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Key Issues for Effective Procurement Remedies

Główne problemy skutecznych środków ochrony prawnej w zamówieniach publicznych

ABSTRACT

Public procurement has been regulated by (then) European Economic Community (EEC) secondary law since 1971. Substantive EU rules aim at enforcing non-discrimination in the internal market. To this end, they prescribe competitive and transparent award procedures contracting authorities or entities must follow to choose their partner. Remedies for breaches of substantive procurement rules have been the object of an early codification in (then) EEC law. The recitals in Directive 89/665/EEC clearly state the issue the directive itself is expected to address: existing arrangements at both national and Community levels for ensuring their application are not always adequate to ensure compliance with the relevant Community provisions particularly at a stage when infringements can be corrected. Many remedies, however, are only named without much details being provided on what is required at national level. Moreover, in the past few years, the Court of Justice seems to have become more restrained in adding details to the Remedies Directives, having instead more and more often recourse to the principle of procedural autonomy. This leaves much uncertainty on the standard of review required or appropriate under the Remedies Directives.

Keywords: public procurement; remedies; non-discrimination; internal market; standard of review

INTRODUCTION

Public procurement has been regulated by (then) European Economic Community (EEC) secondary law since 1971. Those rules were enacted to give effect to the Treaty fundamental (economic) freedoms in an area in which the Member

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States were seen favouring national undertakings or, to use the specific public procurement jargon, economic operators. Substantive EU rules aim at enforcing non-discrimination in the internal market.[1] To this end, they prescribe competitive and transparent award procedures contracting authorities or entities must follow to choose their partner. The degree of detail characterising those rules has grown almost exponentially over the years up to and including the 2014 reforms.[2]

Remedies for breaches of substantive procurement rules have been the object of an early codification in (then) EEC law. The recitals in Directive 89/665/EEC[3] clearly state the issue the directive itself is expected to address "existing arrangements at both national and Community levels for ensuring their application are not always adequate to ensure compliance with the relevant Community provisions particularly at a stage when infringements can be corrected". More specifically, "in certain Member States the absence of effective remedies or inadequacy of existing remedies deter Community undertakings from submitting tenders in the Member State in which the contracting authority is established". Remedies are needed: "effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law".

Directive 92/13/EEC[4] was enacted soon afterwards providing remedies for breach of procurement rules in the utilities sectors very much in line with those foreseen in the older directive.[5] Both directives were later amended by Directive

[1] S. Arrowsmith, *The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies*, "Cambridge Yearbook of European Legal Studies" 2012, vol. 1, p. 1 ff.

[2] Detailed analysis in *European Public Procurement: Commentary on Directive 2014/24/EU*, eds. R. Caranta, A. Sanchez Graells, Cheltenham 2021; *EU Public Procurement Law*, eds. M. Steinicke, P.L. Vesterdorf, Baden-Baden 2018.

[3] Council Directive 89/665/EEC 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 395/33, 30.12.1989).

[4] Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76/14, 23.3.1992).

[5] For example, see the assessment of A.G. Bobek in his opinion in case C-391/15, *Marina del Mediterráneo and Others*, ECLI:EU:C:2017:268, para. 24. According to case C-328/17, *Amt Azienda Trasporti e Mobilità and Others*, ECLI:EU:C:2018:958, para. 40, even the scant provision in Article 5 (7) of Regulation (EC) No. 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315/1, 3.12.2007), establish a system of remedies analogous to the system in Directive 89/665/EEC (see Recital 21 thereof). See also the opinion of A.G. Compos Sánchez-Bordona in the latter case (C-328/17 *Amt Azienda Trasporti e Mobilità and Others*, paras 60 and 63).

2007/66/EC.[6] Recital 3 of the more recent directive somewhat reworded the recitals in Directive 89/665/EEC which were just recalled. According to Recital 3, consultations of the interested parties and the case law of the Court of Justice have revealed a certain number of weaknesses in the review mechanisms in the Member States so that it is not always "possible to ensure compliance with Community law, especially at a time when infringements can still be corrected". Therefore, Directive 2007/66/EC introduced new mechanisms and remedies in the text of the older ones to strengthen the guarantees of transparency and non-discrimination.[7]

Detailed and critical analysis of the EU public procurements and concessions remedial rules already exist in the literature.[8] Suffice it to say that (a) Directives 89/665/EEC and 92/13/EEC afforded a generous standing to economic operators and provided for the traditional administrative law remedies of interim relief (suspension), annulment and damages; conditions for awarding the remedies were however not much, or not at all, specified by those directives; (b) Directive 2007/66/EC added much detailed rules introducing standstill obligations and the new remedy of the effectiveness of the contract concluded following a list of egregious breaches of EU substantive law.[9]

In this contribution, the remedies foreseen under the directive are sketched out first. While with successive enactments new remedies have been introduced, the "old" remedies are still too lightly regulated by the EU law, leaving gaps in the system of judicial protection of tenderers. Some final considerations close this article.

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[6] Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 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 (OJ L 335/31, 20.12.2007).

[7] R. Caranta, *The Interplay between EU Legislation and Effectiveness, Effective Judicial Protection and the Right to an Effective Remedy in EU Public Procurement Law*, "Review of European Administrative Law" 2019, vol. 12(2), p. 72 ff. See also P. Nowicki, *Aksjologia prawa zamówień publicznych. Pomiędzy efektywnością ekonomiczną a instrumentalizacją*, Toruń 2019, p. 140 ff.

[8] A Sanchez-Graells, *"If Ain't Broke, Don't Fix It"? EU Requirements of Administrative Oversight and Judicial Protection for Public Contracts*, [in:] *Contrôles et Contentieux des Contrats Publics – Oversight and Challenges of Public Contracts*, eds. L. Folliot-Lalliot, S Torricelli, Brussels 2018, p. 503 ff; R. Caranta, *Remedies in EU Public Contract Law: The Proceduralisation of EU Public Procurement Legislation*, "Review of European Administrative Law" 2015, vol. 75(1); C. Bovis, *Remedies*, [in:] *EU Public Contract Law: Public Procurement and Beyond*, eds. M. Trybus, R. Caranta, G. Edelstam, Brussels 2014, p. 389; S. Treumer, *Enforcement of the EU Public Procurement Rules: The State of the Law and Current Issues*, [in:] *Enforcement of the EU Public Procurement Rules*, eds. S. Treumer, F. Lichère, Copenhagen 2011, p. 17 ff.; R Caranta, *Many Different Paths, but Are They All Leading to Effectiveness?*, [in:] *Enforcement of the EU Public Procurement Rules…*, p. 53 ff.

[9] See M.-J. Clifton, *Ineffectiveness – The New Deterrent: Will the New Remedies Directive Ensure Greater Compliance with the Substantive Procurement in the Classical Sector?*, "Public Procurement Law Review" 2009, vol. 167; S Treumer, *Towards and Obligation to Terminate Contracts Concluded in Breach of the E.C. Public Procurement Rules – the End of the Status of Concluded Public Contract as Scared Cows*, "Public Procurement Law Review" 2007, vol. 371.

THE REMEDIES FORESEEN BY THE DIRECTIVES

The remedies to be provided under the two original Remedies Directives are the traditional administrative law remedies in those jurisdictions following the French model: interim relief (suspension), set aside (annulment), and damages (Article 2 (1)).[10]

More specifically interim measures aim at "correcting the alleged infringement or preventing further damage to the interests concerned", and include measures to suspend the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority. The "Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits" (Article 2 (4) – now Article 2 (5)). The provision requires the courts to apply a balance of interest as it is usually the case for the granting of interim measures in most jurisdictions.[11]

In a couple of infringement procedures, the Court of Justice interpreted Directive 89/665/EEC in the sense that Member States are under a duty more generally to empower their review bodies to take, independently of any prior action, any interim measures, including measures to suspend or to ensure the suspension of the procedure for the award of the public contract in question.[12] Of course, an interim decision may be subsequently found to have been wrong by the court competent to decide the case on the substance.[13]

Annulment includes the removal of "discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure" (Article 2 (1) of Directive 89/665/EEC). As it will be shown later, the EU is silent as to what makes a decision illegal, namely which are the relevant grounds of invalidity. Also there is no hint as to the possible distinction between formal and substantive illegality and as to whether a balance of interests test is to be applied in deciding whether to annul or not an unlawful decision.[14] However, under Article 2 (7) outside the mandatory cases of ineffectiveness which will be discussed below, a Member State may provide that after the conclusion of a contract the powers of the review body

[10] C. Bovis, *op. cit.*, p. 371 ff.

[11] *Ibidem*, p. 371.

[12] Judgment of the CJEU of 19 September 1996, Case C-236/95, *Commission of the European Communities v Hellenic Republic*, ECLI:EU:C:1996:341; judgment of the CJEU of 15 May 2003, Case C-214/00, *Commission v Spain*, ECR I-4667.

[13] Judgment of the CJEU of 9 December 2010, Case C-568/08 *Spijker*, ECR I-12655, para. 79.

[14] See C. Bovis, *op. cit.*, p. 375. On the latter it would seem that annulment automatically follows from illegal decision; unlike with ineffectiveness, no alternative penalty is provided.

are limited to awarding damages to any person harmed by an infringement.[15] Many Member States have availed themselves of this option.[16]

Finally, a remedy in damages is provided under Article 2 (1) (c), but annulment may be made a condition precedent to damages actions under domestic law.

The remedy system sketched by Directives 89/665/EEC and 92/13/EEC did not prove fully effective. More specifically, it was found out that the mechanisms established by the first Remedies Directives did not always make it possible to ensure compliance with what has become EU law, especially at a time when infringements could still be corrected. Moreover, the big issue were direct awards, that is contracts awarded without any prior publicity in situations in which a call for tenders was required under EU law. In such a case damages are hardly available as causation is close to impossible to prove in most instances. How could, outside cases of small oligopolistic markets, an economic operator not having even placed a bid claim that it stood some chances to get the contract? Another issue was contracting authorities rushing to sign the contract and not leaving disaffected bidders time to get or even ask interim relief.[17]

The overarching problem in most jurisdictions was that sanctity of contract or similar doctrines stood in the way of third parties remedies affecting the effects of a concluded contract.[18] In a way private law made checkmate to public law remedies. The Court of Justice had mitigated some of the shortcomings just mentioned. The rush to sign the contract was already halted in case C-81/98 *Alcatel*.[19] In that case, the Court of Justice indicated – if somewhat obliquely – that a time must elapse between the decision awarding a contract and its conclusion.[20] This message was delivered in unambiguous terms in a following infringement procedure against Austria.[21] Sanctity of contract was undermined when the Court of Justice held first that

[15] On the systemic relevance of that provisions, see judgment of the CJEU of 30 September 2010, Case C-314/09, *Strabag*, ECR I-8769.

[16] S. Treumer, *Towards*...

[17] See C. Bovis, *op. cit.*, p. 368 ff.

[18] The problem was deeply felt in Germany, but already taken care by the case law in France. See the comparative work by J. Germain, *Les recours juridictionnels ouverts au concurrent evince contre un marché public communautaire après sa conclusion en France et en Allemagne*, "Revue Française de Droit Administratif" 2009, p. 49; also contrast M. Burgi, *EU Procurement Rules – A Report about the German Remedies System*, [in:] *Enforcement of the EU Public Procurement Rules*…, p. 137 ff.; F. Lichère, N. Gabayet, *Enforcement of EU Public Procurement Rules in France*, [in:] *Enforcement of the EU Public Procurement Rules*..., p. 314 ff. On the situation in France, see also G. Berthon, *La suspension juridictionnelle du contrat administratif, entre référé-suspension et référé contractuel*, "Revue Française de Droit Administratif" 2009.

[19] Judgment of the CJEU, Case C-81/98, *Alcatel Austria and Others v Bundesministerium für Wissenschaft und Verkehr* [1999], ECR I-7671.

[20] *Ibidem*, paras 41 ff.

[21] Judgment of the CJEU of 24 June 2004, Case C-212/02, *Commission v Austria*, ECR I-0000. See also judgment of the CJEU of 23 December 2009, Case C-455/08, *Commission v Ireland*, ECR I-225.

Germany had breached EU law when two of its municipalities had directly awarded long terms contracts for the collection of waste water and for waste disposal.[22] Then the Commission brought a second infringement procedure claiming that Germany had failed to comply with the first judgment by leaving the two contracts to stand, being content to write to the responsible authority to comply with the rules on the publication of calls for tenders when awarding future contracts. According to Germany and a number of Member States which had intervened in the procedure, the principles of legal certainty, that of the protection of legitimate expectations, the principle *pacta sunt servanda* and the fundamental right to property among other arguments precluded the termination of the contracts at issue. The Court of Justice curtly retorted that those principles might be used against the contracting authority by the other party to the contract in the event of termination, but Member States cannot rely on them to justify the non-implementation of a judgment establishing a failure to fulfil obligations and thereby evade their own liability under (then) Community law.[23] This put Member States in a corner, the alternative being between paying tribute to sanctity of contract and being in persistent breach of EU law or complying and dropping *pacta sunt servanda*.[24]

The Court of Justice had also held that complete legal protection presupposes, first, an obligation to inform tenderers of the award decision,[25] and the possibility for the unsuccessful tenderer to examine in sufficient time the validity of the award decision.[26]

The case law was codified by Directive 2007/66/EC amending Directives 89/665/EEC and 92/13/EEC with the aim of improving the effectiveness of review procedures concerning the award of public contracts.[27] Reference will be had

[22] Judgment of the CJEU of 10 April 2003, joined cases C-20/01, C-28/01, *Commission v Germany*, ECR I-3609.

[23] Judgment of the CJEU of 18 July 2007, Case C-503/04, *Commission v Germany*, ECR I-6153, para. 36. See also M.-J. Clifton *op. cit*.

[24] In the end Germany tried to save both by considering contracts which are ineffective under Directive 2007/66/EC as *de facto* contracts. See F. Wollenschläger, *Germany*, [in:] *Public Procurement Law: Limitations, Opportunities and Paradoxes*, eds. U. Neergaard, C. Jackson, G.S. Ølykke, Copenhagen 2014, p. 439 ff.

[25] See also judgment of the CJEU of 28 January 2010, Case C-406/08, *Uniplex (UK)*, ECR I-817, para. 30 ff.; judgment of the CJEU of 28 January 2010, Case C-456/08, *Commission v Ireland*, ECR I-859, para. 30.

[26] Case C-406/08, *Uniplex (UK)*, para. 23. See also judgment of the CJEU of 11 June 2009, Case C-327/08, *Commission v France*, ECLI:EU:C:2009:371, para. 57 ff. on the (im)possibility to make judicial review conditioned upon a previous administrative appeal. On this latter case, see A. Brown, *A French Provision Breaches Remedies Directives 89/665 and 92/13 by Jeopardising the Effectiveness of the Standstill Period between Notification of the Award Decision and Conclusion of the Contract: Commission v France (C-327/08)*, "Public Procurement Law Review" 2009, no. 6, NA222.

[27] Judgment of the CJEU of 11 September 2014, Case C-19/13, *Ministero dell'Interno v Fastweb*, ECR I-0000, para. 34 ff. See also S. Treumer, *Enforcement*..., p. 17 ff.

here to the new provisions of Directive 89/665/EC, but the remedies in the utilities sectors follow the same patterns. Article 2a of Directive 89/665/EEC as amended by Directive 2007/66/EC now provides for a 15 calendar days standstill period running from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned (reduced to 10 days if fax or electronic means are used). During this period the contract cannot be signed unless one of the situations listed in Article 2b is given.[28] The standstill period comes assorted with an automatic suspension rule. Under Article 2 (3) the suspension is automatic in that there is no need for the economic operator to specifically ask for it.

Directive 2007/66/EC also took the lead from the case law in eroding sanctity of contract. As Recital 13 made it clear, in order to combat the illegal direct award of contracts "there should be provision for effective, proportionate and dissuasive sanctions. Therefore, a contract resulting from an illegal direct award should in principle be considered ineffective". Indeed, "ineffectiveness is the most effective way to restore competition and to create new business opportunities for those economic operators which have been deprived illegally of their opportunity to compete".[29]

Ineffectiveness is regulated in Articles 2d and following of the reformed Directive 89/665/EEC.[30] The scope of the provision reaches beyond illegal direct award to strike a series of egregious breaches of EU public procurement law. More specifically, contract should in principle be declared invalid when awarded without prior publication of a contract notice in the Official Journal of the European Union without this being permissible under EU law (which might be construed as including instances of major deviation of the awarded contract from the contract notice);[31] in case of breach of the rules on standstill and automatic suspension when the infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies,[32] and in case of breaches of the rules on calls off in framework agreements and dynamic purchasing systems.[33] The Member States are left free to decide whether and to what extent provide for in effectiveness in case of other breaches.

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[28] See C. Bovis, *op. cit.*, p. 369.

[29] Recital 14.

[30] S. Treumer, *Enforcement*..., p. 47 ff.; M.-J. Clifton, *op. cit*.

[31] See also Recital 14 ff.

[32] Recital 18 indicates that the sole breach of those safeguards will not lead to ineffectiveness if no substantive public procurement rule was breached as well: "Contracts that are concluded in breach of the standstill period or automatic suspension should therefore be considered ineffective in principle if they are combined with infringements of Directive 2004/18/EC or Directive 2004/17/EC to the extent that those infringements have affected the chances of the tenderer applying for review to obtain the contract".

[33] See also Article 2b (c).

Ineffectiveness is not automatic, but should be pronounced by a court or other independent review body.[34] However, as it is made clear by Recital 21, the objective to be achieved "is that the rights and obligations of the parties under the contract should cease to be enforced and performed".

Under Article 2d (4) ineffectiveness is ruled out in case a voluntary *ex-ante* transparency notice has been published in the Official Journal of the European Union and the standstill period provided therein has been abided to. Voluntary *ex-ante* transparency notices are routinely published in some Member States either as a precaution or as a way to short-circuit ineffectiveness.[35]

This led the Italian Consiglio di Stato – the highest administrative court of the land – to ask the Court of Justice whether Article 2d (4) of Directive 89/665/EEC is to be construed as precluding national courts from declaring the contract to be ineffective, even if it is established that there has been an infringement of the provisions permitting the award of a contract without a competitive tendering procedure. In the affirmative, the Italian court doubted of the consistency of the provision with the principles of equality of the parties, of non-discrimination and of protecting competition, and the right to an effective remedy. The Court of Justice first stated that, since "Article 2d (4) of Directive 89/665 constitutes an exception to the rule regarding the ineffectiveness of contracts, laid down in Article 2d (1) of that Directive, it must be interpreted strictly".[36] However, "the exception must be construed in a manner consistent with the objectives that it pursues. Thus, the principle of strict interpretation does not mean that the terms in which the exception is framed in Article 2d (4) of Directive 89/665 must be construed in such a way as to deprive that exception of its intended effect".[37] On this basis, the Court held that the Member States do not enjoy any discretion as to the consequences of the publication of a voluntary *ex-ante* transparency notice, which are those laid down in Article 2d (4) excluding ineffectiveness as a consequence of the publication of the notice.[38]

This does not however mean that contracting authorities are free to abuse voluntary *ex-ante* transparency notices. The Court of Justice makes clear that the conditions laid down in Article 2d (4) must have been fulfilled. These conditions are that the contracting authority considered it permissible under EU law to award the contract without prior publication of a contract notice and that the voluntary *ex-ante* transparency notice must state the justification for the contracting authority's decision. More specifically, the "justification" "must disclose clearly and unequiv-

[34] See also Recital 13.

[35] S. Troels Poulsen, *Denmark*, [in:] *Public Procurement Law: Limitations…*, p. 323.

[36] Case C-19/13, *Ministero dell'Interno*, para. 40.

[37] *Ibidem*.

[38] *Ibidem*, paras 42 ff.; the Court is here relying on recital 26.

ocally the reasons that moved the contracting authority to consider it legitimate to award the contract without prior publication of a contract notice, so that interested persons are able to decide with full knowledge of the relevant facts whether they consider it appropriate to bring an action before the review body and so that the review body is able to undertake an effective review".[39] According to the Court, the review body has to verify whether the contracting authority acted diligently and whether it could legitimately hold that the conditions for direct award were in fact satisfied. To this end, the review body must take into consideration the circumstances and the reasons mentioned in the notice.[40]

In a way Directive 2007/66/EC strengthened the set of traditional public law remedies laid down in the first Remedies Directives by making sure that they were not put out of play by private law rules on sanctity of contract. However, as it will be shown in the next paragraph, the "old" remedies are still too lightly regulated by the EU law.

All other aspects of the public contract remedy systems are still regulated by domestic law. Procedural autonomy of the Member States still plays a big if residual role in this area.[41] As the Court of Justice has made clear many times, Directive 89/665/EEC lays down only "the minimum conditions to be satisfied by the review procedures established in domestic law to ensure compliance with the requirements of EU law concerning public procurement".[42] Otherwise said, Directive 89/665/EEC "leaves Member States a discretion in the choice of the procedural guarantees for which it provides, and the formalities relating thereto".[43] In the absence of EU rules, it is therefore "for the domestic law of each Member State to determine the measures necessary to ensure that the review procedures effectively award damages to persons harmed by an infringement of the law on public contracts".[44] The procedural autonomy of the Member States is however "limited by the principles of equivalence and effectiveness".[45]

[39] *Ibidem*, para. 48.

[40] *Ibidem*, para. 52.

[41] See C. Bovis, *op. cit.*, p. 368.

[42] Case C-314/09, *Strabag*, para. 33; judgment of the CJEU of 27 February 2003, Case C-327/00, *Santex*, ECR I-1877, para. 47; judgment of the CJEU of 19 June 2003, Case C-315/01, *GAT*, ECR I-6351, para. 45, are referred to.

[43] Case C-568/08, *Spijker*, para. 57.

[44] Case C-314/09, *Strabag*, para. 33; Case C-315/01, *GAT*, para.46, is referred to.

[45] For example, see Case C-314/09, *Strabag*, para. 34; Case C-568/08, *Spijker*, para. 90. See also R. Caranta, *The Interplay*...

THE UNBEARABLE LIGHTNESS OF THE OLD REMEDIES

Following the French model, judicial review of administrative action, including concerning procurement, is limited to legality review (Article 1 (1) of Directive 89/665/EEC). The gist of the idea of legality is reasonably straightforward. "All legal systems require the administration to be able to point to some ground of lawful authority on which it can base its action".[46] For instance, Article 263 (1) of the Treaty on the Functioning of the European Unionexpressly indicates that "the Court of Justice of the European Union shall review the legality of legislative acts". As usual, the devil is in the details and reveals itself and its misdeeds in the practice of judicial review. The problem lies in the indeterminacy of the concept of legality. This is most evident in the fact that, while most jurisdictions limit the courts review of administrative decisions to legality questions, then they variously describe the boundary referring to most indeterminate concepts such as rationality, opportunity, merits, policy and similar.[47]

Inevitably, choices concerning what is the proper scope of legality review varies very much from country to country and often within the same country. It is not unusual for the standard to vary according to the subject matter or because, for instance, fundamental rights are at stake. This is especially so, but not only, concerning the review of discretion or complex factual assessments. Indeed, the modern "service" State requires the lawmakers to leave enough room to the administration to take decisions fitted to the circumstances of each case.[48] Faced with this inescapable leeway, the different jurisdiction could be plotted along a scale ranging from on the one hand the most hands off deference paid to the "discretion" of the decision maker to, on the other hand, very searching and almost *de novo* review systems. But, as it will soon become apparent, discretion is not the only area where divergence happens.

The standard of legality review directly impacts the availability of the annulment remedy. It also impacts the remedy in damages, even if the latter raises additional issues. In no more than a handful of cases the Court of Justice tackled the question of which breaches of EU law could lead to the annulment of the procurement decision.

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[46] P. Craig, *Legality: Six Views of the Cathedral*, [in:] *The Oxford Handbook of Comparative Administrative Law*, eds. P. Cane, H.C.H. Hofmann, E.C. Ip, P.L. Lindseth, Oxford 2020, p. 884.

[47] See the brilliant analysis by P. Craig (*ibidem*).

[48] This is so evident we tend to forget it, but it was very clear to the writers in the first half of the 20th century. See F.M. Marx, *Comparative Administrative Law: A Note on Review of Discretion*, "University of Pennsylvania Law Review" 1939, vol. 87(8), especially p. 973 f.

ANNULMENT

Case C-92/00 *HI* is a benignly old case concerning the review of decisions to withdraw a call for competition.[49] The referring court asked whether the decision was reviewable under Directive 89/665/EC and, if so, if review might be limited to a mere examination of whether that decision was arbitrary. Having regard to the aim of strengthening remedies pursued by Directive 89/665/EEC, the Court of Justice held that "the scope of the judicial review to be exercised in the context of the review procedures referred to therein cannot be interpreted restrictively"[50] so that it cannot be limited to a "mere examination" of whether the challenged decision was arbitrary.[51]

Case *HI* was followed by *Croce Amica*.[52] In this case the procedure was cancelled after three out of four tenderers had been excluded and the best – and only one left – tender had been already chosen but in the meantime a criminal case had been launched against the top management of that tenderer was accused of supplying false declaration in that same procedure. While the referring court had read the situation as a case of mandatory exclusion, the Court treated the situation as a termination of the procedure.[53] Concerning the standard of judicial review, the referring court asked whether the review could have, as a matter of EU law, covered "the reliability and the suitability of the tender, and thus going above and beyond the limited cases of clear absurdity, irrationality, failure to state adequate reasons or error as to the facts?". The question was couched rather ambiguously – to put it gently – basically asking whether a domestic review system allowing intense – but not *de novo* – scrutiny of the procurement decision was compatible with EU law. A most unfortunate English translation had the question referring to "unlimited review", while the Italian original was using *pienamente* which, under Italian administrative law, simply denotes non-peripheral judicial review.[54] An equally unfortunate rephrasing of the question by the Court of Justice made the question read as follows: "Whether, under EU law, the competent national court may conduct a review of a decision of a contracting authority in the exercise of its unlimited jurisdiction, that is, a review enabling it to take account of the reliability and suitability of the tenderers' bids and to substitute its own assessment

[49] Judgment of the CJEU of 18 June 2002, C-92/00, *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Stadt Wien*, EU:C:2002:379.

[50] *Ibidem*, para. 61.

[51] *Ibidem*, para. 63.

[52] Judgment of the CJEU of 11 December 2014, Case C-440/13, *Croce Amica One Italia*, EU:C:2014:2435.

[53] *Ibidem*, para. 28 ff.

[54] Most probably the misunderstanding started with the French version, which used "contrôle de pleine jurisdiction".

for the contracting authority's evaluation as to the expediency of withdrawing the invitation to tender".[55] On that mistaken ridden basis, the Court of Justice was totally reasonable in (a) following *HI* in holding that "review of legality cannot be confined to an examination of whether the decisions of contracting authorities are arbitrary",[56] and (b) in concluding that "the national legislature may grant the competent national courts and tribunals more extensive powers for the purpose of reviewing whether a measure was expedient".[57]

On its face, *Croce Amica* did not really advance the case law on the proper standard of review. What we know after *HI* is that very marginal review is not acceptable. One reading of the two cases outside of a procurement context was given in *Craeynest*,[58] a dumping case, where the Court read those cases as indicating that "despite the absence of rules of EU law on procedures for bringing actions before national courts, and in order to determine the rigour of judicial review of national decisions adopted pursuant to an act of EU law, it is necessary to take into account the purpose of the act and to ensure that its effectiveness is not undermined".[59]

A potentially relevant case on the standard of judicial review is *Rudigier*, a case decided without hearing the opinion of the Advocate General.[60] The substantive law question was whether an open procedure for the supply of bus passenger transport services had to be preceded by the publication of a prior information notice (PIN) referred to in Article 7 (2) of Regulation No. 1370/2007. If this was so, then the referring court was uncertain whether failure to comply with Article 7 (2) may entail the unlawfulness of a call for tenders when the contracting authority has otherwise complied with all the requirements of the public procurement directives. The referring court observed that under Austrian law the contracting authority's decision must be annulled only if the unlawfulness has substantial influence on the outcome of the procurement procedure. It also considered that national legislation to be consistent with EU law, in so far as it does not make it impossible to exercise a right derived from EU law or infringe the principle of equivalence and this even more so because the applicant had been anyway aware for a long time of the forthcoming call for tenders.

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[55] Case C-440/13, *Croce Amica One Italia*, para. 38 ("il giudice nazionale competente possa esercitare sui provvedimenti adottati da un'amministrazione aggiudicatrice un controllo esteso al merito"). The "merito" or merits is a no go area for Italian administrative courts in procurement and in most cases; in the French version too the rephrased question reads "de substituer sa propre appréciation à l'évaluation du pouvoir adjudicateur concernant l'opportunité de procéder au retrait de l'appel d'offres".

[56] *Ibidem*, para. 43.

[57] *Ibidem*, para. 45.

[58] Judgment of the CJEU of 26 June 2019, Case C-723/17, *Craeynest and Others*, EU:C:2019:533.

[59] *Ibidem*, para. 46.

[60] Judgment of the CJEU of 20 September 2018, Case C-518/17, *Rudigier*, ECLI:EU:C:2018:757.

The referring court was trying to find out whether a procedural breach could be condoned. This goes very much to the heart of the rules and practices concerning the judicial review of administrative action. Review being confined to legality, procedures and forms become paramount. In France, the approach has traditionally been to distinguish whether or not the breaches are substantial. For this to sound familiar, one does not need to be of French stock or at least versed in comparative law. The French approach was transferred directly to what in the meantime has become Article 263 (3) of the Treaty on the Functioning of the European Union, the second ground for legality review being the "infringement of an essential procedural requirement". The French case law treats as "substantial" those breaching affecting the rights of those involved or the outcome of the procedure. The 1976 German Administrative Procedure Act has codified the rule according to which the "application for annulment of an administrative act (…) cannot be made solely on the ground that the act came into being through the infringement of regulations governing procedure, form or local competence, where it is evident that the infringement has not influenced the decision on the matter".[61]

The relevance to be assigned to procedural breaches is not a trivial point. Most substantive procurement rules at both EU and national levels are actually procedural in nature, in that they give contracting authorities directions on how to buy rather than what to buy. The "substantive" procurement directives are simply not concerning remedies, but they still concern procedures, more specifically administrative procedures.

The starting point for the Court of Justice in *Rudigier* case was that "EU legislation on the award of public contracts does not lay down a general rule that the unlawfulness of an act or omission at a given stage of the procedure renders unlawful all subsequent acts in that procedure and justifies their annulment. Only in specific well-defined situations does that legislation provide for such a consequence".[62] This would be proven by the fact that the Remedies Directives provide a closed list of hypotheses in which "contracts must be considered ineffective if they are vitiated by the cases of unlawfulness listed in those provisions"[63] and failure to publish a PIN is not among those hypotheses.[64] While the latter is true, for the rest the Court is confusing ineffectiveness with unlawfulness. As already recalled, the former remedy was introduced by Directive 2007/66/EC to strike the most egregious breaches of EU public procurement law such as direct awards. As such, it was intended as an exceptional remedy. Annulment is an old remedy foreseen

[61] See the translation available at https://germanlawarchive.iuscomp.org/?p=289 (access: 11.12.2022).

[62] Case C-518/17, *Rudigier*, para. 57.

[63] *Ibidem*, para. 58.

[64] *Ibidem*, para. 59 ff.

in Directives 89/665/EEC and 92/13/EEC as a general remedy for all breaches *au par* with interim relief and damages. Having blundered its approach, the Court of Justice goes from bad to worse. The mirage *lacuna* has to be filled by the Member States complying with the principles of equivalence and effectiveness.[65]

Another relevant case is *eVigilo*.[66] It is focused on the question of who – the applicant or the contracting authority – shoulders the burden to prove that a decision was or not illegal. In November 2010 eVigilo brought an action against the award decision. In the following months, it added grounds of challenge. Finally, in April 2012, it invoked new facts connected with the bias of the experts who evaluated the tenders. It claimed that the specialists referred to as part of the project team in the tender submitted by the successful tenderers were colleagues, at the Technical University of Kaunas, of three of the six experts the contracting authority had commissioned to both draw up the tender documents and to evaluate the tenders. The Court of Justice squarely placed the burden to investigate the existence of such a conflict of interest on the contracting authority, thus much lessening the burden of proof of the applicant who is simply asked to present some "objective evidence calling into question calling into question the impartiality" of the experts relied upon by the contracting authority.[67] It is indeed for the contracting authorities "to treat economic operators equally and non-discriminatorily and to act in a transparent way".[68] Therefore it is up to those authorities "to determine whether any conflicts of interests exist and to take appropriate measures in order to prevent and detect conflicts of interests and remedy them. It would be incompatible with that active role for the applicant to bear the burden of proving, in the context of the appeal proceedings, that the experts appointed by the contracting authority were in fact biased. Such an outcome would also be contrary to the principle of effectiveness and the requirement of an effective remedy laid down in the third subparagraph of Article 1 (1) of Directive 89/665, in light, in particular, of the fact that a tenderer is not, in general, in a position to have access to information and evidence allowing him to prove such bias".[69]

This approach is very much in line with continental administrative law traditions giving considerable inquisitorial powers to the courts charged with reviewing the legality of administrative action. These powers are consistent with the place the courts – usually, administrative courts – occupy as a last instance venue for redress following an articulated administrative procedure and possibly adminis-

[65] *Ibidem*, para. 61. For further discussion, see R. Caranta, *The Interplay*...
[66] Judgment of the CJEU of 12 March 2015, Case C-538/13, *eVigilo*, ECLI:EU:C:2015:166.
[67] *Ibidem*, para. 44.
[68] *Ibidem*, para. 42.
[69] *Ibidem*, para. 43.

trative appeals throughout which an official file has been put together reflecting the knowledge and the appreciation of the relevant fact by the decision maker.[70]

Still even this case does not go anywhere near the issue of what is the standard of review that must be employed by national courts in assessing whether or not EU public procurement law has been infringed.

Coming somewhere near to the core of the question of the appropriate standard of review, the Court of Justice also had to consider how to balance the disclosure of documents necessary to challenge procurement decisions against commercial secrecy. While in *Varec*[71] the Court was at least aware of the need,[72] in *Secolux*[73] the General Court clearly sided with secrecy, making judicial protection near to impossible.[74] While the Remedies Directives were not applicable in the latter case mentioned, clearly the same directives do not provide any – or at least sufficient – guidance concerning this crucial aspect and the linked issues of the extension of the duty to give reasons.[75] The issue is resurfacing in *Lietuvos Aukščiausiasis Teismas (Lithuania)*.[76]

Concerning the duty to give reasons, *Cooperativa animazione Valdocco* is also worth mentioning.[77] The relevant domestic rules provided that both exclusions and admissions to the award procedure had to be challenged within 30 days from the publication in the contracting authority website of the information concerning which economic operators had been or not allowed in the procedure. The referring court asked whether such a rule was consistent with the effectiveness of judicial protection provided for in Articles 6 and 13 of the European Convention on Human Rights, Article 47 of the Charter, and the Remedies Directives. The Court of Justice, while ready to concede that the Remedies Directives allow the Member States to lay down time limits and that the 30 days deadline exceeds the minimum

[70] As F.M. Marx (*Comparative Administrative Law: The Continental Alternative*, "University of Pennsylvania Law Review" 1942, vol. 91(2), p. 127) indicated recalling his experience in representing his department in front of the administrative courts, those judges "knew their business".

[71] Judgment of the CJEU of 14 February 2008, Case C-450/06, *Varec SA v État belge*, ECLI:EU:C:2008:91.

[72] See critically R. Caranta, *Procurement Transparency as a Gateway for Procurement Remedies*, [in:] *Transparency in EU Procurement*, eds. K.-M. Halonen, R. Caranta, A. Sánchéz Graells, Cheltenham 2019.

[73] Judgment of the EGC of 21 September 2016, Case T-363/14, *Secolux v Commission*, ECLI:EU:T:2016:521.

[74] See R. Caranta, *Procurement Transparency…*

[75] On deducing a duty to give reasons from Article 2 (9) of Directive 89/665/EEC in conjunction with Article 55 of Directive 2014/24/EU, see A. Sanchez-Graells, *op. cit.*, p. 511 ff.

[76] Judgment of the CJEU of 7 September 2021, Case C-927/19, *Lietuvos Aukščiausiasis Teismas (Lithuania)*, ECLI:EU:C:2021:700, pending.

[77] Judgment of the CJEU of 14 February 2019, Case C-54/18, *Cooperativa Animazione Valdocco*, EU:C:2019:118.

time limits provided therein.[78] However, "the effectiveness of the judicial review guaranteed by Article 47 of the Charter requires that the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining notification of those reasons, so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court with jurisdiction, and in order to put the latter fully in a position in which it may carry out the review of the lawfulness of the national decision in question".[79]

Finally, a missed opportunity to set the appropriate standard for judicial review in procurement cases presented itself to the Court of Justice in *Connexxion Taxi Services*.[80] The case concerned the non-application of a tender exclusion clause applicable if the tenderer or any of its manager had been guilty of grave professional misconduct because the contracting authority found its application to the best tenderer to be disproportionate. The referring court wondered whether an exclusion clause in the notice might impede a successive proportionality assessment and if not whether EU law was complied with when the national courts "merely carry out a ('marginal') review as to whether the contracting authority could reasonably have come to the decision not to exclude a tenderer notwithstanding the fact that that tenderer has been guilty of grave professional misconduct". Clearly, the question went to the core of the issue of the appropriate standard for judicial review. However, the Court of Justice did not go into that question. It held that proportionality should be applied in finding whether any professional misconduct was grave or not,[81] but because of the principle of equal treatment, in the presence of a clear and unambiguous exclusion clause, once misconduct is established exclusion must follow.[82]

Arguably, since a proportionality assessment was anyway foreseen, the Court of Justice could have reframed the question and answered it. Maybe it did not because under the applicable domestic law, the finding of grave professional misconduct is not made incidentally by the contracting authority, but *in abstracto* by the competition authority. If so, however, the room for a successive proportionality assessment *in concreto*, with reference to the specific procurement situation, should have been

[78] *Ibidem*, paras 29 and 24 ff., and 32 respectively.

[79] *Ibidem*, para. 63; judgment of the CJEU of 15 October 1987, Case 222/86, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others*, ECLI:EU:C:1987:442, para. 15; judgment of the CJEU of 4 June 2013, Case C-300/11, *ZZ*, EU:C:2013:363, para. 53, are referred to.

[80] Judgment of the CJEU of 14 December 2016, Case C-171/15, *Connexxion Taxi Services*, ECLI.EU:C:2016:948.

[81] *Ibidem*, para. 31 ff.

[82] *Ibidem*, para. 39 ff.

there. What we have is the opinion of Advocate General Campos Sánchez Bordona, who thought that proportionality should have been applied in deciding whether the exclusion clause had to be triggered on not in the specific procurement and indeed shed some light on the appropriate standard of review.[83]

Looking back to the cases analysed in this sub-section one is pervaded by a sense of despair. Few cases, many wrongly decided. The only clear indication, given by the Court of Justice almost 20 years ago, being that marginal review, limited to a "mere examination" of whether the challenged decision was arbitrary is inconsistent with EU law.

DEMAGES

A more or less restrained approach to the legality review directly impacts damages. Illegality – "breach" – being one of the preconditions for liability, a hands off review will directly translate in unsuccessful damages claims.

The scant provisions in the Remedies Directives further affect the availability – or the lack thereof – of remedies in damages. More specifically, those directives are silent on whether in public procurement cases the "breach" must be qualified or not – "grave" or "manifest and serious" as indicated in the well-known *Brasserie du Pêcheur* case. The two judgments of the EFTA Court in *Fosen-Linjen*[84] have laid bare the uncertainties surrounding the law of procurement damages in the EU.

The case law was muddled even before *Fosen-Linjen*. The first case originated from an infringement procedure brought against Portugal.[85] The national legislation made damages conditional upon proof of the fault of the public authority, contracting authorities included. The judgment, which is not available in English, is most terse. Without referring to the case law on manifest and serious breach, it simply declared that conditioning the liability on the proof of fault did not amount to "adequate" judicial protection.[86]

In 2010 two cases were decided based on conflicting approaches at an interval of just a few months. In *Strabag*,[87] while conceding that the implementation of Article 2 (1) (c) of Directive 89/665/EEC comes in principle under the procedural

[83] C-171/15, *Connexxion Taxi Services*.

[84] Judgment of the EFTA Court of 31 October 2017, Case E-16/16, *Fosen-Linjen AS v AtB AS ('Fosen-Linjen I')*; judgment of the EFTA Court of 1 August 2019, Case E-7/18, *Fosen-Linjen AS, supported by Næringslivets Hovedorganisasjon (NHO) v AtB AS ('Fosen-Linjen II')*.

[85] Judgment of the CJEU of 14 October 2004, Case C-275/03, *Commission v Portugal*, not published in the ECR. See also judgment of the CJEU of 10 January 2008, Case C-70/06, *Commission v Portugal*, ECR I-1, ECLI:EU:C:2008:3.

[86] Case C-275/03, *Commission v Portugal*.

[87] Case C-314/09, *Strabag*.

autonomy of the Member States, the Court of Justice noted that Directive 89/665/EEC allows for circumstances in which the contract is concluded and possibly implemented before the legality or otherwise of the award procedure has been definitively assessed, so that annulment is no more possible or does not satisfy the claimant.[88] In these circumstances, damages can constitute "a procedural alternative which is compatible with the principle of effectiveness underlying the objective pursued by that directive of ensuring effective review procedures (…) only where the possibility of damages being awarded in the event of infringement of the public procurement rules is no more dependent than the other legal remedies provided for in Article 2 (1) of Directive 89/665 on a finding that the contracting authority is at fault".[89] Against this background, it makes little difference that, by contrast with the Portuguese case, the Austrian legislation required the contracting authority to rebut the presumption that it was at fault, while also limiting the grounds on which it could rely for that purpose.[90] Still the tenderer harmed by an unlawful decision of a contracting authority may be deprived of the right to damages. This might indeed have been the case for Strabag, given that the mistake of the municipality had originally been upheld in the courts.[91] In the best case scenario, the tenderer will have to wait the extra time needed by the courts to investigate whether the alleged infringement is culpable.[92]

Spijker was the second 2010 case in which the Court of Justice had to rule about damages in public procurement. The Court of Justice held that Article 2 (1) (c) gives "concrete expression to the principle of State liability for loss and damage caused to individuals as a result of breaches of EU law for which the State can be held responsible". According to case law developed since the adoption of Directive 89/665, but which is now consistent, that principle is inherent in the legal order of the Union. In those cases, the Court held that "individuals harmed have a right to reparation where three conditions are met: the rule of EU law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between the breach and the loss or damage sustained by the individuals".[93] Therefore, "the individuals harmed have a right to redress where the rule of EU law 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. In the absence of any provisions of EU law in that area, it is for

[88] *Ibidem*, para. 37 ff.
[89] *Ibidem*, para. 39.
[90] *Ibidem*, para. 40.
[91] *Ibidem*, para. 41.
[92] *Ibidem*, para. 42.
[93] *Ibidem*, para. 87. *Francovich* and *Brasserie du Pêcheur* are duly referred to along judgment of the CJEU of 24 March 2009, Case C-445/06, *Danske Slagterier*, ECR I-2119, paras 19 and 20.

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 with".[94]

Basically, while acknowledging that the Remedies Directives provide very limited indications as to the requirements for successful damages actions, the Court of Justice was unable to agree with herself on which conditions might be then deduced from the general principles of EU law. While some distinction might be found among these cases, it is to say the least singular that the Court failed in pointed out what the proper distinction should be.[95]

The two EFTA Court judgments in *Fosen-Linjen* failed to clarify the situation. The company charged with awarding ferry transports in a county in Norway had launched a tender procedure including an "environmental" award criterion based on the estimated fuel consumption without asking tenderers to explain – and even less demonstrate – how consumption had been calculated. When the issue of conformity with EU law was raised, the company introduced a penalty clause in case the chosen contractor was to deviate of more than 10% from the estimate. Following a decision by the competent court, the entire procedure was cancelled, a contract was directly awarded covering two years, and a new procedure was initiated. Fosen-Linjen, a small company which had challenged the award criterion, sought damages. The case was sent to the EFTA Court by the Frostating Court of Appeal raising the question whether a manifest and serious breach was required to ground the liability of a contracting authority. The Court held that Directive 89/665/EEC must "be interpreted in the light of fundamental rights, in particular the right to right to an effective legal remedy".[96] Referring to (old) Article 2 (6), the Court stressed that damages are a procedural alternative to other remedies, and therefore should not be subject to additional conditions.[97] *Strabag* was referred to and, together with the Portuguese cases, was the basis to hold that manifest and serious breach-like fault would anyway limit the liability.[98]

The Supreme Court of Norway was unsure whether the first EFTA Court judgment had also covered the criteria for liability for the "positive contract interest" and seized again the EFTA Court. In particular, the referring court considered that ambiguity remained in relation to the EFTA Court's understanding of the level of harmonisation under Article 2 (1) of the Remedies Directive, the principle of effec-

[94] *Ibidem*, para. 92 and also the operative part of the judgment.
[95] See R. Caranta, *The Interplay*...
[96] Case E-16/16, *Fosen-Linjen*, para. 72.
[97] *Ibidem*, para. 75.
[98] *Ibidem*, para. 77.

tiveness and the relevance of the liability standard for damages of the EU institutions in their public procurement activities for the standard of liability of contracting authorities of an EEA State. Focusing on loss of profit, this time the EFTA Court recalled that Article 2 of Directive 89/665/EEC must be considered "an instrument of minimum harmonization".[99] The discretion left to the Member States, however, finds a limit in the principles of equivalence and effectiveness.[100] On this basis, and reasoning on the lines of *Brasserie du Pêcheur*, the EFTA Court finally held that "a sufficiently serious breach as a minimum standard is considered sufficient for the purposes of safeguarding the rights of individuals",[101] so that "that Article 2 (1) (c) of the Remedies Directive does not require that any breach of the rules governing public procurement in itself is sufficient to award damages for the loss of profit to persons harmed by an infringement of EEA public procurement rules".[102]

Again, the two EFTA Court judgments might be distinguished but, while it would probably rather be a distinction without a difference, once again we are faced with a much less that straightforward case law failing to put some flesh on the bony provisions of the early Remedies Directives.

STRENGTHENING THE OLD REMEDIES (CONCLUSIONS)

The Remedies Directives must be interpreted in the light of the general principle of effective judicial protection as enshrined in Article 19 of the Treaty on European Union and Article 47 of the Charter.[103] These provisions could be read as adding an additional layer of robustness a case law which seems at loss with the scant provision in the old Procurement Remedies Directives when not, as is the case concerning damages, wildly oscillating between those provisions and the glorious case law on effective judicial remedies.

In *Connexxion Taxi Services*, Advocate General Campos Sánchez Bordona rightly argued that "in matters of public procurement, the same trend which is observable in other areas of European public law is clearly discernible: although the Court was initially content to refer to the procedural autonomy of the Member States and to use, as a corrective, the principles of equivalence and effectiveness as minimum requirements of the national systems of judicial review in disputes involving EU law, gradually, requirements specific to "judicial protection" or su-

[99] Judgment of the EFTA Court of 19 November 2018, Case E-7/18, *Fosen-Linjen AS v AtB AS* [2019], para. 109.

[100] *Ibidem*, para. 114.

[101] *Ibidem*, para. 120.

[102] *Ibidem*, para. 121.

[103] Judgment of the CJEU of 6 October 2015, Case C-61/14, *Orizzonte Salute*, EU:C:2015:655, para. 49.

pervision have gained ground, so as to increase, at the same time, the intensity of that review".[104] The Court of Justice seems however to have become more timid in the past few years having recourse to the principle of procedural autonomy more and more often.[105]

This leaves much uncertainty on the standard of review required – or appropriate – under the Remedies Directives. In 2017 the Commission published a report on the effectiveness of the Remedies Directives.[106] It concluded that the Remedies Directives do not deserve far reaching reforms. In its recent Communication on long-term action plan for better implementation and enforcement of single market rules, the same Commission indicated the intention to propose a Recommendation on review systems.[107] The Commission could hardly be accused of excessive ambitions. Still, it is a fact that, even after Brexit, the domestic review systems of the Member States diverge quite dramatically concerning the proper standard of review. The same is true of the requirements for liability.[108]

However, the most relevant cases of illegality in public procurement are not infinite, and a number of recurrent situation could be easily identified. Such situations would lend themselves to be analysed and compared following the CoCEAL methodology, looking for differences but also to opportunities to bridge them.[109] Arguably the Network of First Instance Review Bodies might very well be involved, potentially leading to some measure of bottom up convergence.[110]

Still, more pointed preliminary references from national courts clearly articulating the issues around legality review are badly needed to force the Court of Justice to address squarely the issues that have been described in the paragraph above. The national courts have a fundamental role to play here!

[104] C-171/15, *Connexxion Taxi Services*, para. 65.

[105] For a discussion, see R. Caranta, *The Interplay*...

[106] See Report from the Commission to the European Parliament and the Council on the effectiveness of Directive 89/665/EEC and Directive 92/13/EEC, as modified by directive 2007/66/EC, concerning review procedures in the area of public procurement, COM(2017) 28 final.

[107] See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Long term action plan for better implementation and enforcement of single market rules", COM(2020) 94 final, p. 5.

[108] See the contributions collected in *Tort Liability of Public Authorities in European Laws*, eds. G. della Cananea, R. Caranta, Oxford 2020.

[109] G. della Cananea, M. Bussani, *The 'Common Core' of Administrative Laws in Europe: A Framework for Analysis*, "Maastricht Journal of European and Comparative Law" 2019, vol. 26(2), p. 217.

[110] See R. Caranta, *Learning from Our Neighbours: Public Law Homogenization from Bottom Up*, "Maastricht Journal of European and Comparative Law" 1997, vol. 4(3), p. 220.

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ABSTRAKT

Zamówienia publiczne stanowią przedmiot regulacji prawa wtórnego (ówczesnej) Europejskiej Wspólnoty Gospodarczej (EWG) od 1971 r. Przepisy unijnego prawa materialnego mają wdrażać zakaz dyskryminacji na rynku wewnętrznym. W tym celu zawierają konkurencyjne i przejrzyste procedury udzielania zamówień, jakich zamawiający muszą przestrzegać przy wybieraniu partnerów. Środki ochrony prawnej przeciw naruszeniom przepisów prawa materialnego były przedmiotem wczesnej kodyfikacji prawa (ówczesnej) EWG. Motywy dyrektywy 89/665/EWG wyraźnie przedstawiają kwestię, którą sama dyrektywa ma rozwiązywać: istniejące rozwiązania w zakresie stosowania tych środków – zarówno na poziomie krajowym, jak i na poziomie wspólnotowym – nie zawsze należycie zapewniały przestrzeganie istniejących przepisów wspólnotowych na etapie, na którym naruszenia można było skorygować. Wiele środków prawnych było jednak jedynie wymienionych, bez wskazania wymagań, jakie miałyby obowiązywać na poziomie krajowym. Ponadto wydaje się, że w kilku ostatnich latach Trybunał Sprawiedliwości stał się bardziej wstrzemięźliwy w uszczegóławianiu dyrektyw o środkach ochrony prawnej, coraz częściej odwołuje się do zasady autonomii proceduralnej. Pozostawia to wiele niepewności w zakresie standardu kontroli wymaganego lub właściwego w świetle dyrektyw o środkach ochrony prawnej.

Słowa kluczowe: zamówienia publiczne; środki ochrony prawnej; zakaz dyskryminacji; rynek wewnętrzny; standard kontroli