legislation adopts the same solutions as those adopted in [Union] law in order, in particular, to avoid discrimination against its own nationals or, as in the case before the national court, any distortion of competition, it is clearly in the [Union] interest that, in order to forestall future differences of interpretation, provisions or concepts taken from [Union] law should be interpreted uniformly, irrespective of the circumstances in which they are to apply⁷³.

In order to achieve a uniform application of Union law, the relevant transitional provisions shall be interpreted in the same manner, no matter if the adopted provisions serve the pursuit of implementation or govern situations of national interest related to the implementing provisions.⁷⁴ This is the translation of the Swedish text referring to *Leur-Bloem*. It must be observed that ‘*situations of national interest related to the implementing provisions*’ do not constitute ‘*purely internal situations*’ in the meaning of *Dzodzi* doctrine. *Leur-Bloem* ruling is not applicable.

Based on *Leur-Bloem* and on the fact that the Act (2010:571) has been based on Directive 2007/66/EC the Supreme Court decides to interpret the transitional provisions relying on the case-law of the Court of Justice. Then the Court refers to the case-law examined above, *Commission v France* and *Stadt Halle* and invokes an analogous application. At this point the Supreme Court could have noticed that the questions at stake in the referred case-law are not materially identical with the question formulated on page 5 in the judgment.

⁷² Judgment of Supreme Court of 17 May 2013, Case 5766-12, *SCA v Immigration Council*, p. 6

⁷³ *Leur-Bloem*, cited supra footnote 25, paragraph 32

⁷⁴ In original language: *För att uppnå en enhetlig rättstillämpning måste den nu aktuella övergångsbestämmelsen tolkas på samma sätt oavsett om de bestämmelser som den omfattar har införts för att tillgodose ändringsdirektivet eller för att reglera situationer av nationellt intresse som har samband med de direktivstyrda bestämmelserna.* Page 6 in the Judgment from 17 May 2013

Again based on pure logic, in order for a public award to come into existence, normally it must be published or announced openly to all the potential interested parties. The rule is also expressed in the travaux préparatoires in relation to awards excepting the direct award⁷⁵. A public award cannot exist before the manifestation of the will of the contracting authority comes in whatever way to the knowledge of the persons interested in contracting. The obligation of transparency incumbent to contracting authority aims to make possible the verification of the fact that the Union rules have been complied with⁷⁶.

The Supreme Court does not make any acknowledgment of the principle of transparency in any form⁷⁷ and construes the manifestation of will just between the contractual parties and the possibility to verify compliance with Union procurement rules is not understood as strongly related to the publicity aspect, namely to the ability of third parties to know that a public award is intended. Based on this understanding the Supreme Court concludes that conditions of initiation have been satisfied already on the 8 June 2009, when the consent for signing a letter of intention is required from the government.

For the sake of completeness it must be underlined that leasing contracts in contrast to public works contracts are not covered by the provisions of Act (2007:1091). The incorrect heading '*Leasing contract*' could have had a misleading effect, because the government didn't notice any inaccuracy at that moment. The external measures considered by the Supreme Court as the starting point of the award are represented by the negotiations between the contractual parties without any special consideration for the transparency principle. Based on these findings the award is supposed as have been initiated before the 15 July 2010 and the sanctions provisions have been deemed as inapplicable.

IX. What's the meaning of transitional provisions?

After a deeper examination of the present case it appears obvious to me that the very purpose of adopting transitional provisions is diluted in the context of implementing legislation that introduces more effective remedies against infringements committed by public authorities. The obligations of the contracting authorities subject to sanction according to Directive 2007/66/EC, such as the duty of prior publication of a contract notice pre-existed the directive. The obligations borne by the state incurred as a result of the directive have come into existence already on the 9 January 2008.

⁷⁵ Prop. 2009/10:180 published on 14 April 2010 pp. 310 and 374

⁷⁶ For that effect, *Stadt Halle*, cited supra footnote 49, paragraph 39

⁷⁷ It must be emphasized that the principle of transparency has been expressed in many ways in Swedish legal language. The usual legal terms are: 'kravet på insyn', 'transparensprincipen' and '(genomföra upphandlingar)på ett öppet sätt'.

Transitional provisions can have an actual purpose in the case of obligations or sanctions imposed on private individuals, but not in relation to liability and sanctions imposed on public authorities or other emanations of the state. Considering the long period of transposition of two years and the delay of six months that occurred in the national legislative process, the necessity to put into effect an additional transitional period of one month appears to be immaterial under the circumstances of the case.

It does not come out sufficiently clear from the reasoning of the Swedish Courts that the period of transition in fact represents only one month, though the transposition delay of six months counted from 20 December 2009 until 15 June 2010 has been acknowledged. For the interpretation of the facts is also immaterial to discuss the actual period of transition comprised between the 15 June 2010 and 15 July 2010, because the interval is situated anyway after June 2009 and before October 2010.

Since the transitional period of one month occurred after the time limit for transposition and the case is about fine liability of an institution representing the state there is no ground for an additional protection against retroactive application. A public authority cannot invoke as a reasonable excuse the state failure to comply with the article 288(3) TFEU in conjunction with article 4.3 TEU.

X. Fine liability

Finally, after an examination of the relevant EU law I will draw some conclusions. First, it appears obvious that a reference for a preliminary ruling in conformity with article 267(3) TFEU was apposite. Secondly, I have proven that the situation of an illegal direct award for which the member state has provided a stricter regime of sanctions does not constitute a purely internal situation. It's a *contractio in terminis* to affirm that a situation falling within the scope of EU procurement rules might constitute a purely internal situation. Thirdly, the legal terminology of public procurement expressed in 23 official languages is complex and this constitutes an additional reason for requiring a preliminary ruling even for cases not covered by the obligation to refer. Fourthly, I have proven that the transitional period is of no material relevance, because even if the amending Act (2010:571) had come into force on its publication day i.e. the 15 June 2010, it would have not mattered at all under the current circumstances.

I will distinguish two possible solutions depending on the condition of publicity named in my argumentation above. According to my opinion and agreeing with the conclusion drawn by the appellant an award cannot come into existence, if the intention of the contracting authority in relation to the contract in question does not become public. '*External negotiations*' should not be interpreted as known by the contractual parties, but known by all the potential interested parties, known to the public. In general, an act of public body is amenable to judicial review only if it produces legal effects vis-à-vis third parties. Therefore in *Stadt Halle* the Court has established that as long as the award decision can be corrected no judicial review should be available.

In alternative, supposing that the interpretation above is not accepted and the date of 9 June 2009 is considered as the relevant temporal position for starting the award I claim that the transitional period lacks anyway relevance for the outcome of the dispute. The main remark is that the date 9 June 2009 occurs before the time limit for transposition, but after the coming into force of the directive. The member states are bound to act in a manner consistent with the obligation imposed by the directive. The respondent represents the state, namely the public authority responsible for the enforcement of the immigration policy.

The objectives of the directive are to enhance the effectiveness of the remedies for public procurement and the illegal direct award in question is covered by the prohibition and the sanction of ineffectiveness. In my opinion the award should have been declared ineffective and in case its ineffectiveness could not be maintained for reasons of public interest an alternative sanction should have been enforced in accordance with article 2e of the Remedies Directive. Escaping both ineffectiveness and any form of alternative sanctions based on the fact that the Swedish legislator considered that a stricter regime must apply cannot be a compatible solution neither from the perspective of the Directive nor from the perspective of the travaux préparatoires to the Act (2010:571)⁷⁸.

Now in relation to the breach of the obligation to refer in article 267(3) TFEU I can't refrain from observing that the state liability is a soft and innocuous remedy taking into consideration the fact that the harm caused to the potential interested parties and the community at large in this type of cases will never be compensated. It will be difficult to prove the damages, since a potential supplier must show an actual loss of opportunity. In the case of an illegal direct award, where no award criteria have been established and there are several potential '*winner*s', it's almost impossible to imagine a case where an action in civil damages could be successful at least according to Swedish law.

My special area of interest in EU law is the field of transparency at a more general level. I will conclude the current dissertation by giving an account of transparency seen as a condition for access to justice. This is because I consider that the only imaginable way of enforcing the individual rights is by placing the accent on the relation between transparency and Article 47 of the Charter in connection with article 19(1) TEU.

⁷⁸ Prop. 2009/10:180 14 April 2010 p.187

XI. A transparent way towards effective remedies

The protection of the private rights in the fields covered by Union law must be ensured by the member states by providing remedies sufficiently effective to serve this objective. The principle of transparency is relevant for several legal domains. There is an obligation of transparency in relation to article 15 TFEU and the law-making pursuits of participative democracy and good governance in the EU. The extension of the transparency obligation comprises also the acts of other public bodies and institutions, including the EU judicial organs.

The right of access to Union public documents is stipulated by the provisions of the Charter in Article 42. Moreover the right of access to a court as guaranteed by Article 47 might be impeded by a non-transparent administration of the documents engaged containing evidence of an illegality committed under a regime of secrecy. I see an analogy between the illegal agreements prohibited by Article 101 TFEU and the illegal direct awards banned by EU procurement rules in the meaning that in both cases the evidence exists in the possession of the infringers and the third parties who have suffered damages need to obtain access to the incriminating evidence in order to be able to bring a successful action for damages.

As known, the private enforcement is still the Cinderella of antitrust law and even in the field of public enforcement the Union legislator has emphasized that the civil damages do not constitute an appropriate alternative for the cases, where ineffectiveness of an illegal direct award cannot be enforced for overriding reasons of public interest. This implies that civil damages do not represent an actual effective remedy against illegal direct awards and the member states must provide according to the obligation in article 19(1) TEU other sufficiently effective, dissuasive and proportional means.

In *Donau Chemie* the Austrian law required the consent of the antitrust law infringer in order to allow the access of a damage claimant to the competition file of the public enforcer and AG Jääskinen concluded in his Opinion of 7 February 2013 that the member states may regulate the factors to be taken into account in a balancing exercise of opposed interests⁷⁹, but not preclude it from taking place⁸⁰. By analogy, compliance with Article 47 of the Charter of Fundamental Rights in the field of public procurement shall be ensured by alternative avenues to verify the conformity with the public procurement rules, in cases where the respect due to transparency principle as provided by EU law has not been observed.

The possibility of a review in the present case that determines according to the Swedish Supreme Court the moment of initiation of an award should take into account the actual possibility of third interested parties to obtain knowledge about the award in an alternative manner, since it has been established that no prior publication of a contract notice has been arranged. In my opinion this would be a compliant interpretation of the possibility offered to the contracting authority to bring evidence about the fact that the award has been initiated prior to the date of contract conclusion as discussed by the Swedish legislator in the travaux préparatoires to Act (2010:571)⁸¹.

⁷⁹ In this case related to the protection of the leniency programme

⁸⁰ Case C-536/11, *Donau Chemie*, [2013] I-00000 point

⁸¹ Prop. 2009/10:180 pp. 310 and 374

In my view a disproportionate consideration has been paid to the transitional period of no longer than one month, 15 June 2010 - 15 July 2010, while the momentous issue relating to the alternative that the illegal direct award occurred before the end of the transposition period i.e. before the date when the Remedies Directive took full effect has not been satisfactorily elucidated. The decision of the Supreme Court not to refer the matter for a preliminary ruling leaves us without a definitive answer to an interesting material question.

The tenders of all suppliers must be subject to the same conditions. The principle of transparency, which is the corollary of the principle of equality, is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. The obligation of transparency enables to verify that the Union rules have been complied with⁸². There is an intimate correlation between transparency and the actual possibility to obtain access to justice and its recognition may constitute the eve of a revolution of placing a definite accent on the overarching link between grant of rights and provisions of remedies in EU law.

⁸² Case C-92/00, *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Stadt Wien*, [2002] ECR I-5553 paragraph 45