



REMEDIES IN EU PUBLIC PROCUREMENT LAW



Roberto Caranta

Content

- Remedies between Treaties and secondary law
- Overview of the case-law:
 1. Standing and justiciability
 2. Deadlines
 3. Proc requirements
 4. Remedies
- What next?
- Conclusions



REMEDIES BETWEEN TREATIES AND SECONDARY LAW



TREATY PROVISIONS

- MS duty to foresee effective judicial protection (Article 19(1) TEU)
- Right to an effective remedy and to fair trial in Article 47 of the Charter
- ALSO case law general principles of equivalence and effective judicial protection



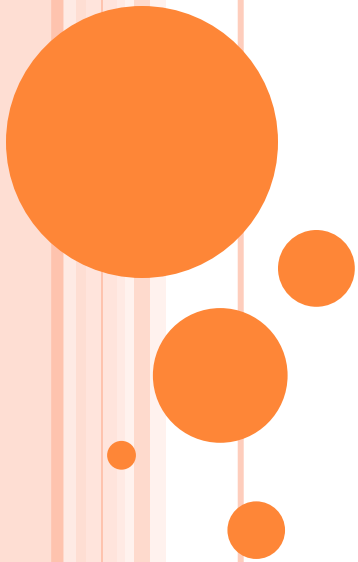
THREE DIRECTIVE

- 89/665/EEC - concerns remedies in the field of works, supplies and services procurement
- 92/12/EEC - concerns remedies in the utilities sector
- 2007/66/CE- amending Directive
- Some tinkering in the 2014 reform package, No further reform envisaged at this stage:
COM/2017/028 final



Directive 89/665/EEC

- Whereas it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement; (Rec.)



MAIN REMEDIES IN THE OLD DIRECTIVES

- Interim relief
- Annulment of award decision
- Damages
- **NB: V BASIC RULES**

(grounds/requirements not specified; much room for procedural autonomy & its limit)



ADDITIONAL REMEDIES IN THE NEW DIRECTIVE AMENDING THE OLD ONES

- Standstill
- Automatic suspension
- (In)Effectiveness

NB: v detailed rules



Overview on the case law



GENERALLY GENEROUS ON STANDING

- C-249/01 *Hackermüller*; C-100/12 *Fastweb I*;
- BUT preclusion from *res judicata* C-355/15 *Technische Gebäudebetreuung*
- If no *no res judicata* back to wide standing C-131/16 *Archus and Gama*
- NB polycentric nature of PP litigations in most MS

BUT BETTER IF BID SUBMITTED

- C-230/02 *Grossmann Air Service*
- C-328/17 *Amt Azienda Trasporti e Mobilità* (CJEU goes v much into the merits of the case)

PARTICIPANTS TO CONSORTIA?

- Annulment actions: NO C-129/04 *Espace Trianon and Sofibail*

Damages: YES Joined Cases C-145/08 and C-149/08, *Club Hotel Loutraki*

WIDE JUSTICIABILITY

- C-81/98 *Alcatel Austria*; C-26/03 *Stadt Halle and RPL Lochau*
- C-391/15 *Marina del Mediterráneo* (allowing immediate challenge to decision not to exclude)
- C-260/17 *Anodiki Services EPE* (decision to have recourse to employment contract is challengeable)

SOME (OLDER) JUDGEMENTS TOUGH ON PROCEDURAL REQUIREMENTS

- C-470/99 *Universale-Bau*: adm appeals cannot be condition precedent
- C-327/00 *Santex*: legitimate expectations override rigid deadlines
- C-406/08 *Uniplex (UK)*: deadlines must be certain, NO to discretion of MS courts

○ BUT MORE RECENTLY

GENERALLY UPHOLDING DEADLINES

- C-54/18 *Cooperativa Animazione Valdocco*: burden to immediately challenge a competitor' participation
OK provided economic operator has all the necessary info as to illegality

C-300/17 *Hochtief*: impossibility to add grounds in subsequent phases OK

HOWEVER, 6 months deadline to bring ineffectiveness claims can not preclude damages actions: C-166/14, *MedEval*

JOINED CASES C-496/18 AND C-497/18 HUNGEOD KÖZLEKEDÉSFEJLESZTÉSI, FÖLDMÉRÉSI ETC

- EU Directives neither require MS to establish nor prevent them from establishing *ex officio* reviews by public authorities of alleged infringements of PP rules

Legal certainty precludes the application of *ex officio* review of infringements **when deadlines had already expired** before the entry into force of those new provisions

HIGH COURT FEES IN ITALY

- Article 1 Dir 89/665/EEC and the principles of equivalence and effectiveness must be interpreted as not precluding national legislation requiring the payment of court fees.

C-61/14 *Orizzonte Salute*; C-495/14 - *Tita*

GUARANTEE TO BRING ACTION IN ROMANIA

(JOINED CASES C-439/14 AND C-488/14, *SC STAR STORAGE SA*)

- Article 1(1) to (3) Dir 89/665, read in the light of Article 47 Charter, do not preclude national legislation making the admissibility of any action subject to the obligation for the applicant to constitute a good conduct guarantee that it provides to the CA, if that guarantee must be refunded to the applicant whatever the outcome of the action.

Some effort to strengthen remedies

- C-19/13 *Fastweb*: VEATs not to be abused;
- C-538/13 *eVigilo*: burden to investigate conflict of interest on CA, applicant is simply asked to present some objective evidence calling into question the impartiality of the experts relied upon by the contracting authority
- **HOWEVER**

Hands off on relevance of procedural mistakes

- C-518/17 *Rudigier*: CJEU mixes up ineffectiveness (closed list of situations) w annulment
- Only where the lack of prior information caused it a significant disadvantage compared to the incumbent, a breach of the principle of effectiveness can be established, entailing the annulment of the call for tenders.

JR & TRANSPARENCY

AG CAMPOS SÁNCHEZ-BORDONA

- Articles 21, 50 and 55 of Directive 2014/24/EU do not necessarily require the CA to provide to a participant in a procurement procedure who is challenging before that authority the latter's evaluation of tenders *all* of the information contained in the tender submitted by the selected tenderer.
- When adjudicating on an application for review of the decision evaluating tenders, the CA must substantiate its response by expressing the reasons for its decision, so that this may be effectively challenged before a review body.
- The duty to state reasons does **not** entail a requirement to disclose confidential information, in the case where it considers such disclosure to be **inappropriate**.

Case C-927/19 UAB Klaipėdos regiono atliekų tvarkymo centras

JR & TRANSPARENCY 2

Articles 1 and 2 of Directive 89/665 are to be interpreted as meaning that the body competent to review the decisions of the CA:

- Must be empowered to annul the decisions that the CA has adopted in respect of the disclosure of the confidential information, and, where appropriate, to order that that information be provided to the applicant for review.
- May, **if national law authorises it**, evaluate of its own motion the lawfulness of the acts adopted by the CA, having regard to the confidential information made available to it.

What is in store for the future?



ENHANCED DISCRETION (AND COMPLICATION)

- Choice among available award procedures
- MEAT
- Incl. sustainability

MSB or no MSB?



Pre-contractual liability?

- DCFR Article II. – 3:301 *Negotiations contrary to good faith and fair dealing* § (2): “A person who is engaged in negotiations has a duty to negotiate in accordance with good faith and fair dealing and not to break off negotiations contrary to good faith and fair dealing”.
- Article 55(1) Directive 2014/24/EU, information to candidates and tenderers: *the grounds for any decision not to conclude a framework agreement / award a contract / recommence the procedure*

CONCLUSIONS



Convergence has much slowed after BIG BANG

- Effective judicial protection does not normally push law beyond (limited) secondary law rules
- Prel ref limited and NOT going to the core issues of JR and otherwise caught in path dependancy and growing self-restraint

Commission rules out new legislation
and infringement procedures are stalled

The image features a background of silhouettes of people protesting against a blue and white geometric background. One person on the left holds a sign high, while another on the right uses a megaphone. The sun is visible behind the person with the megaphone, creating a bright glow. The overall scene is one of active civic participation.

WHAT
WOULD
YOU DO
FOR EUROPE?

EUROPE
NEEDS YOU



Yes Europe Lab

THANKS!

Gracids
MERC
ARIGATO
thank you

Gracids
MERC
ARIGATO
thank you

