PART 3

JUSTICIABILITY IN PUBLIC PROCUREMENT

11. Judicial activism and public procurement

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1. INTRODUCTION

Judicial activism represents the most influential factor in the evolution of the public procurement *acquis,* which has been experiencing conceptual and regulatory vagueness, limited interoperability with legal systems of Member States and continuous market-driven modality changes in financing and delivering public services.[1] The jurisprudence of the Court of Justice of the European Union (CJEU) has been instrumental in developing and honing the concepts of the public procurement *acquis* and in providing for clarity and certainty to its decentralised application and enforcement. The current reform agenda of public procurement is guided by doctrines developed by the Court which attempt to fuse the underlying principles of public procurement regulation with the fundamental principles enshrined in the EU Treaties by supplementing the deficiencies of the public procurement Directives with primary EU law. Public procurement is viewed by both EU Institutions and Member States as an instrument for growth and competitiveness in the light of the European 2020 Strategy.

Public procurement law has been moulded by the instrumental role of the CJEU,[2] which has provided intellectual support to the efforts of the European institutions to strengthen the fundamental principles which underpin public procurement regulation.[3] The impact of the Court's jurisprudence has been in developing the public procurement *acquis* by submitting the conceptual themes of public procurement Directives to the doctrines which the Court established and had recourse to in its attempt to develop public procurement law as the conduit for the delivery of public services in EU Member States. Judicial activism in public procurement to expose *exhaustive harmonisation* as the main shortcoming of public procurement law and the cause of significant porosity in the procurement Directives, has resulted in a legal *lacuna* and a recurrent danger of limiting the effectiveness of the public procurement *acquis*. The way the porosity of the public procurement Directives has been treated by the Court is focused on the application of the transparency principle and its surrogate principle of equality in an attempt to fortify the public procurement Directives by supplementing their thrust with legal principles enshrined in primary European law.

[1] See C. Bovis, 'Public Procurement in the EU: Jurisprudence and Conceptual Directions' (2012) 49 CMLRev 1–44.

[2] See C. Bovis, 'Recent Case Law Relating to Public Procurement: A Beacon for the Integration of Public Markets' (2002) 39 CMLRev 1025–56.

[3] See C. Bovis, 'The Effects of the Principles of Transparency and Accountability on Public Procurement Regulation' Chapter 11 in H. Hoffman and A. Turk (eds), *Legal Challenges in EU Administrative Law*,(Cheltenham, UK and Northampton, MA, USA: Edward Elgar, 2009) pp. 288–321.

1.1 Judicial Activism and the Side Effects of Public Procurement Regulation

A first sight of the Court's judicial activism has been the *de lege ferenda* interpretation of public procurement Directives in order to provide a platform upon which Member States can effectively implement the *acquis* into domestic legal systems. The Court recognised the deficiencies and conceptual limitations of the public procurement Directives and its jurisprudence has pointed towards the strategic goal of arming the regime with direct effect, in order to enhance access to justice at national level, to improve compliance and to streamline public procurement regulation by introducing an element of uniformity in its application.

The most pronounced deficiency of the public procurement Directives is their porosity which is caused by exhaustive harmonisation. The porosity of the public procurement Directives undermines their effectiveness by preventing their applicability to certain contractual situations and as a result restricting a *de lege ferenda* extension of their provisions.

Exhaustive harmonisation excludes *de lege lata* from the scope of the public procurement Directives public contracts below certain thresholds and certain contractual relationships which reflect inter-administrative interfaces in the public sector or contractual relations based on dominant influence between utilities and affiliated undertakings and in particular, service concessions, public contracts based on exclusive rights, public contracts in pursuit of services of general economic interest, in-house contracts, and non-priority services contracts. Exhaustive harmonisation reflects the mutual exclusivity of the public sector Directive and the Utilities Directive[4] as well as their non applicability in cases of public contracts awarded pursuant to international rules,[5] or secret contracts and contracts requiring special security measures or contracts related with the protection of Member States' essential interests.[6] In addition, the public sector Directive also does not cover public contracts whose object is to provide or exploit public telecommunications networks;[7] contracts for the acquisition or rental or land; contracts related to broadcasting services; contracts related to financial securities, capital raising activities and central bank services; employment contracts; and research and development contracts which do not benefit the relevant contacting authority.[8] The Utilities Directive does not apply to contracts awarded in a third country;[9] contracts awarded by contracting entities engaged in the provision or operation of fixed networks for the purchase of water and for the supply of energy or of fuels for the production of energy;[10] contracts subject to special arrangements for the exploitation and exploration of oil, gas, coal or other solid fuels;[11] contracts and framework agreements awarded by central purchasing bodies;[12] contracts of whose object activity is directly exposed to

4 See the Utilities Directive 2004/17, [2004] OJ L134/1.
5 See Article 15 of the Public Sector Directive and Article 22(a) of the Utilities Directive.
6 See Article 14 of the Public Sector Directive and Article 21 of the Utilities Directive.
7 See Article 13 of the Public Sector Directive.
8 See Article 16 of the Public Sector Directive.
9 See Article 20(1) of the Utilities Directive.
10 See Article 26(a) of the Utilities Directive.
11 See Article 27 of the Utilities Directive.
12 See Article 29(2) of the Utilities Directive.

competition on markets to which access is not restricted[13] and contracts related to works and service concessions.[14]

Exhaustive harmonisation in *lex specialis* legal instruments such as the public procurement Directives cannot impose limits on the application of primary EU law to supplement their legal thrust. The Court has recognised the *lacuna* in the limited effectiveness of the procurement Directives and particularly in areas which cannot *de lege ferenda* be conducive to regulatory control and the need for conformity with EU law. Although the application of primary European law is not precluded in the presence of exhaustive provisions of secondary law,[15] the Court explicitly recognised that the *lex specialis* character of the procurement Directives aims at complementing fundamental freedoms of EU law.[16] The Court responded to and treated the porosity of the procurement Directives by signalling the necessity of supplementing their remit with *acquis* deriving from fundamental principles of EU law. Thus, the supplementary applicability of primary EU law intends to close the gap that exists in contracts falling outside the procurement Directives, such as service concessions and sub-dimensional contracts[17] and in contracts which fall within the remit of the Directives, but escape from the full thrust of the principles enshrined therein, such as non-priority services contracts.[18] The Court, also, manifested the need to increase compliance of contracting

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[13] See Article 30(1) of the Utilities Directive.

[14] See Article 30(6) third indent of the Utilities Directive.

[15] See Cases C-37/92, *Vanacker and Lesage* [1993] ECR I-4947, para 9; C-324/99, *DaimlerChrysler* [2001] ECR I-9897, para 32; and C-322/01, *Deutscher Apothekerverband* [2003] ECR I-14887, para 64.

[16] See P Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34 ELRev 349.

[17] See Cases C-231/03, *Coname* [2005] ECR I-7287, para 16, and C-264/03, *Commission v France* [2005] ECR I-8831, para 32.

[18] See Cases 45/87, *Commission v Ireland* [1988] ECR I-4929, para 27, where the Court held that the inclusion in the contract specification of a clause stipulating exclusively the use of national specifications infringe Article 30 EC; C-243/89, *Commission v Denmark* (*Storebælt)* [1993] ECR I-3353, where the Court found that contract clauses concerning preference to national specifications and nominated sub-contractors infringe Articles 30, 48 and 59 EC; C-158/03 *Commission v Spain* and C-234/03, *Contse and Others* [2005] ECR I-9315, where the content of tendering specifications, and in particular sub-criteria for the award of contracts ran contrary to Article 49 EC; C-92/00, *HI* [2002] ECR I-5553, para 42, where the Court ruled that contracting authorities' decisions are subject to fundamental rules of Community law, and in particular to the principles on the right of establishment and the freedom to provide services; C-244/02, *Kauppatalo Hansel Oy* [2003] ECR I-12139, paras 31 and 33, where the Court confirmed the principle under which primary law is to be taken into account in a supplemental capacity for evaluating the effectiveness of the public procurement Directives; C-57/01, *Makedoniko Metro and Mihaniki* [2003] ECR I-1091, para 69, where the Court held that even if the Community directives on public procurement *do not contain specifically applicable provisions*, the general principles of Community law … govern procedures for the award of public contracts; C-275/98, *Unitron Scandinavia* [1999] ECR I-8291, para 30 *et seq*, where the Court held that Community law principles such as the principles of transparency and the prohibition of discrimination on grounds of nationality must embrace the remit of the public procurement Directives.

authorities by promoting the objectivity of the procurement Directives and enhancing their justiciability, whilst in parallel limiting their inherent flexibility.

The Court treated further the porosity of the public procurement Directives by relying on the principle of transparency for their interpretation and application. The principle of transparency is surrogate to the principle of equal treatment and both principles encapsulate the fundamental EU law principles which underpin public procurement, such as the free movement of goods, the right of establishment and the freedom to provide services, as well as the principle of non-discrimination. The Court's case-law shows the conceptual link between transparency and the principle of equal treatment. Transparency intends to ensure the effectiveness of equal treatment in public procurement by guaranteeing the conditions for genuine competition. As the principle of equal treatment is a general principle of EU law, Member States are required to comply with the duty of transparency, which constitutes a concrete and specific expression of that principle. The Court has viewed that the duty of transparency represents a concrete and specific expression of the principle of equal treatment,[19] which assumes that similar situations should not be treated differently unless differentiation is objectively justified.[20]

The Court had the opportunity to define the scope of the principle of equal treatment in the context of public procurement in *Commission v Denmark*[21] and *Commission v Belgium*.[22] The Court held that compliance with the principle of equal treatment requires an absence of discrimination on grounds of nationality and a duty of transparency which enables contracting authorities to ensure that that principle is complied with. The Court then defined the scope of the duty of transparency in *Telaustria*[23] and *Parking Brixen*.[24] Accordingly, the duty of transparency is intended to preclude any risk of favouritism or arbitrariness on the part of contracting authorities by ensuring a sufficient degree of advertising, which would result in opening up the market to competition and by guaranteeing effective review mechanisms of the impartiality of the procurement procedures. The duty of transparency also implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents in order to enable all reasonably informed tenderers their significance and to allow unequivocally their interpretation. The duty of transparency must also enable contracting authorities to ascertain whether the tenders submitted satisfy the award criteria applied to the relevant contract.[25]

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[19] See Joined Cases C-117/76 and C-16/77, *Ruckdeschel and Others* [1977] ECR 1753, para 7.

[20] See Joined Cases 201/85 and 202/85, *Klensch and Others* [1986] ECR 3477, para 9, and Case C-442/00, *Rodríguez Caballero* [2002] ECR I-11915, para 32.

[21] See Case C-243/89, *Commission v Denmark* [1993] ECR I-3353, paras 37–39.

[22] See Case C-87/94, *Commission v Belgium* [1996] ECR I-2043, in particular paras 51–56. See also Case C-496/99 P, *Commission v CAS Succhi di Frutta* [2004] ECR I-3801, para 108.

[23] See Case C-324/98, *Telaustria and Telefonadress,* [2000] ECR I-10745.

[24] See Case C-458/03, *Parking Brixen* [2005] ECR I-8612.

[25] See European Commission Interpretative Communication on the Community Law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, [2006] OJ C179/02. The Commission drew up best practice by recommending means

1.2 Doctrinal Judicial Activism through a Rule of Reason

A second glimpse of the Court's judicial activism reveals an approach based on a *rule of reason.* Such approach is reflected in the establishment of a number of doctrines which have guided the application of the public procurement rules by defining essential legal concepts such as public contracts,[26] contracting authorities,[27] the remit of selection and qualification criteria,[28] and the parameters for contracting authorities to use environmental and social considerations[29] as award criteria and which have

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of adequate and commonly used publication of notices in the Member States such as the internet, the contracting authority's website, or specific portal websites, national official journals and other means of publication including a voluntary submission to the OJEU/Tenders Electronic Daily for larger value contracts.

[26] See Cases C-399/98, *Ordine degli Architetti and Others* [2001] ECR I-5409; C-324/98, *Telaustria and Telefonadress* [2000] ECR I-10745; C-59/00, *Vestergaard* [2001] ECR I-9505; C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1; C-264/03, *Commission v France* [2005] E.C.R. I-8831; C-231/03, *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti* [2005] ECR I-7287; C-507/03, *Commission v Ireland*, (An Post) [2007] ECR I-9777; C-231/03, *Coname* [2005] ECR I-7287; C-458/03, *Parking Brixen* [2005] ECR I-8585; C-264/03, *Commission v France* [2005] ECR I-8831; C-412/04, *Commission v Italy* [2008] ECR I-0000; C-295/05, *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado* [2007] ECR I-2999; C-220/05, *Jean Auroux and Others v Commune de Roanne* [2007] ECR I-385; C-382/05, *Commission v Italy* [2007] ECR I-6657; C-6/05, *Medipac-Kazantzidis AE v Venizelio-Pananio (PE.S.Y. KRITIS)* [2007] ECR I-4557; C-480/06, *Commission v Germany* [2009] ECR I-04747; C-148/06, *SECAP SpA* and *Santorso Soc. coop. arl* [2008] ECR I-3565; C-220/06, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado* [2007] ECR I-12175; C-324/07, *Coditel Brabant SA v Commune d'Uccle, Région de Bruxelles-Capitale*, [2009] 1 CMLR 29; C-437/07, *Commission v Italy* [2008] ECR I-0000; C-147/06, *Commission v Ireland* [2007] ECR I-0000; C-206/08, *WAZV Gotha v Eurawasser Aufbereitungs* [2009] ECR I-8377.

[27] See Cases C-31/87, *Beentjes* [1988] ECR 4635; C-343/95, *Diego Cali et Figli* [1997] ECR 1-1547; C-44/96, *Mannesmann Anlagenbau Austria* [1998] ECR I-73; C-360/96, *BFI Holding* [1998] ECR I-6821; C-360/96, *Gemeente Arnhem Gemeente Rheden v BFI Holding BV* [1998] ECR 6821; C-380/98, *University of Cambridge* [2000] ECR I-8035; C-107/98 *Teckal* [1999] ECR I-8121; C-470/99 *Universale-Bau and Others* [2002] ECR I-11617; C-237/99 *Commission v France* (OPAC) [2001] ECR I-939; C-223/99, *Agora Srl v Ente Autonomo Fiera Internazionale di Milano* and C-260/99 *Excelsior Snc di Pedrotti runa & C v Ente Autonomo Fiera Internazionale di Milano* [2001] ECR 3605; C-373/00, *Adolf Truley* [2003] ECR-193; C-26/03, *Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* [2005] ECR I-1; C-18/0,1 *Korhonen and Others* [2003] ECR I-5321.

[28] See Cases C-176/98, *Holst Italia* [1999] ECR I-8607; C-324/98, *Telaustria and Telefonadress,* [2000] ECR I-10745; C-399/98, *Ordine degli Architetti and Others* [2001] ECR I-5409; C-285/99 and C-286/99, *Lombardini and Mantovani* [2001] ECR I-9233; C-315/01, *(GAT) and Österreichische Autobahnen und Schnellstraßen AG (ÖSAG),* ECR [2003] I-6351; C-314/01, *Siemens and ARGE Telekom & Partner* [2004] ECR I-2549; C-57/01, *Makedoniko Metro and Mikhaniki* [2003] ECR I-1091; C-126/03, *Commission v Germany* [2004] ECR I-11197.

[29] See Cases C-31/87*, Gebroeders Beentjes B.V. v State of Netherlands* [1988] ECR 4635; C-225/98, *Commission v French Republic* (*Nord-Pas-de-Calais)* [2000] ECR 7445; C-513/99, *Concordia Bus Filandia Oy Ab v Helsingin Kaupunki et HKL-Bussiliikenne,* [2002] ECR 7213; C-448/01, *EVN AG, Wienstrom GmbH and Republik Österreich,* [2003] ECR I-14527.

influenced public procurement law making.[30] The Court's influence on the interpretation and application of the procurement *acquis* has positioned public procurement regulation as an instrument which creates compliance safeguards by authenticating established principles of European Union law[31] and which verifies compatibility links with European policies.[32]

The Court's jurisprudence reveals the following doctrines which have been utilised to construct the concepts of the public procurement Directives. First, the doctrine of *objectivity,* intends to provide a restrictive interpretation of rules governing selection procedures (quantitative and qualitative suitability criteria) and award procedures, in particular negotiated procedures as well as with the support of the test of *equivalence*, eliminate non-tariff barriers in the fields of technical standards, product specification and standardization. Secondly, the doctrine of *effectiveness* has been applied through the tests of *functionality* and *dependency* in order to define the notion of contracting authorities and also with a view to meeting the requirements of swift dispute resolution at national level and of enforceability of decisions of national courts or tribunals. Thirdly, the doctrine of *flexibility* which is defined through the tests of *dualism*, *commercialism* and *competitiveness* has been applied in order to determine the remit and thrust of public procurement rules, particularly in relation to the concept of contracting authorities and through the test of *compatibility* of socio-economic and environmental policies with the economic approach to public procurement regulation, to verify public procurement as a policy instrument of the European integration process. Fourthly, the doctrine of *procedural autonomy*, depicted through the wide discretion afforded to Member States to create the appropriate *fora* to receive complaints against decisions of contracting authorities and utilities, as well as actions for damages. Fifthly, the doctrine of *procedural equality*, expressed through the explicit obligation conferred to Member States to avoid introducing review procedures for public procurement disputes, as well as procedures for actions for damages which differ, in a discriminatory context, from other review procedures and procedures for actions for damages under national law.

2. THE CONCEPT OF REDRESS IN PUBLIC PROCUREMENT

The effectiveness of the substantive public procurement rules envisaged by the enactment of the Supplies, Works and Services Directives, as well as the Utilities

[30] See Directive 2004/18, [2004] OJ L134 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17, [2004] OJ L134 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. See C. Bovis, 'The New Public Procurement Regime of the European Union: A Critical Analysis of Policy, Law and Jurisprudence' (2005) 30 ELRev 607–30.

[31] See P. Craig, 'Specific Powers of Public Contractors' in R. Noguellou and U. Stelkens (eds), *Comparative Law on Public Contracts* (Brussels: Bruylant, 2010).

[32] See C. Bovis, 'Financing Services of General Interest, Public Procurement and State Aids: The Delineation between Market Forces and Protection' (2005) 11(1) ELJ 79–109.

Directives[33] would have been compromised without a legal framework which could provide a system of effective protection of interested parties in cases of infringements of their provisions.

Since the inspection of the first generation of public procurement Directives as legal instruments in need of incorporation within Member States,[34] the role of the CJEU has been instrumental. The main influence of the CJEU can be traced in important jurisprudence on the definition of contracting authorities,[35] the use of selection and qualification criteria,[36] and the possibility for contracting authorities to use environmental and social considerations[37] as criteria for the award of public contracts.

Under Article 267 TFEU which regulates the judicial co-operation between national judiciaries and the CJEU, in excess of 100 preliminary rulings during the last 30 years have shed light on the correct interpretation of the substantive public procurement Directives by pronouncing the direct effect of their provisions, declaring the incompatibility of national laws with the spirit and letter of the Directives and the underlying principles of EU law and finally offered to national judiciaries the necessary inferences

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[33] See Directive 2004/18, [2004] OJ L134 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17, [2004] OJ L134 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

[34] See the Public Supplies Directive 93/36/EC, [1993] OJ L199, as amended by Directive 97/52/EC, [1997] OJ L328 and Directive 2001/78/EC, [2001] OJ L285; The Public Works Directive 93/37/EC, [1993] OJ L199, amended by Directive 97/52/EC [1997] OJ L328 and Directive 2001/78/EC, [2001] OJ L285; The Utilities Directives 93/38/EC, [1993] OJ L199, amended by Directive 98/4/EC [1998] OJ L101; The Public Services Directive 92/50/EEC, [1992] OJ L209, amended by Directive 97/52/EC [1997] OJ L328 and Directive 2001/78/EC, [2001] OJ L285;

[35] See Cases C-237/99, *Commission v France* [2001] ECR I-939; C-470/99, *Universale-Bau and Others* [2002] ECR I-11617; C-373/00, *Adolf Truley* [2003] ECR-193; C-84/03, *Commission v Spain* [2005] ECR I-139; C-44/96, *Mannesmann Anlagenbau Austria* [1998] ECR I-73; C-31/87, *Beentjes* [1988] ECR 4635; C-360/96, *BFI Holding* [1998] ECR I-6821; C-223/99, *Agora Srl v Ente Autonomo Fiera Internazionale di Milano* and C-260/99, *Excelsior Snc di Pedrotti runa & C v Ente Autonomo Fiera Internazionale di Milano* [2001] ECR 3605; C-360/96, *Gemeente Arnhem Gemeente Rheden v BFI Holding BV* [1998] ECR 6821; C-343/95, *Diego Cali et Figli* [1997] ECR I-1547; C-380/98, *University of Cambridge* [2000] ECR I-8035; C-237/99 *Commission v France* [2001] ECR I-939; C-26/03, *Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* [2005] ECR I-1; C-107/98, *Teckal* [1999] ECR I-8121; C-18/01, *Korhonen and Others* [2003] ECR I-5321; C-237/99 *Commission v France* (OPAC) [2001] ECR I-939.

[36] See Cases C-315/01, *(GAT) and Österreichische Autobahnen und Schnellstraßen AG (ÖSAG)* [2003] ECR I-6351; C-21/03 and C-34/03, *Fabricom SA v État Belge* [2005] ECR I-1559; C-285/99 and C-286/99, *Lombardini and Mantovani* [2001] ECR I-9233; C-324/98, *Telaustria and Telefonadress* [2000] ECR I-10745; C-126/03, *Commission v Germany* [2004] ECR I-11197; C-176/98, *Holst Italia* [1999] ECR I-8607, para 29; C-399/98, *Ordine degli Architetti and Others* [2001] ECR I-5409, para 92; C-314/01, *Siemens and ARGE Telekom & Partner* [2004] ECR I-2549, para 44; C-57/01 *Makedoniko Metro and Mikhaniki* [2003] ECR I-1091.

[37] See Cases C-31/87, *Gebroeders Beentjes B.V. v State of Netherlands* [1988] ECR 4635; C-225/98, *Nord-Pas-de-Calais Commission v French Republic* [2000] ECR 7445; C-513/99, *Concordia Bus Filandia Oy Ab v Helsingin Kaupunki et HKL-Bussiliikenne* [2002] ECR 7213.

to comprehend the concepts and doctrines of public procurement regulation within the remit of EU law.

In addition to the reference procedures under Article 267 TFEU, the European Commission may bring actions against Member States before the CJEU by virtue of Article 258 TFEU. The action is a compliance procedure against Member States and their contracting authorities which breach the substantive public procurement Directives. It may initiate proceedings, on its own initiative[38] or in response to a complaint, against a defaulting Member State for failure to fulfil its obligations under the Treaty. Existence of specific legal interest is not required[39] as a condition of the admissibility of the action, since it is in the general interest of the Commission to observe, supervise and ensure the correct application of EU law. During the past 30 years, there have been in excess of 100 rulings from the CJEU. Although their high profile is evident, the rulings under the compliance procedure of Article 258 TFEU have limited effectiveness, as they have mainly declaratory character on the part of the defaulting Member State of the failure to comply with EU law.

The inadequacy of existing remedies at national level to ensure compliance and enforcement of the public procurement *acquis* was highlighted by their inability to correct infringements and ensure a correct application of the substantive public procurement rules. In order to facilitate a decentralised enforcement of the public procurement Directives, European institutions enacted the Remedies Directive on the harmonization of laws, regulations and administrative provisions relating to the application of review procedures in the award of public works and public supply contracts[40] which was extended to embrace the utilities procurement rules, by its sister Utilities Remedies Directive[41] on remedies and review procedures to the water, energy, transport and telecommunication sectors.

The scope and thrust of the Remedies Directives focused on the obligation of Member States to ensure effective and rapid review of decisions taken by contracting authorities which infringe public procurement provisions. Undertakings seeking relief from damages in the context of a procedure for the award of a contract should not be treated differently under national rules implementing EU public procurement legislation and under other national rules. This meant that the measures to be taken concerning the review procedures should be similar to national review proceedings, without any discriminatory character. Any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement of public procurement provision shall be entitled to seek review before national courts. This particular obligation is followed by a stand-still provision concerning the prior notification by the person seeking review to the contracting authority of the alleged infringement and of his intention to seek review. However, with respect to admissibility, there is no qualitative or quantitative definition

[38] Individuals cannot force the European Commission to bring a State before the Court under Article 169 EC procedure. See Case C-48/65, *Alfons Luttucke GmbH v Commission* [1966] ECR 19.

[39] See Case C-167/73, *Commission v France* [1974] ECR 359.

[40] See Directive 89/665, [1989] OJ L395.

[41] See Directive 92/13, [1992] OJ L76/7.

of the interest of a person in obtaining a public contract. As to the element of potential harm by an infringement of public procurement provisions, it should be cumulative with the first element, that of interest. The prior notification should intend to exhaust any possibility of amicable settlement before the parties have recourse to national courts. A novelty in the Remedies Directive of the Utilities sectors[42] was deemed to be the introduction of the *attestation procedure*. Member states were required to give the contracting entities the possibility of having their purchasing procedures and practices *attested* by persons authorised by law to exercise this function. Under the attestation mechanism, possible irregularities in the award of a public contract may be identified in advanced and provide for the opportunity to contracting authorities to correct them. The latter may include the attestation statement in the notice inviting tenders published in the Official Journal (OJ). The system appeared in principle flexible and cost-efficient and could potentially have prevented wasteful litigation. The attestation procedure under Directive 92/13/EC was deemed the essential requirement for the development of EU standards of attestation.[43]

The extra-territoriality of the legal regime regulating the public procurement of the Member States of the European Union has been achieved by virtue of the special inter-governmental agreements concluded between the EU and member/signatories to the GATT Agreement. It was initially the GATT Agreement on Government Procurement (AGP), which was concluded during the Tokyo Round of negotiations that provided third-country contractors access to EU public markets. The AGP was amended by virtue of the WTO Government Procurement Agreement (GPA) during the Uruguay Round. In principle, access to the public sector markets of the Member States has been guaranteed, as far as the framework of provisions in relation to procedural and substantive stages of public procurement is concerned. However, even the most comprehensive set of rules would be ineffective, if its enforcement appeared not sufficient. Access to justice for third-country providers under the GATT/WTO agreements is thus equally important with the principles of access to the public markets of the EU Member States.

Both the WTO Government Procurement Agreement and its predecessor (the GATT AGP) are considered inter-governmental instruments which are addressed to States and do not intend to confer rights and duties upon individuals as such. Irrespective of the clearness and precision, the unconditionality of their provision and the lack of discretion reserved to States for their implementation, international agreements are not deemed to produce direct effect,[44] thus depriving individuals from taking advantage of directly effective provisions in litigation before national courts. The Decision of the European Council which incorporates the WTO GPA into Community law specifically stipulates that the provisions of the GPA do not have direct effect. However, there is apparently a contradiction between the difficulties arising from applying the theory of direct effectiveness to the GPA provisions and the spirit and wording of the agreement. Express provision of remedies for aggrieved providers is made under Article XX of the

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[42] See Directive 92/13, [1992] OJ L76/7.

[43] See Article 7 of EC Directive 92/13.

[44] See Cases 21-24/72, *International Fruit Co NV v Produktschap voor Groenten en Fruit* [1972] ECR 1236. Also Case C-280/93, *Germany v Council* [1993] ECR I-3667.

GPA, where the remedies provided should be as favourable as those conferred upon Community contractors. Also, Article III of the GPA stipulates that signatories to the agreement should not be treated in a less favourable manner than national providers or providers from other parties. How in practice these provisions concerning access to justice at national level for third-party providers will operate remains to be seen.

As with its predecessor, the WTO Government Procurement Agreement has created an inter-governmental mechanism for settling disputes arising from its application. The mechanism is referred to as the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and is attached to Annex II of the Agreement. The mechanism provides for a dispute settlement procedure between parties to the Agreement, that is states and not individuals. The DSU apparently elevates the pre-contractual or the contractual dispute between a third-party provider and a contracting authority to a grievance of an inter-governmental dimension. To invoke the DSU, a state must first exhaust all possible ways of settling the dispute in an amicable manner by means of direct consultation and negotiations with the State allegedly in breach. If settlement cannot be reached, the State then may request the WTO Dispute Settlement Body for a Panel to be established in order to hear the case. The Panel is appointed in consultation with the parties and comprised of persons with experience in the area of government procurement. The Panel has as its task the provision of a report to the parties concerned, which is then adopted by the Dispute Settlement Body. The latter would then request the state in breach to repeal all the measures which contravene the principles of the WTO GPA. Failing to do so, the Dispute Settlement Body may authorise *unilateral suspension* of the application of the GPA or any other agreement under the WTO in the territory of the state affected by the violation.

This chapter aims to project the concepts of the Remedies Directives in public procurement and reflect on the insights of the CJEU in making public contracts redress as effective as possible with a view to facilitating the decentralised application of the substantive public procurement Directives.

3. THE PRINCIPLES OF THE REMEDIES DIRECTIVES

The Remedies Directives have been based on three fundamental principles; the principle of effectiveness, the principle of non-discrimination and the principle of procedural autonomy. In both Directives, effective review of decisions or acts of contracting authorities is the essential requirement of compliance with the substantive public procurement rules. The principle of effectiveness includes two individual features; first, the swift resolution of disputes and secondly the enforceability of decisions. In particular, the Remedies Directives stipulate that Member States must take any measures necessary to ensure that decisions taken by the contracting authorities may be reviewed effectively and as rapidly as possible and can be effectively enforced[45] on the grounds that such decisions have infringed EU law in the field of public procurement or national implementing laws.

[45] See Article 2(7) of Directive 89/665 and Article 2(8) of Directive 92/13.

There is an explicit obligation conferred on Member States to avoid introducing review procedures for decisions of contracting authorities and utilities, as well as procedures for the recovery of damages which differ, in a discriminatory context, from review procedures for other administrative acts and procedures for the recovery of damages under national law.[46] Finally, the Remedies Directives leave Member States with wide discretion as to the creation of the appropriate forum to receive complaints and legal actions against decisions of contracting authorities and utilities, as well as action for damages in public procurement cases.[47]

4. CONCEPTS IN LEGAL REDRESS IN PUBLIC PROCUREMENT CONTRACTS

The spectrum of redress in public procurement contracts reflects on three pivotal concepts for remedies available to aggrieved parties. First, interim protection, secondly, set aside and annulment of decisions of contracting authorities and finally, actions for damages.

4.1 The Concept of Interim Protection

4.1.1 Interim measures and their admissibility

The most important function of interim measures in public procurement is the ability to suspend an award procedure, particularly prior to the conclusion of the contract. The suspensory character of interim measures is a demonstrable factor of the ability of aggrieved tenderers to review decisions of contracting authorities and utilities or any other act or measure which forms part of the procurement process, without necessarily having recourse to an action for damages, which, in all Member States, appears as the only possible remedy available after the conclusion of the contract. It is widely accepted that a public contract, once concluded, is not subject to any set aside or annulment actions. The courts in most Member States apply a balance of interest test, where the complainant may have to show, *prima facie,* that he is likely to suffer serious and possibly irreparable harm if interim measures are not granted. Harm that must outweigh the inconvenience or any harm or damages which the interim order would cause both to the awarding authority and to the public interest at large.[48] The complainant might also have to show that the harm which he is likely to suffer could not be adequately compensated through financial damages. Interim measures against not only definitive acts but also procedural acts, should be admissible, if they determine, directly or indirectly, the substance of the case, bring an end to the award procedures of a public contract, or cause irreparable harm to legitimate rights of interested parties.[49] The Remedies Directives do not provide for any derogation

[46] See Article 1(2) of Directive 89/665 and Article 1(2) of Directive 92/13.
[47] See Article 2(2) of Directive 89/665 and Article 2(2) of Directive 92/13.
[48] See Article 2(4) of Directive 89/665 and Article 2(4) of Directive 92/13.
[49] See Cases C-214/00, *Commission of the European Communities v Kingdom of Spain* [2003] ECR I-4667; C-236/95, *Commission v Greece* [1996] ECR I-4459.

regarding the possibility of appealing against procedural acts, or administrative measures which do not bring administrative proceedings to an end.[50] However, national legislation which restricts interim judicial protection to proceedings for suspension of the operation of an administrative act and made the suspension conditional on bringing an action for the annulment of the contested act, contravene the spirit of the public procurement *acquis*.[51]

Interim measures represent an autonomous legal remedy which is to remain unconditional to any other judicial review process. Their objective is to correct the alleged infringement or to prevent further damage to the interests concerned, to suspend or ensure the suspension of the procedure for the award of a public contract and finally to suspend or ensure the suspension of the implementation of any decision taken by the contracting authority. Interim measures are granted with reference to a balance test which takes into consideration the likely consequences of such measures for all parties liable to be harmed on the one hand and the public interest on the other hand.

The CJEU examined[52] the conditionality of an application for interim measures upon a prior action to set aide or annul an act or a decision of a contracting authority and ruled against such a requirement on the grounds that it restricts interim judicial protection by making the suspension of an administrative act procedurally conditional on bringing an action for the annulment of the contested act.[53] The Court maintained that not only actions against definitive acts but also procedural acts, should be allowed to be suspended by the application of interim measures, if they determine, directly or indirectly, the substance of the case, or bring an end to the award procedures for a public contract, or cause irreparable harm to legitimate rights of interested parties. The Remedies Directives do not provide for any derogation regarding the possibility of appealing against procedural acts, or administrative measures which do not bring administrative proceedings to an end.[54]

National provisions concerning the possibility of applying for interim measures against acts or decisions of contracting authorities must not be specific to the award of public contracts, but apply equally to all procedures.[55] National legislation which restricts judicial protection in public procurement disputes through the conditional

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[50] See Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671. The conception of precluding the review of procedural acts is embedded in Community case-law. See case C-282/95 P *Guérin automobiles v Commission* [1997] ECR I-1503. The Court has also held that the preparatory nature of the act against which the action is brought is one of the grounds of inadmissibility of an action for annulment, and that that is a ground which the Court may examine of its own motion, see Case 346/87, *Bossi v Commission* [1989] ECR 303.

[51] See Case C-236/95, *Commission v Greece* [1996] ECR I-4459.

[52] See Cases C-214/00, *Commission of the European Communities v Kingdom of Spain* [2003] ECR I-4667; C-236/95, *Commission v Greece* [1996] ECR I-4459.

[53] See Case C-236/95, *Commission v Greece* [1996] ECR I-4459.

[54] See Case C-81/98, *Alcatel Austria and Others* [1999] ECR I-7671. The conception of precluding the review of procedural acts is embedded in Community case-law. See Case C-282/95, P *Guérin automobiles v Commission* [1997] ECR I-1503. The Court has also held that the preparatory nature of the act against which the action is brought is one of the grounds of inadmissibility of an action for annulment, and that that is a ground which the Court may examine of its own motion, see Case 346/87, *Bossi v Commission* [1989] ECR 303.

[55] See Case C-236/95, *Commission v Greece* [1996] ECR I-4459.

application of interim measures, that interested parties must bring an action for the annulment of the contested act of a contracting authority first, is in contradiction with the principle of procedural equality.

4.1.2 Pre-judicial stages in review procedures

Making access to the review procedures, which are provided for by the Public Sector Procurement Review Directive 89/665/EC, conditional on prior application to a body which has no judicial character, such as a conciliation commission, is contrary to the aims and objectives of the Remedies Directives and in particular the objective of speed and effectiveness in the judicial review of acts or decisions of contracting authorities. First, prior application to a non-judicial body which has the aim to conciliate disputes arising between contracting authorities and aggrieved tenderers inevitably has the effect of delaying the initiation of the review procedures which Directive 89/665/EC requires Member States to establish. Secondly, a non-judicial review body such as a conciliation commission has none of the powers which Article 2(1) Directive 89/665/EC requires Member States to grant the bodies responsible for carrying out those review procedures, so that referral to it does not ensure the effective application of the Directives on public procurement.[56]

Even though Member States are free to determine the detailed rules according to which they must make the review procedures provided for in that Directive available to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement,[57] they cannot interpret the term 'interest in obtaining a public contract' strictly.[58] Thus, a person who has participated in a contract award procedure, but subsequently failed to initiate pre-judicial proceedings, such as conciliation or mediation proceedings, to review an act or decision of a contracting authority must not be regarded as having lost his or her interest in obtaining the contract and therefore being precluded from lodging an action to contest the legality of the contract awarding decision or any decision of the contracting authority.[59]

4.2 The Set Aside and Annulment of Decisions

The principle of effectiveness of review procedures under the Remedies Directives covers the ability of aggrieved tenderers to initiate proceedings for the set aside decisions of contracting authorities taken unlawfully or to remove 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. Set aside procedures are deemed as legitimate conditional remedies for the award of damages.

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[56] See Case C-230/02, *Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG and Republik Österreich* [2004] ECR I-1829.

[57] See Case C-327/00, *Santex* [2003] ECR I-1877, para 47.

[58] See Case C-410/01, *Fritsch, Chiari & Partner and Others* [2003] ECR I-11547, paras 31 and 34.

[59] See Case C-230/02, *Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG and Republik Österreich* [2004] ECR I-1829.

The powers of national courts or administrative tribunals to set aside or annul acts of contracting authorities aim at nullifying the decision of the contracting authority or utility awarding a contract, prior to its conclusion. A set aside or annulment order cannot attack the contract itself, as the latter represents a pact between the contracting authority and a third party. In most legal orders, a set aside or annulment order will be reached after the application of a balance of interest test. However, many legal systems rely predominantly on the mere lawfulness of the administrative act of the contacting authority or the utility and do not involve any test which weights interests and potential harm and damages. The Remedies Directives also stipulate that national courts or administrative tribunals must be given the power to set aside or annul acts of contracting authorities.

The set aside or annulment of decisions of contracting authorities aims at nullifying administrative acts to award public contracts before the conclusion of the relevant contract. The nature of set aside or annulment orders is such as to prevent them contesting the legality of a concluded contract between a contracting authority and a third party. In most legal orders of the EU Member States, a set aside or annulment order will be successfully granted by the competent court after the application of the *balance of interest test*, in a similar manner to the application of the test in interim measures cases. However, some legal systems rely on the examination of the lawfulness of the administrative act of the contracting authority to award a public contract and do not apply any balance of interest test which weights interests and potential harm to aggrieved parties.[60]

4.2.1 Locus standi and interest to review acts

Persons to whom review procedures must be available must include, at least, any person having or having had an interest in obtaining a public contract[61] who has been or risks being harmed by an alleged infringement.[62] The formal capacity of tenderer or candidate is not thus required.[63] The CJEU maintained that an assessment of an aggrieved tenderer's interest in reviewing a decision or an act of a contracting entity should be examined on the face that he did not participate in the contract award procedure, as well as he did not appeal against the invitation to tender before the award of the contract.

According to Article 1 of the Public Sector Remedies Directive 89/665/EC and Article 1 of the Utilities Remedies Directive 93/13/EC, Member States shall ensure effective and rapid review of decisions taken by contracting authorities which infringe public procurement provisions. Undertakings seeking relief from damages in the context of a procedure for the award of a contract should not be treated differently under national rules implementing EU public procurement legislation and under other

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[60] See Bovis, *EU Public Procurement, Case Law and Regulation* (Oxford: Oxford University Press, 2006), Chapter 14.

[61] See Case C-26/03, *Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall und Energieverwertungsanlage TREA Leuna,* [2005] ECR I-1.

[62] See Case C-212/02, *Commission v Austria,* judgment of 24 June 2004.

[63] See Case C-230/02, *Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG and Republik Österreich* [2004] ECR I-1829.

national rules. This means that the measures to be taken concerning the review procedures should be similar to national review proceedings, without any discriminatory character.

Any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement of substantive public procurement law shall be entitled to seek review before national courts. This is laid down in the third paragraph of Article 1 Directive 89/665/EC and Article 3 Directive 92/13/EC. In both cases this is followed by a stand-still provision concerning the prior notification by the person seeking review to the contracting authority of the alleged infringement and of his intention to seek review. However, with respect to admissibility aspects, there is no qualitative or quantitative definition of the interest of a person in obtaining a public contract. As to the element of potential harm by an infringement of public procurement provisions, it should be cumulative with the first element, that of interest. The prior notification should intend to exhaust any possibility of amicable settlement before the parties have recourse to national courts.

Fritsch Chiari[64] precludes the conditionality of *locus standi* upon prior participation of aggrieved tenderers in conciliation procedures as incompatible with the effectiveness principle, thus recognizing the autonomous and unconditional character of judicial review procedures in public procurement. Even though Member States are free to determine the detailed rules according to which they must make the review procedures provided for in the Remedies Directive available to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement,[65] they cannot interpret the term interest in obtaining a public contract strictly.[66] Thus, a person who has participated in a contract award procedure, but subsequently failed to initiate pre-judicial proceedings, such as conciliation or mediation proceedings, to review an act or decision of a contracting authority must not be regarded as having lost his interest in obtaining the contract and therefore being precluded from lodging an action to contest the legality of the contract awarding decision or any decision of the contracting authority.[67]

Grossmann[68] confirmed the existence of interest in obtaining a contract where no bid has been submitted. The CJEU held that it must be possible for an undertaking to seek review of discriminatory specifications before submitting a bid and without waiting for the contract award procedure to be terminated, but a refusal to acknowledge interest in obtaining a contract of a person who has not participated in the contract award procedure or has not sought review against the invitation to tender does not impair the effectiveness of the Remedies Directives.

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[64] See Case C-410/01, *Fritsch, Chiari & Partner, Ziviltechniker GmbH and Others and Autobahnen- und. Schnellstraßen-Finanzierungs-AG. (Asfinag),* ECR [2003] I-11547.

[65] See Case C-327/00, *Santex* [2003] ECR I-1877, para 47.

[66] See Case C-410/01, *Fritsch, Chiari & Partner and Others* [2003] ECR I-11547, paras 31 and 34.

[67] See Case C-230/02, *Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG and Republik Österreich* [2004] ECR I-1829.

[68] See Case C-230/02, *Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG and Republik Österreich* [2004] ECR I-1829.

Espace Trianon,[69] recognised the existence of both collective and individual interest in obtaining a contract in cases of consortia participation in public procurement procedures and the CJEU held that not only all the members of a consortium without legal personality which has participated in a procedure for the award of a public contract and has not been awarded that contract, acting together, may bring an action against the decision awarding the contract, but *locus standi* is recognised even where only one member of the consortium seeks review. Interestingly, if the application of one of the consortium members is held inadmissible, *locus standi* of the other members of the consortium is not affected.

Elisoccorso/Elilombarda[70] repeated the *Espace Trianon* ruling by confirming the existence of individual interest and reaffirming the eligibility of an aggrieved individual member of a consortium without legal personality to contest a decision or an act of a contracting authority in relation to the award of a public contract.

4.2.2 The failure to participate in the contract award procedure

Under Article 1(3) of the Public Sector Remedies Directive 89/665/EC, the Member States are required to ensure that the review procedures provided for are available at least to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement of EU public procurement law or national rules transposing that law. It follows that Member States are not obliged to make those review procedures available to any person wishing to obtain a public contract, but instead, require that the person concerned has been or risks being harmed by the alleged infringement.[71]

In that sense, participation in a contract award procedure may, in principle, with regard to Article 1(3) Directive 89/665/EC, validly constitute a condition which must be fulfilled before the person concerned can show an interest in obtaining the contract at issue or that he or she risks suffering harm as a result of the allegedly unlawful nature of the decision to award that contract. If he or she has not submitted a tender it will be difficult for such a person to show that he or she has an interest in challenging that decision or that he or she has been harmed or risks being harmed as a result of that award decision. However, where an undertaking has not submitted a tender because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, or in the contract documents, which have specifically prevented it from being in a position to provide all the services requested, it would be entitled to seek review of those specifications directly, even before the procedure for awarding the contract concerned is terminated.

It is maintained that, on the one hand, it would be excessive to require an undertaking allegedly harmed by discriminatory clauses in the documents relating to the invitation to tender to submit a tender, before being able to avail itself of the review

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[69] See Case C-129/04, *Espace Trianon SA and Société wallonne de location-financement SA (Sofibail) v Office communautaire et régional de la formation professionnelle et de l'emploi (FOREM)* [2005] ECR I-7805.

[70] See Case C-492/06, *Consorzio Elisoccorso San Raffaele v Elilombarda Srl and Azienda Ospedaliera Ospedale Niguarda Ca' Granda di Milano* [2007] ECR I-8189.

[71] See Case C-249/01, *Hackermüller* [2003] ECR I-6319, para 18.

procedures provided for by Directive 89/665/EC against such specifications, in the award procedure for the contract at issue, even though its chances of being awarded the contract are non-existent by reason of the existence of those specifications. On the other hand, it is clear from the wording of Article 2(1)(b) Directive 89/665/EC that the review procedures to be organised by the Member States in accordance with the Directive must, in particular, set aside decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications. It must, therefore, be possible for an undertaking to seek review of such discriminatory specifications directly, without waiting for the contract award procedure to be terminated.

Member States are not obliged to make review procedures available to any person wishing to obtain a public contract, but instead, require that the person concerned has been or risks being harmed by the alleged infringement.[72] In that sense, participation in a contract award procedure may validly constitute a condition which must be fulfilled before the person concerned can show an interest in obtaining the contract at issue or that he or she risks suffering harm as a result of the allegedly unlawful nature of the decision to award that contract.

4.2.3 Absence of proceedings against the invitation to tender

National courts sought to ascertain whether Article 1(3) of the Public Sector Remedies Directive 89/665/EC must be interpreted as meaning that it precludes a person who not only has not participated in the award procedure for a public contract but has not sought any review of the decision of the contracting authority determining the specifications of the invitation to tender either, from being regarded as having lost his interest in obtaining the contract and, therefore, the right of access to the review procedures provided for by the Directive. The CJEU examined the absence of proceedings against the invitation to tender in the light of the purpose of Directive 89/665/EC and in particular its intentions to strengthen the existing mechanisms, both at national and EU level, to ensure the effective application of the EU public procurement directives, in particular at a stage when infringements can still be remedied. To that effect, Article 1(1) Directive 89/665/EC requires Member States to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible.[73]

It must be pointed out that the fact that a person does not seek review of a decision of the contracting authority determining the specifications of an invitation to tender which in his or her view discriminate against him or her, in so far as they effectively disqualify him or her from participating in the award procedure for the contract at issue, but awaits notification of the decision awarding the contract and then challenges it before the body responsible, on the ground specifically that those specifications are discriminatory, indicates a conduct which is incompatible with the spirit and objective of the Public Sector Remedies Directive. Such conduct, in so far as it may delay,

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[72] See Case C-249/01, *Hackermüller* [2003] ECR I-6319, para 18.

[73] See Cases C-81/98, *Alcatel Austria and Others* [1999] ECR I-7671, paras 33 and 34; C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, para 74; and C-410/01 *Fritsch, Chiari & Partner and Others* [2003] ECR I-6413, para 30.

without any objective reason, the commencement of the review procedures which Member States were required to institute by Directive 89/665/EC impairs the effective implementation of the EU public procurement Directives.

In those circumstances, a refusal to acknowledge the interest in obtaining the contract in question and, therefore, the right of access to the review procedures provided for by Directive 89/665/EC of a person who has not participated in the contract award procedure, or sought review of the decision of the contracting authority laying down the specifications of the invitation to tender, does not impair the effectiveness of the Public Sector Remedies Directive. Therefore, once a public contract has been awarded, an aggrieved tenderer may be regarded, as having lost his right of access to the review procedures provided for by the Directive if he did not participate in the award procedure for that contract on the ground that he was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, but he did not seek review of those specifications before the contract was awarded.

The CJEU examined the material scope of Article 1(3) Public Sector Remedies Directive 89/665/EC with a view to determining the persons to whom review procedures must be available and providing a definition of interest in obtaining a public contract.[74] It also pointed out that the fact that Article 1(3) Directive 89/665/EC expressly allows Member States to determine the detailed rules according to which they must make the review procedures available to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement nonetheless does not authorise them to give the term interest in obtaining a public contract an interpretation which may limit the effectiveness of that Directive.[75] Thus, Article 1(3) Directive 89/665/EC precludes an undertaking which has participated in a public procurement procedure from being considered as having lost its interest in obtaining that contract on the ground that, before bringing review procedures for setting aside or annulling an act or a decision of a contracting authority, it failed to exhaust pre-judicial proceedings.

The CJEU also examined the scope of Article 1(3) of the Public Sector Remedies Directive 89/665/EC in respect of review procedures concerning the award of public contracts and the *locus standi* of persons that are eligible to bring such review procedures before the competent national forum.[76] The Court pointed out that, under Article 1(3) Directive 89/665/EC, Member States are required to ensure that the review procedures laid down by the Directive are available at least to any person having or having had an interest in obtaining a particular public contract and who has been or risks being harmed by an alleged infringement of EU public procurement law or the national rules implementing that law. Therefore, it is apparent that the provision does not oblige the Member States to make those review procedures available to any person wishing to obtain a public contract but allows them to require, in addition, that the

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[74] See Case C-410/01, *Fritsch, Chiari & Partner, Ziviltechniker GmbH and Others and Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag)* [2003] ECR I-11547.

[75] See Case C-470/99, *Universale-Bau and Others* [2002] ECR I-11617, para 72.

[76] See C-249/01, *Werner Hackermüller and Bundesimmobiliengesellschaft mbH (BIG), Wiener Entwicklungsgesellschaft mbH für den Donauraum AG (WED)* [2003] ECR I-6319.

person concerned has been or risks being harmed by the infringement he or she alleges. The Court concluded that Article 1(3) Directive 89/665/EC does not preclude the review procedures laid down by the Directive being available to persons wishing to obtain a particular public contract only if they have been or risk being harmed by the infringement they allege.

The national court also sought to ascertain whether a tenderer seeking to contest the lawfulness of the decision of the contracting authority not to consider his bid as the best bid may be refused access to the review procedures laid down by Directive 89/665/EC on the ground that his or her bid should have been eliminated at the outset by the contracting authority for other reasons and that, therefore, he or she neither has been nor risks being harmed by the unlawfulness which he alleges. The Court reiterated that Directive 89/665/EC is intended to strengthen the existing mechanisms, both at national and EU level, to ensure the effective application of the EU public procurement Directives, in particular at a stage when infringements can still be remedied. To that effect, Article 1(1) Directive 89/665/EC requires Member States to guarantee that unlawful decisions of contracting authorities can be subjected to effective review which is as swift as possible.[77] The full achievement of the objective of Directive 89/665/EC would be compromised if it were permissible for a body responsible for the review procedures provided for by the Directive to refuse access to them to a tenderer alleging the unlawfulness of the decision by which the contracting authority had not considered its bid as being the best bid, on the ground that the same contracting authority was wrong not to eliminate that bid even before making the selection of the best bid. The CJEU pointed out that there can be no doubt that a decision by which the contracting authority eliminates the bid of a tenderer even before making that selection is a decision of which it must be possible to seek review under Article 1(1) Directive 89/665/EC, since that provision applies to all decisions taken by contracting authorities which are subject to EU public procurement law,[78] and makes no provision for any limitation as regards the nature and content of those decisions.[79] Therefore, if the tenderer's bid had been eliminated by the contracting authority at a stage prior to that of the selection of the best bid, he or she would have had to be allowed, as a person who has been or risks being harmed by that decision to eliminate his or her bid, to challenge the lawfulness of that decision by means of the review procedures provided for by Directive 89/665/EC.

In those circumstances, if a review body were to refuse access to those procedures to a tenderer, the effect would be to deny him or her not only his or her right to seek review of the decision he or she alleges to be unlawful but also the right to challenge the validity of the ground for exclusion raised by that body to deny him or her the status of a person who has been or risks being harmed by the alleged unlawfulness. Admittedly, if in order to mitigate that situation the tenderer is afforded the right to

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[77] See Case C-81/98, *Alcatel Austria and Others* [1999] ECR I-7671, paras 33 and 34, and Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, para 74.

[78] See Case C-92/00, *Hospital Ingenieure* [2002] ECR I-5553, para 37, and Case C-57/01 *Makedoniko Metro and Michaniki* [2003] ECR I-1091, para 68.

[79] See Case C-81/98, *Alcatel Austria and Others* [1999] ECR I-7671, para 35 and Case C-92/00 *Hospital Ingenieure* [2002] ECR I-5553, para 49.

challenge the validity of that ground of exclusion in the review procedure he or she instigates in order to challenge the lawfulness of the decision by which the contracting authority did not consider his or her bid as being the best bid, it is possible that at the end of that procedure the review body may reach the conclusion that the bid should actually have been eliminated at the outset and that the tenderer's application should be dismissed on the ground that, in the light of that circumstance, he neither has been nor risks being harmed by the infringement he alleges. However, if the contracting authority has not taken a decision to exclude the tenderer's bid at the appropriate stage of the award procedure, the method of proceeding described in the previous paragraph must be regarded as the only one likely to guarantee the tenderer the right to challenge the validity of the ground for exclusion on the basis of which the review body intends to conclude that he or she neither has been nor risks being harmed by the decision he or she alleges to be unlawful and, accordingly, to ensure the effective application of the EU public procurement Directives at all stages of the award procedure.

The CJEU concluded that Article 1(3) Directive 89/665/EC does not permit a tenderer to be refused access to the review procedures laid down by the Directive to contest the lawfulness of the decision of the contracting authority not to consider his bid as the best bid on the ground that his bid should have been eliminated at the outset by the contracting authority for other reasons and that therefore he neither has been nor risks being harmed by the unlawfulness which he alleges. In the review procedure thus open to the tenderer, he or she must be allowed to neither challenge the ground of exclusion on the basis of which the review body intends to conclude that he neither has been nor risks being harmed by the decision he alleges to be unlawful.

4.2.4 The meaning and content of decisions for judicial review

The CJEU verified that any remedies available to interested parties against decisions of contracting authorities extends also to decisions taken outside a formal award procedure and decisions prior to a formal call for tenders,[80] such as decisions on whether a particular contract falls within the personal and material scope of the public procurement Directives, a question discussed in detail in Chapter 1 of this book, as well as decisions to withdraw invitations to tender and abort public procurement procedures.[81] The Remedies Directives preclude national legislation from limiting review of the legality of the withdrawal of an invitation to tender to mere examination of whether this was arbitrary. However, the Court has defined the scope of the obligation to notify reasons for abandoning the award procedure of a contract,[82] which must be limited to exceptional cases or must necessarily be based on serious grounds.[83] Although a contracting authority is required to notify candidates and tenderers of the grounds for its decision if it decides to withdraw the invitation to tender for a public contract, there

[80] See Case C-26/03, *Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall und Energieverwertungsanlage TREA Leuna,* [2005] ECR I-1.

[81] See Case C-92/00 *Hospital Ingenieure* [2002] ECR I-5553, para 55.

[82] See [1993] OJ L199/54.

[83] See Case C-27/98, *Fracasso and Leitschutz v Salzburger Landesregierung* [1999] ECR I-5697, paras 23 and 25.

is no implied obligation on that authority to carry the award procedure to its conclusion.

The broad meaning of the concept of a decision taken by a contracting authority is confirmed by the Court's case law. The CJEU has held that there is no restriction with regard to the nature and content of the decisions taken by contracting authorities.[84] Nor may such a restriction be inferred from the wording of the Remedies Directives. Moreover, a restrictive interpretation of the concept of a decision amenable to review would be incompatible with the requirement of Member States providing for interim relief procedures in relation to any decision taken by the contracting authorities.[85] On the other hand, decisions or acts of contracting authorities which constitute a mere preliminary study of the market or which are purely preparatory and form part of the internal reflections of the contracting authority with a view to a public award procedure are not reviewable.[86] The CJEU has held that the contracting authority's decision prior to the conclusion of the contract as to the tenderer to whom the contract will be awarded must in all cases be open to review, regardless of the possibility of obtaining an award of damages once the contract has been concluded.[87]

4.2.5 Time limits to enact review proceedings

Member States have wide discretion to establish the procedural framework for review procedures and the logistics for its operation. The existence of national legislation which provides that any application for review of decisions of contracting authorities must be commenced within a specific time-limit and that any irregularity in the award procedure relied upon in support of such application must be raised within the same period is compatible with public procurement *acquis*,[88] provided that, in pursuit of fundamental principle of legal certainty, such specific time limits are reasonable.[89]

The duration to assess the legality of acts or decisions of contracting authorities[90] remains within the discretion of Member States, subject to the requirement that the relevant national rules are not less favourable than those governing similar domestic actions.[91]

In *Universale Bau*,[92] Austrian procurement rules stipulated limitation periods within which certain allegedly unlawful decisions had to be challenged. The CJEU declared that the Remedies Directives do not provide for any specific limitation periods and that

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[84] See Case C-81/98, *Alcatel Austria and Others* [1999] ECR I-7671, paras 32–35.

[85] See Case C-92/00, *Hospital Ingenieure* [2002] ECR I-5553, para 49.

[86] See the Opinion of Advocate-General Stix-Hackl in Case C-26/03, *Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall und Energieverwertungsanlage TREA Leuna,* points 23-29, delivered on 23 September 2004.

[87] See Case C-81/98, *Alcatel Austria and Others* [1999] ECR I-7671, para 43.

[88] See Case C-470/99, *Universale-Bau AG, Bietergemeinschaft* [2002] ECR I-11617.

[89] See Case C-261/95, *Palmisani* [1997] ECR I-4025, para 28, and Case C-78/98 *Preston and Others* [2000] ECR I-3201, para 33.

[90] See Case C-92/00, *Hospital Ingenieure Krankenhaustechnik Planungs- GmbH (HI) and Stadt Wien,* [2002] ECR I-5553.

[91] See Case C-390/98, *Banks v Coal Authority and Secretary of State for Trade and Industry* [2001] ECR I-6117, para 121; Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, para 29.

[92] See Case C-470/99, *Universale-Bau and Others* [2002] ECR I-11617.

in absence of EU rules, Member States are free to provide procedural rules if they are coherent with fundamental principles of the Treaty. The Court considered a two-week limitation period in principle consistent with principles of effectiveness and equivalence and reflecting an element of appropriateness in the light of their overall objective.[93]

In *Sanetex*,[94] Italian law provided that an invitation to tender or clauses thereof must be challenged within the limitation period of 60 days; when that period has expired, a challenge is no longer possible. An aggrieved bidder did not contest a specific and potentially discriminatory clause because the contracting authority led him to believe that the disputed clause would be interpreted in a non-discriminatory manner. After the elapse of the time limitation period, the contracting authority excluded the bidder from the tender procedure on basis of the potentially discriminatory clause. The Court considered that the 60 days limitation period is reasonable but held that the conduct of the contracting authority had rendered the exercise of the rights conferred on the tenderer excessively difficult. Therefore, despite the elapse of the limitation period, the aggrieved party could challenge the act of the contracting authority. The latter assertion by the Court gives reasonable guidance to national courts to interpret national laws on limitation periods in a functional manner in which if redress for challenging public contracts is rendered excessively difficult, the relevant limitation periods may not apply or may be extended to allow for effective access to justice.

In *Lämmerzahl*,[95] the CJEU dealt with an application for review being deemed inadmissible where no complaint is raised about infringements that are identifiable in the contract notice by, at the latest, the end of the period for submission of bids. The Court held that a contract notice lacking any information as to the estimated contract value followed by evasive conduct of the contracting authority must, in view of the limitation period, be seen as rendering excessively difficult the exercise by the tenderer concerned of rights conferred on him by EU law.

In *Uniplex*[96] the CJEU confirmed that any periods laid down for bringing proceedings start to run only from the date on which the claimant knew or ought to have known of the alleged infringement and requires the contracting authority to notify unsuccessful candidates of the relevant reasons, at least a summary of its decision in relation to the award of a public contract. The Court had the opportunity to rule on the compatibility of United Kingdom law which provides that:

> … proceedings must be brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose unless the Court considers there is a good reason for extending the period within which proceedings may be brought.[97]

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[93] See Case C-231/96, *EDIS* [1998] ECR I-4951.

[94] See Case C-327/00, *Santex SpA v Unità Socio Sanitaria Locale n. 42 di Pavia* [2003] ECR I-1877.

[95] See Case C-241/06, *Lämmerzahl GmbH v Freie Hansestadt Bremen* [2008] 1 CMLR 462.

[96] See Case C-406/08, *Uniplex (UK) Ltd v NHS Business Services* Ltd [2010] ECR I-0000.

[97] See Regulation 47(7)(b) of the Public Contracts Regulations 2006 and regulation 45(6)(b) of the Utilities Contracts Regulations 2006 which implement Article 2c of Directive 89/665/EEC, as amended by Directive 2007/66/ EC and article 2c of Directive 92/13/ EEC, as amended by Directive 2007/66/EC respectively.

The Court held that the United Kingdom provisions give rise to legal uncertainty as the limitation period the duration of which is at the discretion of the competent court is not predictable in its effects. Moreover, national courts are bound to interpret national law that transposes a directive in the light of the wording and purpose of the directive, that is, in a way that the period begins to run from the date on which the claimant knew or ought to have known infringement. If national law does not arrive at such an interpretation the national court is bound to extend the period for bringing proceedings in relation to the award of public contracts.

The CJEU upheld the *Uniplex* ruling in *Commission v Ireland*,[98] where national law provided that application for review of a decision to award a contract shall be made:

> … at the earliest opportunity and in any event within three months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending such period.

The Court maintained that the national limitation periods are to be interpreted by national courts as to apply not only to the final decision to award the contract but also to preparatory acts or interim decisions and that national rules need to be unequivocally clear and beyond doubt as to the time from which the limitation period starts to run.

The principle of effectiveness underpinned *Commission v Germany*,[99] where the Court confirmed that the Commission, as guardian of the TFEU has absolute discretion to initiate compliance proceedings for failure to implement EU law against a Member State even if limitation periods under national law have expired.

4.2.6 *Ex proprio motu* investigation of the unlawfulness of decisions

National courts responsible for hearing review procedures in actions brought by aggrieved tenderers, with the ultimate aim of obtaining damages, may declare on their own motion the unlawfulness of a decision of the contracting authority other than the one contested by the tenderer.[100] However, a tenderer harmed by a decision to award a public contract, the lawfulness of which he or she is contesting, cannot be denied the right to claim damages for the harm caused by that decision on the ground that the award procedure was in any event defective owing to the unlawfulness, raised *ex proprio motu*, of another decision of the contracting authority. Therefore, national courts cannot dismiss an application for damages on the ground that, owing to the unlawfulness raised of the courts' own motion, the award procedure was in any event unlawful and that the harm which the tenderer may have suffered would therefore have been caused even in the absence of the unlawfulness alleged by the tenderer.

4.2.7 Obligation to allow sufficient time between contract award and contract conclusion

Member States are required to provide for a review procedure so that an applicant may apply for the set aside of a decision of a contracting authority to award a public

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[98] See Case C-456/08, *Commission v Ireland* [2010] ECR I-0000.

[99] See Case C-17/09, *Commission v Germany,* [2010] ECR I-4.

[100] See Case C-315/01, *Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT) and Österreichische Autobahnen und Schnellstraßen AG (ÖSAG),* [2003] ECR I-6351.

contract to a third party, prior to the conclusion of the contract.[101] That right of review for tenderers must be independent of the possibility for them to bring an action for damages once the contract has been concluded.[102] A national legal system that makes it impossible to contest the award decision because of the award decision and the conclusion of the contract occurring at the same time deprives interested parties of any possible review in order to have an unlawful award decision set aside or to prevent the contract from being concluded. Complete legal protection requires that a reasonable period must elapse between the decision which awards a public contract and the conclusion of the contract itself, as well as a duty on the part of contracting authorities to inform all interested parties of an awarding decision.

4.2.8 The standstill period

The standstill period is viewed as the answer to prevent a race to sign a public contract and as the mechanism to allow interested parties to launch review procedures 10 calendar days from the day following the day of the award decision if fax or electronic means are used, or 15 calendar days from the day following the day of the award decision if other means of communication are used, or 10 calendar days from the day following the date of the receipt of the contract award decision.

4.2.9 The notion of ineffectiveness

The threat of ineffectiveness is a deterrent factor in the award of public contracts in breach of the relevant Directives and offers a considerable margin of discretion to the national legislator. Ineffectiveness may result in retrospective cancellation of contractual obligations, or reduction of contractual obligations or appropriate penalties in the sense of fines levied on contracting authorities or shortening of concluded public contracts. Grounds for deviation from ineffectiveness reflect overriding reasons relating to a general interest and must be subject to alternative penalties.

Overriding reasons are economic interests, in exceptional circumstances, which manifest the conclusion of the contract due to the disproportionate consequences arising from its ineffectiveness. Economic interests directly linked to the contract such as costs resulting from the delay in the execution of the contract, costs resulting from the launching of a new procurement procedure, costs resulting from the change of the economic operator and costs of legal obligations resulting from the ineffectiveness are not deemed overriding reasons.

Member States may provide that application for review regarding ineffectiveness of contracts must be made before 30 calendar days after publication of the contract award notice, provided that the decision of the contracting authority to award the contract without prior publication of a contract notice was justified or in any case before expiry of period of at least six months after conclusion of the contract.

5. Damages

The public procurement Directives do not require the provision of a remedy for the award of damages when there is a breach of a directly effective provision. The reasons

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[101] See Case C-212/02, *Commission v Austria*, judgment of 24 June 2004.
[102] See Case C-81/98, *Alcatel Austria and Others* [1999] ECR I-7671, para 43.

for that absence vary: in some cases a national court has held that the authority in breach of EU law did not owe any obligation directly to the plaintiff or that the plaintiff's losses were the result of foreseeable economic risk; in others, the award of damages was seen as an unacceptable restraint on the freedom of authorities to enact legislative measures or administrative rules in good faith, pursuant to their general duty to safeguard the public interest. Damages in public procurement may be available as a consequence of breaches of provisions of national law which make a national authority liable to compensate for the breach of its obligations. However, in the context of the Remedies Directives, a pattern has emerged where a complainant seeking damages must prove that the contracting authority has committed an infringement of the procurement rules and as a direct result and consequence of that infringement, he or she has suffered harm or loss. In some legal orders, the complainant does not have to prove a breach of procurement rules on the part of the contracting authority, if a previous set aside or annulment judgment of an administrative court or tribunal had declared the award decision unlawful. In most Member States, the burden of proof concerning damages is set at a relatively high level. The mere presence of a breach of procurement procedures, which could be proved by the applicant or through a previous set aside or annulment order of the award decision of a contracting authority would be a sufficient ground to trigger the award of damages relating to bid costs and costs necessary for the preparation and submission of a tender. However, the recovery of damages relating to losses of profit is subject to the complainant proving that, in the absence of the alleged breach, he would have been awarded the contract.[103]

Article 2(1)(c) in both Remedies Directives provides for the award of damages to persons harmed by an infringement of public procurement law. The purpose behind this provision is to mobilise interested stakeholders in order to supervise the application of the EU public procurement Directives. However, the most important issue emerging from actions for damages in the legal systems of Member States relates to the burden of proof on the part of the aggrieved tenderer seeking damages. In most legal orders, the recovery of damages relating to losses of profit is subject to the complainant proving that, in the absence of the alleged breach, he would have been awarded the contract. The public sector Remedies Directive 89/665/EC is silent on this issue, whereas Directive 92/13/EC provides some clarification as regards the recovery of bid costs as against utilities. Directive 92/13/EC provides that where an aggrieved tenderer establishes that an infringement deprived him of a real chance of winning the contract, he is entitled (at least) to damages covering his bid costs. General principles and relevant case-law in a number of Member States suggest that this real chance test would apply more generally to any claim for damages under either Remedies Directive.

Award of damages in public procurement is limited to persons economically harmed by an infringement on the part of the contracting authority. After the conclusion of the

[103] The public sector Remedies Directive 89/665 is silent on this issue, whereas Directive 92/13 provides some clarification as regards the recovery of bid costs as against utilities. Directive 92/13 provides that where an aggrieved tenderer establishes that an infringement deprived him of a real chance of winning the contract, he is entitled (at least) to damages covering his bid costs. For more details, see chapter 11 in Bovis, *EC Public Procurement: Case Law and Regulation* (Oxford: Oxford University Press, 2006).

contract, damages represent the only remedy available. The amending Remedies Directive[104] has introduced contract ineffectiveness as a new type of remedy to restore equilibrium after the conclusion of an illegally awarded public contract.

The Remedies Directive contains no further requirements, as to the burden of proof nor the method of calculation of damages. The national legislator is free to decide; it must however comply with the principle of equivalence and the principle of effectiveness. The degree of the effective award of damages in breach of public procurement law varies enormously within the legal orders of the Member States. Some national courts may award punitive damages on the grounds of likelihood of harm; others, in order to award damages for breaches of public procurement law, require proof that the contract would have been awarded to the claimant. Difficulties also arise in cases where no bid was submitted or in cases of direct awards, where the award criteria did not required that in cases where no notice was published or no tender procedure was carried out.

Commission v Germany,[105] recognised that the principle *pacta sunt servanda* and the prospect of litigation for damages for termination of illegally awarded contracts cannot act as a defence for contracting authorities. German municipalities concluded service contracts for a term of at least 30 years without publishing notices in the Official Journal of the EU. The conclusion of the contracts and the threat of damages arising from potential termination of the contracts were used as arguments for not rescinding illegally awarded contracts. Germany argued that any breach of public procurement law was cured by the conclusion of the relevant contracts and after that time, there is no actual breach. The Court held that the effects of unlawful contract awards go beyond the conclusion of the contract because of its long duration and any breach of obligations under the public procurement Directives and EU law in general remain as long as the unlawfully concluded contract is valid.

In *Wall v Frankfurt*,[106] the Court held that the principles of equal treatment and non-discrimination and the consequent obligation of transparency do not require the national authorities to terminate a contract or grant a restraining order in every case of an alleged breach of that obligation in connection with the award of service concessions. But it is for the national law to regulate the legal procedures for safeguarding the rights which individuals derive from the transparency obligation in such a way that those procedures are no less favourable than similar domestic procedures according to the principle of equivalence and they do not make the exercise of those rights practically impossible or excessively difficult according to the principle of effectiveness.

In *Commission v Portugal*,[107] the conditionality of procedures related to the award of damages upon proof of fraud or fault on the part of the contracting authority was found to contravene the Remedies Directives. Portuguese law made the award of damages to persons harmed by a breach of EU procurement law conditional on proof of fault or

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[104] See Directive 2007/66/EC, [2007] OJ L335/31.

[105] See Joined Cases C-20/00 and C-28/01, *Commission v Germany,* [2003] ECR I-3609.

[106] See Case C-91/08, *Wall AG v City of Frankfurt* [2010] ECR I-2815.

[107] See Case C-275/03, *Commission v Portugal* and Case C-70/06, *Commission v Portugal* [2004] ECR I-0000.

fraud conditions which substantially reduced the likelihood of aggrieved tenderers in obtaining damages.

In *Aktor ATE v ESR*,[108] the CJEU expanded *de lege ferenda* the coverage of the Remedies Directives to bodies which are not contracting authorities but their decisions are capable of having a certain effect on the outcome of a procurement procedure. The Court found that the national law did not comply with principles of equivalence and effectiveness, as it rendered impossible to seek annulment of a decision and to obtain compensation for any damage incurred, whereas this was not the case in other areas by virtue of national law applicable to damages incurred by virtue of unlawful acts of public authorities. As a result, those bodies should be deemed as contracting authorities, by applying the functionality test, and their decisions or acts in relation to public procurement procedures must be subject to review procedures to satisfy the effectiveness principle of the Remedies Directives. The Court reiterated that in the absence of EU rules governing damages it is for each Member State to designate the courts having jurisdiction and to lay down detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law as long as they are not less favourable than those governing similar domestic actions in accordance with the principle of equivalence.

6. CONCLUSIONS

The EU Remedies Directives and the implementing regimes of the domestic legal orders of the Member States aim at decentralising the application and enforcement of the EU public procurement *acquis* and rest upon a fundamental conceptual principle, the principle of effectiveness of national remedies to avail redress to aggrieved parties. Although in relative terms public procurement jurisprudence of the CJEU has been limited over the past 30 years, it is encouraging to see an increasing flow of cases before national courts that underpin the concepts of the Remedies Directives. Decentralisation in the enforcement and application of public procurement law will definitely increase litigation before the competent national *fora* and result in an acceptable degree of compliance of Member States and contracting authorities; it will enhance transparency and accountability in the award of public contracts and it will improve the justiciability of public contracts redress. The key question is if the increased levels of justiciability will result in speculative litigation with the adverse side effects of delaying procurement processes, making contracting authorities more reluctant in engaging with the private sector and finally, increasing the cost of procurement as a result of the potential of contractual ineffectiveness and damages to aggrieved parties.

[108] See Case C-145/08, *Club Hotel Loutraki AE and Others v Ethnico Symvoulio Radiotileorasis and Ypourgos Epikrateias* and Case C-149/08 *Aktor Anonymi Techniki Etaireia (Aktor ATE) v Ethnico Symvoulio Radiotileorasis* [2010] ECR I-0000.