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*Roberto Caranta*

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The Comparatist's Lens on Remedies in Public  
Procurement





# The Comparatist's Lens on Remedies in Public Procurement

*Roberto Caranta\**

## 1. Foreword.

It has been some times since the stipulated deadline for the implementation of Directive 2007/66/EC elapsed.<sup>1</sup> Pursuing accrued effectiveness in the application of EU procurement law,<sup>2</sup> the Directive revised the previous legislation mainly introducing two new remedies, standstill and ineffectiveness (with the ancillary remedy of alternative penalties).<sup>3</sup>

Inevitably Member States have approached the implementation of Directive 2007/66/EC differently. At times, rules on remedies in public procurement have been rewritten almost from scrap. Other times, the new remedies have been grafted into the existing legislation. In both cases, the peculiar legal traditions of each Member State are deemed to influence the way remedies are not just implemented but applied.

Even after Directive 2007/66/EC entered into force the remedies in public procurement have been harmonised to a limited extent only. As the Court of justice held in *Santex*, Directive 89/665/EEC “lays down the minimum conditions to be satisfied by the review procedures established in the national legal systems, so as to ensure compliance with the requirements of Community law concerning public contracts”.

What is not covered by the Directive is left to the residual procedural autonomy of the Member States, meaning to the remedial traditions proper to each jurisdiction. Moreover, the same tradition affect the way rules are implemented and implemented rules are interpreted and applied. Harmonisation by EU law is partial at best here, and calls for comparative analysis.<sup>4</sup>

## 2. Private law or Public law? Civil or Administrative Courts?

Public contracts – or, and possibly more correctly at this stage, contracts to which a public administration is a party to – lie somewhere on the border between private and public law. How much at one or the other side of the border has long been decided by national legislation and legal traditions.

Putting it in a somewhat simplistic way, it can be said that in France contracts to which a public administration is a party are in principle ruled by public law.<sup>5</sup> This basically means that the public administration retains some of its exorbitant powers and is not bound by the contract the same way as any private contractor. In other jurisdiction,

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\*This paper is an edited version, focusing on the most relevant comparative aspects of R. Caranta, *Many Different Paths, but Are They All Leading to Effectiveness?*, in S. Treumer and F. Lichère (eds) *Enforcement of the EU Public Procurement Rules*, Copenhagen, DJØF, 2011, 53; readers are referred to the original for more information.

<sup>1</sup>Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

<sup>2</sup>See Recitals 3 ff of Directive 2007/66/EC, referring to weaknesses to be remedied.

<sup>3</sup>S. Treumer ‘Enforcement (EU)’ above.

<sup>4</sup>See R. Caranta ‘Pleading for European Comparative Administrative Law: What is the Place for Comparative Law in Europe?’ in K.j. de Graaf, J.H. Jans, A. Prechal, R.J.G.M. Widdershoven (eds.) *European Administrative Law: Top-Down and Bottom-Up* (Groningen, Europa Law Publishing, 2009) 155.

<sup>5</sup>F. Lichère and N. Gabayet ‘Enforcement of EU Public Procurement Rules in France’ § 1.



belonging to both the civil law (Germany) and the common law (England) traditions, the same contracts are in principle ruled by private law (or by a mix where private law might be seen as prevailing).<sup>6</sup>

The distinction historically focused on the contract performance or contract implementation phase, and essentially boiled down to the question whether or not the public administration could change its mind after passing a contract because of changed circumstances and more specifically because of a different appreciation of the general interest having determined it to look for a contractor. From answers to this question which at times were different more in principle than their actual consequences, a further difference arose.<sup>7</sup>

Having grounded in public law what may now safely be called public contracts, France was ready to afford protection to potential bidders claiming that the rules passed for choosing the contractors had been breached. Those claims were and are in the end part and parcel of the standards for judicial review of administrative action, the only possible question being what to do whether a contract has already entered into? Not an intractable problem, and one being soon mostly solved with reference to the theory of the *acte détachable*.<sup>8</sup>

Having kept contracts to which a public administration is a party within the realm of private law, other jurisdictions had more problems in affording remedies to third parties. The same happened when those contracts were considered as part of budgetary law (Fiscus) rather than administrative law. Private contract law is for the parties to the contract, and does not go into any depth as to the procedures to choose one's partner.<sup>9</sup> Outside the limited grounds afforded by pre-contractual liability (mainly, bad faith on the part of the public purchaser), potential bidders had no ground in private law for complaining about not being the chosen one.<sup>10</sup>

In a way, it is not so much that that in France there existed an extensive body of rules on how the public administration should choose its partners where none existed for instance in Germany. The difference laid on whether breaches to these rules were actionable in court by potential bidders or not, in the latter case being considered as internal working rules for the public administration whose breach could be relevant for accounting or auditing purposes.

Then EEC law was obviously attracted by the French model. What is now the EU cannot rely only on the Commission acting as a watchdog to police compliance to the rules it edicts. This is even more so in the field of public contracts, Member States being at the same time the public purchasers and easily tempted to buy national to foster domestic firms and protect local products.<sup>11</sup> To establish and police the internal market, the EU

<sup>6</sup>See M. Burgi 'Enforcement of EU Public Procurement Rules' § 1.1. and VII; see also M. Trybus 'An Overview of the UK' esp. § 8. The same is true of the situation in the Netherlands as it is described in Case C-568/08 *Combinatie Spijker Infrabouw* [2010] ECR I-0000, paragraph 11: "the award of public contracts is a matter for private law, the award of a public contract constitutes an act of private law, and decisions preliminary to the award of a public contract taken by administrative bodies are regarded as preparatory acts of private law. The civil courts have jurisdiction to hear disputes on the award of public contracts as regards both the adoption of protective measures and the procedure on the substance".

<sup>7</sup>R. Noguellou U. Stelkens 'Propos introductifs/Introduction' in R. Noguellou U. Stelkens (eds.) *Droit comparé des contrats publics. Comparative Law on Public Contracts* (Bruylant, Brussels 2010) 1.

<sup>8</sup>F. Lichère and N. Gabayet 'Enforcement of EU Public Procurement Rules in France' § 5.I.

<sup>9</sup>See for instance M. Trybus 'An Overview of the UK' § 1.1.

<sup>10</sup>U. Stelkens et H. Schröder 'Les droit de contrats publics en Allemagne' in R. Noguellou U. Stelkens (eds.) *Droit comparé des contrats publics* above nt 13, point 3.2.1.

<sup>11</sup>On the resource limits placed on the Commission when enforcing EU law see S. Treumer 'Enforcement (EU)' §§ 1, 2 and 2.2.; generally on the use of infringement procedures in public procurement cases P. Trepte *Public Procurement in the EU* 2nd (Oxford, Oxford University Press, 2007) 578 ff, and C. Bovis *EC Public Procurement: Case Law and Regulation* (Oxford, Oxford University Press, 2006) 50 ff.



needs to enlist the help of disaffected potential bidders and this means giving them enforceable rights along the French model.<sup>12</sup>

The above goes a long way towards explaining not just how EU public procurement law is, but also why given jurisdictions find it easier than others to adopt and adapt to its rules and principles. Inevitably those legal systems – like Germany – which adhere to a private law systematization of public procurement contracts face more difficulties in accommodating the rules on non-discrimination and transparency in the award of the same contracts.<sup>13</sup> On the contrary France has no problem in extending the procurement remedies to all public contracts. In the end, they are quite in line with the pre-existing administrative law traditions already developed there.<sup>14</sup>

The possible existence of a specialized administrative jurisdiction is relevant mainly in so far as it may have contributed to and strengthened the public law character of contracts to which a public administration is a party, while giving competence to the ordinary courts will have pushed for the opposite solution.

### 3. The Question of Standing.

While under a private law context it could make sense to deny potential bidders any standing to challenge the choice of a contractor, in a public law environment anyone having a ‘sufficient’ interest in the matter should be able to go to court. A sufficient interest immediately identifies those competitors potentially interested to be chosen as partners for the contract at stake because the subject matter of the given contract falls within the scope of their business.<sup>15</sup>

This approach is followed by Article 1(3) Directive 89/665/EEC, under which the remedies provided in the directive are to be made available “at least to 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”.

Most Member States are quite generous on standing. It is to be remembered that not just fair competition but also taxpayers money are best served by allowing challenges to procurement decisions. While the former might explain the remedies system at EU level, both are relevant and reinforce each other at national level.<sup>16</sup> So for instance in the UK is granted following a very flexible and liberal test not just to competitors but to representative trade organisations. Only taxpayers and the general public are excluded.<sup>17</sup> In some other jurisdiction too standing is extended beyond the circle of competitors and potential competitors, to include, as in the case of Denmark, public bodies such as the Competition and Consumer Authority,<sup>18</sup> or the Prefect in France.<sup>19</sup>

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<sup>12</sup>C. Bovis EC Public Procurement above fn 17, 67.

<sup>13</sup>See J. Germain ‘Les recours juridictionnels ouverts au concurrent évincé contre un marché public communautaire après sa conclusion en France et en Allemagne’ [2009] Rev. Fr. Dr. Adm. 58, and U. Stelkens et H. Schröder ‘Les droit de contrats publics en Allemagne’ above nt 16, point 3.2.1.

<sup>14</sup>F. Lichère and N. Gabayet ‘Enforcement of EU Public Procurement Rules in France’ § 1.

<sup>15</sup>This is the case in Italy M. Comba ‘Enforcement of EU Procurement Rules’ § 1, and France, even if the situation might slightly change according to the specific judicial procedure followed: F. Lichère and N. Gabayet ‘Enforcement of EU Public Procurement Rules in France’ § 2, I.1.1., with reference to the SMIRGEOMES case.

<sup>16</sup>R. Caranta ‘Transparence et concurrence’ in R. Noguellou U. Stelkens (eds.) Droit comparé des contrats publics above nt 13, 154 ff.

<sup>17</sup>M. Trybus ‘An Overview of the UK’ § 1.3.

<sup>18</sup>See above S. Treumer ‘Enforcement (Denmark)’, § 1 and, describing how this has lost relevance, § 9.

<sup>19</sup>F. Lichère and N. Gabayet ‘Enforcement of EU Public Procurement Rules in France’ §§ 2.I.1.1. and 5.II.



Germany only faced challenges in recognising standing to competitors and needed ad hoc legislative interventions.<sup>20</sup> This is probably due to a certain private law fundamentalist approach, failing to take into account that as a minimum public fiscal interests are involved in contracting by public authorities. These interests may as well benefit from the protection afforded by giving standing to watchful competitors. Italy may provide for an interesting instance. Somewhat independently from the remedies directives but anyway because of the influence of what was then EEC law, courts started to relax standing rules from the moment they accepted that even when choosing to award a contract directly, public authorities were not using their private law capacity. In all such cases contracting authorities were making a choice ruled – and limited – by the general principles of public law, such as non-discrimination and equal opportunities for all bidders.<sup>21</sup>

Another question is the standing of those benefiting from the challenged procurement decision to oppose judicial action. This seems to be an issue only in Romania, and should be solved for the positive under the ECHR.<sup>22</sup>

#### 4. The ‘Old’ Remedies.

Directive 89/665/EEC required Member States to afford disaffected competitors three basic remedies, that is interim relief, annulment and damages. These are still very much relevant today. Directive 89/665/EEC however did not go very far in detailing the conditions for granting the remedy awarded. The potential for divergence at national level was therefore – and still is – quite relevant.

##### 4.1. Interim Measures.

Interim measures are measures taken to avoid having the consequences of the lamented breach consolidated during the time necessary to courts in order to come at a final decision. In public procurement, these are mainly measures aimed at suspending the procedure pending judicial action, and especially so to avoid the contract being concluded, making effective judicial review more difficult (but not impossible, as it will be shown).<sup>23</sup> In France, however, the *référé* judge has much wider powers, including giving directions to the contracting authority and deleting clauses which infringe the applicable legal requirements.

The conditions for granting interim relief are more or less the same all over Europe. In the substance, they are the same applying in procedures in front of EU Courts.<sup>24</sup> Firstly, if the remedy is not provided, the claimant might suffer an irrecoverable loss. A variation of this condition – at times seen as an autonomous one – focuses not just on the claimant position, but on the interests of all parties involved, the general interests served by the contract at stake included therein. Secondly, the claimant must show a strong *prima facie* case.<sup>25</sup>

<sup>20</sup>See J. Germain ‘Les recours juridictionnels ouverts au concurrent évincé’ above fn 19, 53.

<sup>21</sup>Const. St., Sez. V, 22 marzo 1995, n. 454, in *Giur. it.*, 1996, III, 1, 34, note C. Viviani.

<sup>22</sup>D.C. Dragoș, B. Neamțu and R. Velișcu ‘Remedies in Public Procurement in Romania’ § 5.

<sup>23</sup>S. Treumer ‘Enforcement (EU)’ § 3.1.

<sup>24</sup>S. Treumer ‘Enforcement (EU)’, § 2 ; on those rules see P. Trepte *Public Procurement in the EU* above fn 17, 588 ff.

<sup>25</sup>E.g. concerning Denmark, S. Treumer ‘Enforcement’ (Denmark), § 2.2; see also on Germany M. Burgi ‘Enforcement of EU Public Procurement Rules’ § II.2.b.



These conditions strengthen the discretion of national courts rather than limiting it.<sup>26</sup> Unsurprisingly, the chances of being granted an interim measures vary very much from jurisdiction to jurisdiction. Basically, on the one hand there is the risk of halting the conclusion of contracts which may answer very relevant general interests. This is a widespread concern in many jurisdictions and very much so in Romania, the necessity to comply with the deadlines for spending grants from the EU structural funds being one of the reasons for this<sup>27</sup> On the other hand, if no interim measure is taken, the contracting authority risk ending paying twice, once to the contractor and the other to a successful claimant for damages. The picture presented by different jurisdictions is therefore quite a varied one. Italy is possibly the only country where courts are quite generous in granting interim measures.<sup>28</sup> This is so very much so that the Parliament tried to limit the courts' power in case of contracts for major infrastructure projects.<sup>29</sup> This peculiar attitude may be explained with a marked judicial preference for those which in Germany are called primary remedies to the detriment of damages actions.<sup>30</sup> French courts are reluctant at holding that the (mainly economic) interests of the claimant might be harmed beyond remedy if no interim relief were granted.<sup>31</sup> Danish courts too are very prudish about granting interim relief (one possible reason being the theoretical availability of a remedy in damages for the successful claimant).<sup>32</sup> Finally, in Germany the position of the best bidder is specifically protected through the grant of a right to demand the preliminary award of the contract.<sup>33</sup>

#### 4.2. Annulment and Beyond

The fact that the remedies directives stopped well short of full harmonisation is nowhere more evident than when we consider the standard of review against which the compliance to substantive procurement rules is assessed.

Art. 2(1)(b) of Directive 89/665/EEC was not affected by Directive 2007/66/EEC. It provides that review bodies must be given the power "either set aside or ensure the setting aside of decisions taken unlawfully". The grounds of illegality are not really clarified. The only specification found in Art. 2(1)(b) is that "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" must be removed. This implies that discriminatory specifications are illegal, but of course a number of quite different illegal decisions may be envisaged. Suffice it to think of recourse to a negotiated procedure outside the situations for which this is allowed<sup>34</sup> or of the exclusion of what appears to be an abnormally low offer without providing the opportunity for explaining the problem away.<sup>35</sup>

It is of course clear that direct award outside the exceptional cases where it is allowed is among the gravest breaches of EU law.<sup>36</sup> However in the main the remedies directives

<sup>26</sup>See D.C. Dragoş, B. Neamţu and R. Velişcu 'Remedies in Public Procurement in Romania' § 8.

<sup>27</sup>D.C. Dragoş, B. Neamţu and R. Velişcu 'Remedies in Public Procurement in Romania' § 8.

<sup>28</sup>See M. Comba 'Enforcement of EU Procurement Rules' § 3.

<sup>29</sup>This was clearly inconsistent with EU law and was rectified in the recently enacted Code of administrative judicial procedure: see R. Caranta 'Le contentieux des contrats publics en Italie' in *Rev. fr. Dr. Adm.* 2011, 57, and V. Parisio, F. Gambato Spisani and G. Pagliari 'I riti speciali' in R. Caranta (dir.) *Il nuovo processo amministrativo* (Torino, Zanichelli, 2011) 724 ff.

<sup>30</sup>R. Caranta *Le controversie risarcitorie* in R. Caranta (dir.) *Il nuovo processo amministrativo*, above fn 62, 635 ff.

<sup>31</sup>F. Lichère and N. Gabayet 'Enforcement of EU Public Procurement Rules in France' § 2.II.2.1.

<sup>32</sup>S. Treumer 'Enforcement (Denmark)', §§ 2.2. and 8; a similar consideration may play in the UK.

<sup>33</sup>M. Burgi 'Enforcement of EU Public Procurement Rules' § II.2.a.

<sup>34</sup>Among the many cases which could be quoted here see Case C-157/06 *Commission v Italy* [2008] ECR I-7313.

<sup>35</sup>Joined Cases C-147/06 and C-148/06 *SECAP and Santorso* [2008] ECR I-3565.

<sup>36</sup>Case C-26/03 *Stadt Halle* [2005] ECR I-1, paragraph 37.



are mostly silent as to the grounds of review. This opens the door to the question of which breaches are relevant.<sup>37</sup> The question is inescapably linked to the margin of unreviewable and unreviewed discretion – or margin of appreciation – left to contracting authorities.<sup>38</sup> A few instances may clarify the problem. Some breaches are just patent and reviewing them does not mean to go very deep into the choices made by the contracting authority. This is the case with direct awards when this is not allowed by EU law. These cases might imply difficult questions of interpretation as for instance as to the limits of in-house under EU law.<sup>39</sup> They however can be fully reviewed by courts, all questions focusing on the interpretation of legal provisions. Other cases, such as whether a bidder qualifies for a given contract, what weight to give to award criteria, how to rank different bids against non-quantitative award criteria, or whether a given bid is abnormally low may involve wide margins of appreciation. Whether and to what extent the latter decisions are reviewed very much depends on choices made at national level.<sup>40</sup>

The Member States have applied to procurement review the same national standards they apply to judicial review generally. This means that a great variety of approaches are to be found.<sup>41</sup> French courts are used to give a hard look to procurement decisions, and in principle they will look into possible violations to any and every procurement rule.<sup>42</sup> Italian courts are quite keen on easy to detect formal breaches, and while showing some deference to the margin of appreciation of contracting authorities, can go as far as to check the proportionality of admission criteria.<sup>43</sup> In Germany too, while a number of cases concern illegal direct awards, different breaches might be reviewed, for instance the wrong decision to use a negotiated procedure rather than a more competitive procedure.<sup>44</sup> In Romania the hard look by the National Council for Solving Legal Disputes – an independent quasi-judicial body competent to hear procurement cases at first instance – may be contrasted with the more deferential stance taken by the courts.<sup>45</sup> Review is quite limited and peripheral in the UK, with courts focusing on major formal violations.<sup>46</sup> Somewhat in the middle, the Danish Complaints Board, has shown a certain deference towards the margin of appreciation granted to contracting authority, often focusing on illegal technical dialogue prior to the submission of bids and more recently on the legality of the award criteria chosen by the contracting authority.<sup>47</sup>

Concerning the effects of a finding of illegality, they are at times limited in the UK and in Denmark, where it is not unusual for a complainant to ask for a declaratory judgment of illegality instead of outright annulment with a view for a future action for damages and a possible settlement out of court.

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<sup>37</sup>A number of instances are listed by P. Trepte *Public Procurement in the EU* above fn, 556.

<sup>38</sup>The issues around the definition of discretion and margin of appreciation are quite numerous and complicated: see R. Caranta 'On Discretion' in S. Prechal and B. van Roermund (eds.), *The Coherence of EU Law. The Search for Unity in Divergent Concepts* (Oxford, Oxford University Press, 2008) 185, and a number of articles in the same collection.

<sup>39</sup>See M. Comba and S. Treumer (eds.) *The In-House Providing in European Law* (Copenhagen, DJØF, 2010).

<sup>40</sup>See below § 8.

<sup>41</sup>Because traditions of judicial review vary a lot: see the papers in R. Caranta and A. Gerbrandy (eds.) *Tradition and Change in Administrative Law* (Groningen, Europa Law Publishing, 2011), and in O. Essens, A. Gerbrandy and S. Lavrijssen (eds.) *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Groningen, Europa Law Publishing, 2009).

<sup>42</sup>See the very articulated list provided by F. Lichère and N. Gabayet 'Enforcement of EU Public Procurement Rules in France' § 4.

<sup>43</sup>See M. Comba 'Enforcement of EU Procurement Rules' § 4, and R. Caranta 'Le contentieux des contrats publics en Italie' above fn 62, 58.

<sup>44</sup>M. Burgi 'Enforcement of EU Public Procurement Rules' § 1.4.; see also § 4.

<sup>45</sup>See D.C. Dragoș, B. Neamțu and R. Velișcu 'Remedies in Public Procurement in Romania' § 6, listing the potential grounds for review and listing some statistics as to success rate of the claims.

<sup>46</sup>M. Trybus 'An Overview of the UK' § 4.

<sup>47</sup>S. Treumer 'Enforcement (Denmark)', § 3.



Conforming to a tradition of strong judicial intervention, German courts may instead go well beyond annulment (or, seen otherwise, they can remedy the breach by substituting the illegal decisions rather than quashing them). To a point they can direct the activity of the contracting authority following a finding of illegality so that it complies with the procurement rules, the limit being that courts cannot choose the best bid.<sup>48</sup> At the same time, a deeply rooted respect for the sanctity of contract stops German courts from annulling contract award decision, which could be seen as an infringement of EU law.<sup>49</sup> In Romania the National Council for Solving Legal Disputes can request the contracting authority to issue an act, or it can adopt any other necessary measure for remedies illegal decisions taken by the contracting authority short of awarding the contract itself.<sup>50</sup>

### 4.3. Damages

The provisions on damages have not been directly interested by the amendments brought about by Directive 2007/66/EC. Under Art. 2(1)(c) Member States are asked to empower review bodies to “award damages to persons harmed by an infringement”. Here too harmonisation is very ‘light’ and lot of uncertainty remains as to what is required from Member States.<sup>51</sup>

This has led to divergent solutions in different Member States.<sup>52</sup> A big issue is causation.<sup>53</sup> The more liberal solution, followed in France and albeit more timidly in Italy, place on the plaintiff the burden to show it had some – or serious – chances to win the contract if the procurement rules had been complied with.<sup>54</sup> The French system is indeed the more advanced. If the claimant can show that he had at least a chance to be awarded the contract, he will recover the costs shouldered for taking part into the procedure. If he can prove he has a serious chance of being awarded the contract, the lost profit will be compensated. Other jurisdiction are showing signs of gradually shifting to a middle ground. In the UK courts have applied the loss of chance theory to procurement cases, a lighter standard than the balance of probabilities normally applied to tort claims. Even the loss of chance standards however does not help much in case no tender was submitted.<sup>55</sup> A few recent cases in Denmark testify to an attempt by the Complaints Board to lessen or even reverse the burden of proof on causation issues, while other cases are more on the line of a traditional strict approach.<sup>56</sup>

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<sup>48</sup>See the discussion by M. Burgi ‘Enforcement of EU Public Procurement Rules’ § IV and V; similar powers are enjoyed by *référé* judges in France: F. Lichère and N. Gabayet ‘Enforcement of EU Public Procurement Rules in France’ § 2.1.1.3.

<sup>49</sup>See the discussion and the negative reply to the question by M. Burgi ‘Enforcement of EU Public Procurement Rules’ § V; apparently infringement is avoided by serving a pre-award notice after the decision as to the best bid has been taken; in other jurisdictions the same would be considered an award notice (see *ibidem* § VI.2), and of course by allowing ineffectiveness when EU law so mandates. The all construction could be seen as a contortion to square the circle between pre-existing dogmatic construction and the need to comply with EU law.

<sup>50</sup>D.C. Dragoş, B. Neamţu and R. Velişcu ‘Remedies in Public Procurement in Romania’ § 2.1.2.

<sup>51</sup>S. Treumer ‘Enforcement (EU)’, § 3.5.; M. Burgi ‘Enforcement of EU Public Procurement Rules’ § VII; see also P. Trepte Public Procurement in the EU above fn 17, 558.

<sup>52</sup>The topic is now thoroughly investigated by the papers collected in D. Fairgrieve and F. Lichère (eds) ‘Public Procurement Law. Damages as an Effective Remedy’ above fn 95.

<sup>53</sup>See R. Caranta ‘Damages for Breaches of EU Public Procurement Law: Issues of Causation and Recoverable Losses’ in D. Fairgrieve and F. Lichère (eds) ‘Public Procurement Law’ above fn 95; see also, distinguishing different procurement situations affecting the availability of a redress in damages, C. Bovis EC Public Procurement above fn 17, 87 ff.

<sup>54</sup>F. Lichère and N. Gabayet ‘Enforcement of EU Public Procurement Rules in France’ § 7; see also the discussion in Germany as analysed by M. Burgi ‘Enforcement of EU Public Procurement Rules’ § VII.1; see also S. Ponzio ‘State Liability in the Field of Public Procurement. The Case of Italy’ above fn.

<sup>55</sup>M. Trybus ‘An Overview of the UK’ § 8.1.

<sup>56</sup>For references S. Treumer ‘Enforcement (Denmark)’ § 7.





Another question focuses on the recoverable losses.<sup>57</sup> A few jurisdictions are ready to award lost profits, again maybe following a chance-based approach.<sup>58</sup> Other would award either costs for participating in the procedure or lost profits. A few would also consider damages to the professional standing of the firm which was affected by the unlawful management of the procurement procedure (loss of future business chances).<sup>59</sup>

## 5. The ‘New’ Remedies

### 5.1. Standstill

Under Art. 2(a) of Directive 89/665/EEC, as added by Directive 2007/66/EC, contracts cannot be concluded before a set period running from the date a notice of the award decision was served to concerned bidders. The provision codifies the case law of the Court of justice, according to which “Complete legal protection also requires that it be possible for the unsuccessful tenderer to examine in sufficient time the validity of the award decision. Given the requirement that the Directive have practical effect, a reasonable period must elapse between the time when the award decision is communicated to unsuccessful tenderers and the conclusion of the contract in order, in particular, to allow an application to be made for interim measures prior to the conclusion of the contract”.<sup>60</sup>

The standstill period foreseen by Directive 2007/66/EC is quite short (minimum 10 or 15 days, depending on the communication mean used). In the main, the Member States have stuck to the minimum periods,<sup>61</sup> but Italy has opted for a longer period, thereby making sure that the standstill expires after the expiring of the term to bring judicial review.<sup>62</sup>

The Member States have taken notice that the standstill letter must provide unsuccessful bidders with the reasons for the award decision.<sup>63</sup> The problem is still that of the level of detail required. German law is very protective of the bidders, providing that all the reasons for the decision have to be disclosed.<sup>64</sup> French law less so.<sup>65</sup> In Romania, the simple incompleteness of the notices will normally not lead to ineffectiveness.<sup>66</sup>

### 5.2. Ineffectiveness

Ineffectiveness is one of the big new remedies introduced by Directive 2007/66/EC. The novelty was anticipated by a well known case arising from a breach of Directive 92/50/EEC which was protracted even after a first infringement decision by the Court of justice.

Directive 2007/66/EC can be seen a codification of the case law. The directive lays down quite precise conditions for the standstill. Art. 2(d)(1) and 2(e)(1) list different cases in which contracts are to be considered ineffective. In a nutshell, they are direct illegal

<sup>57</sup>See R. Caranta ‘Damages for Breaches of EU Public Procurement Law’ above fn.

<sup>58</sup>See M. Burgi ‘Enforcement of EU Public Procurement Rules’ § VII.1.

<sup>59</sup>, this is excluded in Germany: M. Burgi ‘Enforcement of EU Public Procurement Rules’ § VII.1., and in Romania D.C. Dragoș, B. Neamțu and R. Velișcu ‘Remedies in Public Procurement in Romania’ § 13.

<sup>60</sup>Case C-212/02, Commission v Austria, paragraph 23.

<sup>61</sup>E.g. on Germany see M. Burgi ‘Enforcement of EU Public Procurement Rules’ §§ III.3. and VI.2.; this is the case also in France, even if apparently a one day longer term could be read in the law: see the discussion by F. Lichère and N. Gabayet ‘Enforcement of EU Public Procurement Rules in France’ § 3.

<sup>62</sup>M. Comba ‘Enforcement of EU Procurement Rules: the Italian system of remedies’ §§ 1 and 2.

<sup>63</sup>E.g. M. Trybus ‘An Overview of the UK’ § 3.

<sup>64</sup>See M. Burgi ‘Enforcement of EU Public Procurement Rules’ § VI.

<sup>65</sup>F. Lichère and N. Gabayet ‘Enforcement of EU Public Procurement Rules in France’ § 3.

<sup>66</sup>D.C. Dragoș, B. Neamțu and R. Velișcu ‘Remedies in Public Procurement in Romania’ § 11.



award, breach of the standstill period, derogation from the standstill period for contracts based on a framework agreement and a dynamic purchasing system.<sup>67</sup>

The judgement against Germany and the adoption of Directive 2007/66/EC have induced courts in Italy, France, and, albeit not without some wavering, Denmark to evolve their case law and allow annulment judgments to affect the contract concluded in the meantime, at times under more generous conditions than the ones laid down in the Directive.<sup>68</sup>

Other jurisdictions, and particularly those such as Germany and the UK which tended to follow the private law paradigm, were less ready – and less enthusiast – at what was a real novelty going against the sanctity of contract.<sup>69</sup>

Most Member States had been happy to limit the possible cases of ineffectiveness to those listed by Directive 2007/66/EC. In the pursuit of accrued effectiveness of judicial protection, Romania has added a few more instances, tellingly including the case of breaches of the rules against conflict of interests in the award procedure.<sup>70</sup> In Italy administrative courts might be seen as having a quite general power to declare ineffective a contract concluded in breach of award procedure rules.<sup>71</sup>

The directive allows Member States to choose whether the ineffectiveness operates retroactively or for the future only, and this both accommodates potential different approaches and leads to legal taxonomy discussions at national level.<sup>72</sup> Unsurprisingly given the novelty of the remedy, a number of Member States rather preferred to limit ineffectiveness to the proactive effects, even if this impacts the effectiveness of the remedy (the so called ‘ineffectiveness light’).<sup>73</sup> In Denmark non-retroactive effects are the rule,<sup>74</sup> and the same is the case in the UK.<sup>75</sup> In other jurisdictions, however, ineffectiveness operates retroactively. This is the case for instance in France, Romania, and in Germany.<sup>76</sup>

In most Member States where ineffectiveness may be declared only if it is sought by the claimant,<sup>77</sup> but in Italy it is up to the courts to decide the remedy provided (or at least claimants are strongly pushed to ask for ineffectiveness).<sup>78</sup>

If a contract whose performance already started is declared to be retroactively ineffective a problem of restitution might arise.<sup>79</sup> This will either be solved under private law rules or, as is the case in France, through the application of specific public law rules on unjust enrichment.<sup>80</sup>

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<sup>67</sup>See S. Treumer ‘Enforcement (EU)’ § 3.4. ; on the specific issues concerning framework agreements see G.M. Racca ‘Derogations from the standstill period’ § 2.

<sup>68</sup>See S. Treumer ‘Enforcement (EU)’ §§ 4; M. Comba ‘Enforcement of EU Procurement Rules’ § 6; F. Lichère and N. Gabayet ‘Enforcement of EU Public Procurement Rules in France’ § 6.1., and 5.2., and S. Treumer ‘Enforcement (Denmark)’, § 6.

<sup>69</sup>See M. Trybus ‘An Overview of the UK’ § 1.1., and, referring to the ‘immunity of the concluded contract’ M. Burgi ‘Enforcement of EU Public Procurement Rules’ § IV.

<sup>70</sup>D.C. Dragoş, B. Neamtu and R. Velişcu ‘Remedies in Public Procurement in Romania’ § 12.

<sup>71</sup>M. Comba ‘Enforcement of EU Procurement Rules’ § 6, and R. Caranta ‘Le contentieux des contrats publics en Italie’ in *Rev. fr. Dr. Adm.* 2011, 58.

<sup>72</sup>E.g. D.C. Dragoş, B. Neamtu and R. Velişcu ‘Remedies in Public Procurement in Romania’ § 11.

<sup>73</sup>M. Trybus ‘An Overview of the UK’ § 6.

<sup>74</sup>S. Treumer ‘Enforcement (EU)’ § 5.2.

<sup>75</sup>M. Trybus ‘An Overview of the UK’ § 6.

<sup>76</sup>F. Lichère and N. Gabayet ‘Enforcement of EU Public Procurement Rules in France’ § 6.1.; D.C. Dragoş, B. Neamtu and R. Velişcu ‘Remedies in Public Procurement in Romania’ § 12, and M. Burgi ‘Enforcement of EU Public Procurement Rules’ § VI.3.b.

<sup>77</sup>See for Germany M. Burgi ‘Enforcement of EU Public Procurement Rules’ § VI.3.a.; the same is apparently the case in the UK M. Trybus ‘An Overview of the UK’ § 7

<sup>78</sup>M. Comba ‘Enforcement of EU Procurement Rules’ § 6; this is again due to a strong preference of the administrative courts case law for primary remedies.

<sup>79</sup>M. Burgi ‘Enforcement of EU Public Procurement Rules’ § VI.3.a.; the situation in France is more nuanced, the retroactive or proactive effects of remedies affecting concluded contracts depending on different remedies: F. Lichère and N. Gabayet ‘Enforcement of EU Public Procurement Rules in France’ §§ 6.I. and 6.II.

<sup>80</sup>F. Lichère and N. Gabayet ‘Enforcement of EU Public Procurement Rules in France’ § 7.III



### 5.3. Alternative Penalties

Directive 89/665/EEC as amended by Directive 2007/66/EC provides for alternative penalties in cases where in principle ineffectiveness should be declared, but either it is not or it is limited. These are for instance the case of overriding reasons relating to a general interest (Art. 2d(3)), and the case ineffectiveness was declared *pro futuro* only (Art. 2d(2)).

It is up to the Member States to provide for detailed rules and parameters to calculate the penalties as well as naming the payee institution.<sup>81</sup> Concerning the first profile, the Member States have provided for penalties which may exceed one million Euros.<sup>82</sup>

The remedies provisions in the Directive convey the impression that alternative penalties should be an exception in cases when ineffectiveness should be pronounced. A number of jurisdictions such as the UK and Denmark, where the sanctity of contract is more deeply rooted, seems however ready to develop a marked preference for alternative penalties.<sup>83</sup>

## 6. Of some Miscellaneous Matters Affecting the Effectiveness of Judicial Review

Going beyond the remedies available, a number of other issues affect the effectiveness of review of public procurement decisions. In principle, as was already remarked with reference to the choice of the competent jurisdiction, they might fall under the residual procedural autonomy of Member States.

Costs of procedure and legal expenses are quite a relevant issue affecting the effectiveness of remedies. In case they are high, such as in England, they contribute to discourage litigation.<sup>84</sup> The same effect is played by rules providing for penalties in case actions brought against award decisions are rejected.<sup>85</sup> When on the contrary costs and/or expenses are low, possibly because, as it is now the case in Denmark, the contracting authority cannot recover its costs in front of the Complaints Board even if it wins the case,<sup>86</sup> competitors are prodded to challenge unfavorable decisions.<sup>87</sup>

Another aspect is the possible recourse to non- or quasi-judicial bodies as a first stop shop for redressing breaches to procurement rules. On implementing of Directive 2007/66/EC a few Member States have thought it fit to make compulsory recourse to these bodies.<sup>88</sup> This is so in Romania with the National Council for Solving Legal Disputes.<sup>89</sup> This has also been the case in Denmark, where affected bidders must seize the Complaint

<sup>81</sup>Which in case a State contracting authority has committed the breach ends up being nothing else the another branch of the same State: F. Lichère and N. Gabayet 'Enforcement of EU Public Procurement Rules in France' § 6.II.

<sup>82</sup>E.g. S. Treumer 'Enforcement (Denmark)' § 6; see also D.C. Dragoş, B. Neamţu and R. Velişcu 'Remedies in Public Procurement in Romania' § 12.

<sup>83</sup>S. Treumer 'Enforcement (EU)' § 3.6., and S. Treumer 'Enforcement (Denmark)' § 6; the same will be probably the case in the UK M. Trybus 'An Overview of the UK' § 6.

<sup>84</sup>M. Trybus 'An Overview of the UK' § 11; consider also the effects played by recent changes affecting costs in Romania in the light of the data provided by D.C. Dragoş, B. Neamţu and R. Velişcu 'Remedies in Public Procurement in Romania' § 7; the situation may be similar in Italy: M. Comba 'Enforcement of EU Procurement Rules' § 1; the cost factor seems to be less relevant in Germany: see M. Burgi 'Enforcement of EU Public Procurement Rules' § 1.3.c.

<sup>85</sup>This was the intent behind some rules recently passed in Romania whose consistency with both EU and domestic constitutional law may be questioned: D.C. Dragoş, B. Neamţu and R. Velişcu 'Remedies in Public Procurement in Romania' § 2.2.

<sup>86</sup>S. Treumer 'Enforcement (Denmark)' § 1; rather unsurprisingly, the Danish government is minded to change the situation.

<sup>87</sup>F. Lichère and N. Gabayet 'Enforcement of EU Public Procurement Rules in France' § 1.

<sup>88</sup>Italian legislation instead opted for excluding an alternative remedy to judicial review: M. Comba 'Enforcement of EU Procurement Rules' § 1.

<sup>89</sup>D.C. Dragoş, B. Neamţu and R. Velişcu 'Remedies in Public Procurement in Romania' § 2.1.



Board for Public Procurement, whose competencies have been expanding to include the power to award damages and whose decisions might then be appealed with ordinary courts.<sup>90</sup> The situation is similar in Germany, but the jurisdiction of the review chambers normally working within the Federal Cartel Office is limited to the primary protection (therefore excluding the award of damages).<sup>91</sup>

Generally speaking, these boards are seen as an efficient solution, combining speed, lower costs, and expertise.<sup>92</sup> It is fair to say that a good deal of the former and more of the latter are also provided by administrative courts in countries like France and Italy, where special procedural devices are used, such as giving competence to one judge instead than to a panel the power to decide on *référé* actions,<sup>93</sup> or providing for accelerated decision-making procedures.<sup>94</sup>

## 7. The Gaping Black Hole: Which Standard for Review?

As already remarked, a major point of divergence between different national enforcement standards is to be found in the standard of review applied to procurement cases. Harmonisation is here partial to say the least, and each Member States naturally follows its own traditions and inclinations. Which are quite different.<sup>95</sup>

If any guidance is to be drawn by the case law from EU courts when reviewing procurement decisions by EU institutions, it points in the direction that marginal review is fine.<sup>96</sup> Here it is sufficient to recall the *Renco* case.<sup>97</sup> The Court very much emphasised the difficulties of the procurement, but it was just a somewhat complex contractual arrangement, as complex as many procurements are.<sup>98</sup>

The same hands off claim may be made on the basis of the case law on effective judicial protection. The Court of justice has been quite reserved here.<sup>99</sup> In *Upjohn* the Court concluded that “Community law does not require the Member States to establish a procedure for judicial review of national decisions revoking marketing authorisations, taken [...] in the exercise of complex assessments, which involves a more extensive review than that carried out by the Court in similar cases”.<sup>100</sup> The same principle has been reaffirmed recently, even if it was somewhat qualified by stressing the need for the

<sup>90</sup>See S. Treumer ‘Enforcement (Denmark)’ §§ 1, 5.2. and 7.

<sup>91</sup>M. Burgi ‘Enforcement of EU Public Procurement Rules’ § 1.3.a.

<sup>92</sup>S. Treumer ‘Enforcement (EU)’ § 12 ; a degree of informality might be an additional bonus: see D.C. Dragoş, B. Neamţu and R. Velişcu ‘Remedies in Public Procurement in Romania’ § 2.1.

<sup>93</sup>F. Lichère and N. Gabayet ‘Enforcement of EU Public Procurement Rules in France’ § 2.

<sup>94</sup>V. Parisio, F. Gambato Spisani and G. Pagliari ‘I riti speciali’ above fn 62, 698 ff.

<sup>95</sup>See, with reference to another topic, the works collected by O. Essens, A. Gerbrandy and S. Lavrijssen (eds.) *National Courts and the Standard of Review in Competition Law and Economic Regulation* above fn 87.

<sup>96</sup>See for more references S. Treumer ‘Enforcement (EU)’ § 3.3.

<sup>97</sup>Case T-4/01 *Renco* [2003] ECR II-171.

<sup>98</sup>Para 64: “First, the contract was to be awarded not to the tender with the lowest price but to the most economically advantageous tender, which necessitates the application of various criteria which vary according to the contract in question (see, in particular, paragraph 65 below). Secondly, the procedure was to lead to the conclusion of a framework agreement for a term of five years renewable for 12-month periods. Thirdly, the contract was mixed and consisted of three different types of work for which the methods of determining the price varied. Furthermore, part B of the contract consisted of a large number of jobs to be defined and remunerated only during the execution of the contract. In the light of the specific characteristics of the contract in question, the comparative assessment of the tenders which the Council had to carry out necessarily meant that it not only had to check the accuracy and reliability of the unit prices given in the tenders but also had to estimate the total cost of the types of job covered by the contract over a five-year period on the basis of the contract terms and the prices stated in the tenders”.

<sup>99</sup>Case C-120/97 *Upjohn* [1999] ECR I-223, paragraph 34.

<sup>100</sup>Paragraph 35.



competent authority to “to examine carefully and impartially all the relevant aspects of the individual case”<sup>101</sup>.

This line of cases points to the facts that national courts could hardly be asked to be tougher than EU courts when reviewing procurement decisions. It goes without saying that that the EU case law could very well evolve. In the field of review of competition measures the EU courts seem to have ditched marginal review for good in the well-known *Tetra Laval* case.<sup>102</sup>

If this were so, the requirements of effective judicial protection could be strengthened. In the meantime, it is submitted that the different degree of deference shown to procurement decisions by national courts goes a long way in showing the diverging litigation patterns observed in Member States. Otherwise said, it is not due to a chance that procurement are litigated a lot in countries like France and Italy and very less so in the UK (even if litigation is on the increase there).<sup>103</sup>

## 8. The Dance of Remedies

Other elements contribute into explaining the different litigation pattern. Directives 89/665/EEC and 92/13/EEC as amended by Directive 2007/66/EC provide for a rich panoply of remedies. The new directive added standstill, ineffectiveness and alternative sanctions to interim relief, annulment and damages.

The ways these remedies interact depend on many different considerations. Both Directive 2007/66/EC and the judgements by the Court of justice against Germany points out at the importance of remedying the breach in kind, by either not having the contract concluded or by having it declared ineffective. In this perspective, the logical sequence would be standstill, interim relief and annulment of the award decision and/or of the decisions taken during the award procedure (e.g. the notice, the decision to exclude one bidder or an abnormally low offer, and so on). While standstill is automatic, being directly provided by the law, interim relief is to be crucial if conclusion of the contract is to be avoided in the first place.<sup>104</sup>

Ineffectiveness should be resorted to if the above sequence is for some reason insufficient to remedy the breach of procurement rule (e.g. because the standstill period was not complied with, or because interim relief was not granted). Alternative sanctions and damages should be the last resort option.<sup>105</sup> Ineffectiveness could lead to damages claims from the disenfranchised private contractor.<sup>106</sup>

Reasons for following this logic would be many. A few have been mentioned in the national reports: successful damage claims are rare,<sup>107</sup> and this is especially so for the

<sup>101</sup>Joined Cases C-379/08 and C-380/08 *ERG and Others* [2010] ECR I-0000, paragraph 60.

<sup>102</sup>Case C-12/03 P *Commission v Tetra Laval BV* [2005] ECR I-987, affirming Case T-5/02 *Tetra Laval BV* [2002] ECR II-4381; see the discussion by see the discussion by A. Gerbrandy, S. Lavrijssen and O. Essens ‘European and National Standards of Review’ in O. Essens, A. Gerbrandy and S. Lavrijssen (eds.) *National Courts and the Standard of Review* above fn 87, 269 ff.

<sup>103</sup>Of course, other factor may contribute to the picture: see M. Trybus ‘An Overview of the UK’ §§ 1and 11, and M. Burgi ‘Enforcement of EU Public Procurement Rules’ § 1.3.c.

<sup>104</sup>S. Treumer ‘Enforcement (EU)’ § 3.1.

<sup>105</sup>This seems to be the case for damages in Romania: D.C. Dragoş, B. Neamtu and R. Velişcu ‘Remedies in Public Procurement in Romania’ §§ 14 and (also referring to suspension) 16.

<sup>106</sup>S. Treumer ‘Enforcement (EU)’ § 3.5.2.

<sup>107</sup>This might be the case also in France, where courts are more ready to award damages for illegal award than in other jurisdictions F. Lichère and N. Gabayet ‘Enforcement of EU Public Procurement Rules in France’ § 8.III.2.3.



gravest violations, such as direct awards.<sup>108</sup> Bidders do prefer to be awarded the contract rather than damages because the former is better for their business.<sup>109</sup>

It is however easy to list countervailing arguments, the main being that the contracting authority might use its margins of appreciation to avoid awarding the contract to the firm having seized the courts and that anyway in many cases it will just be impossible to conclude anew the procedure challenged. The delays brought about by judicial review will indeed often make the original technical specifications and the tenders submitted outdated if no more realistic considering the market conditions.

Add to this that, as it is the case in both the UK and in Denmark, some courts are still very restive to grant interim relief,<sup>110</sup> which adversely impact the time for completing possibly important public projects, and anyway, as in Denmark, the implementing legislation as a rule provides for ineffectiveness having effects for the future only.<sup>111</sup> The costs of the claims may be another consideration.<sup>112</sup> The countervailing considerations may be so strong to that, even after the introduction of a remedy like ineffectiveness, damages actions might be seen growing.<sup>113</sup>

National legislation may try and more or less corral the preferences of complainants. This is especially the case for the relationship between what in Germany are called primary (annulment and ineffectiveness) and secondary remedies (damages).<sup>114</sup> In Italy the recently enacted legislation strongly pushes the successful claimant to ask to be awarded the contract, otherwise severely curtailing his right to damages.<sup>115</sup> The UK stops short of building a hierarchy of remedies, but courts are ready to consider whether annulment or ineffectiveness have restored the chances of the claimant to try and have the contract awarded and thus making groundless a damage action based on the loss of chance theory.<sup>116</sup> The more liberal approach is followed in France through the theory of ‘parallel remedies’. It is up to the complainant to choose which remedies to activate. If some remedies are in a relation of exclusivity, this is only because there are presently so many of them.<sup>117</sup> Even the time limits for bringing an action are differentiated, tort actions having to be lodged in the usual long four years deadline starting from the moment the claimant became aware of the loss.<sup>118</sup>

The rationales for these contrasting approaches have both their relative merits. Making annulment (and now ineffectiveness) a condition precedent to damages means somewhat limiting the risk for the taxpayer to pay both the unduly chosen contractor and the successful claimant for damages.<sup>119</sup> Of course since the parties to ineffective contracts are not easily capable of claiming damages, this rationale loses much of its force.<sup>120</sup> The

<sup>108</sup>S. Treumer ‘Enforcement (EU)’ § 3.4 and more generally 3.5.

<sup>109</sup>M. Burgi ‘Enforcement of EU Public Procurement Rules’ § VII.

<sup>110</sup>M. Trybus ‘An Overview of the UK’ § 2.

<sup>111</sup>S. Treumer ‘Enforcement (EU)’ § 3.1, and works referred in nt 28 therein.

<sup>112</sup>The relevance played by both costs and the availability of interim relief is vividly emerging from 2.

<sup>113</sup>See S. Treumer ‘Enforcement (Denmark)’ § 1, pointing out that now the Complaints Board has been given jurisdiction to award damages and it is ready to compensate even lost profit; as to the effects of ineffectiveness see § 5.2.

<sup>114</sup>See M. Burgi ‘Enforcement of EU Public Procurement Rules’ § I.1.; it is worth remarking that the French too distinguish two kinds of recours, but they don’t establish a hierarchy between them: F. Lichère and N. Gabayet ‘Enforcement of EU Public Procurement Rules in France’ § 7.

<sup>115</sup>M. Comba ‘Enforcement of EU Procurement Rules’ § 8, and R. Caranta ‘Le contentieux des contrats publics en Italie’ in *Rev. fr. Dr. Adm.* 2011, 60 f.

<sup>116</sup>M. Trybus ‘An Overview of the UK’ § 9.

<sup>117</sup>F. Lichère and N. Gabayet ‘Enforcement of EU Public Procurement Rules in France’ § 8.

<sup>118</sup>F. Lichère and N. Gabayet ‘Enforcement of EU Public Procurement Rules in France’ § 7.I.

<sup>119</sup>Unsurprisingly the law-makers may be very sensible to these arguments: see concerning the preparatory work for the Danish legislation S. Treumer ‘Enforcement (Denmark)’ § 9.

<sup>120</sup>See above § 5.3.



parallel remedies approach, besides strengthening the legal protection of claimants allowing them to choose the remedy or combination of remedies they think optimal,<sup>121</sup> reduces the risk of a successful plaintiff getting neither the contract – maybe because the contracting authority in retendering was not too keen in awarding it to the undertaking having challenged its previous choice – nor damages.<sup>122</sup>

## 9. Conclusions

Inevitably given the partial harmonisation brought about by the remedies directives, judicial protection of actual or potential bidders is still differentiated in the Member States.

This is due to a number of reasons, some of which pertain to the path followed when implementing the directives. A relevant one has to do with the different techniques followed. Some Member States, such the UK have been reacting to the remedies directives and to the judgments handed down by the Court of justice by changing the national legislation as less as possible.<sup>123</sup> Of course, the assessment by a Member State of the minimum requirement for correct implementation may or may not be shared by EU institutions including the Court of justice). The latter might be true with Romania, where newly introduced remedies were almost immediately amended trying to bring them in line with EU law.<sup>124</sup> A variation to this approach might be the German one, where the concern not to change too much was focused on the existing dogmatic constructions more than on preserving as much as possible the legal texts already in force at the time of the implementation of Directives 2007/66/EC.<sup>125</sup> In France, on the contrary, EU law remedies have been generously implemented. Only they were piled up onto the existing one, leading to a somewhat complicated picture.<sup>126</sup> By contrast, in Italy the occasion provided by the implementation of the directive has been taken to recast the entire system of remedies for breaches of public contract rules.<sup>127</sup>

A partially different aspect is the scope of application given to the rules taken in implementing the EU directives. This aspect was already discussed. Here it is enough to recall that many Member States such as the UK favor a narrow implementation not going beyond the express requirements of EU law,<sup>128</sup> while others, such as France and Italy don't think it fit to have diverging legal protection systems based on whether the 2004 directives apply or not.

Putting together these differences one does not find the traditional comparative law opposition between civil law and common law. The picture is one of characterised by the divergence between jurisdictions traditionally considering contracts passed by public

<sup>121</sup>M. Burgi 'Enforcement of EU Public Procurement Rules' § VIII; it is worth remarking that in administrative law matters § 839 BGB strongly subordinates secondary protection; however, given the private law characterisation of public contracts in Germany, § 839 BGB plays a very minor role in the liability system (ibidem VII) and is not referred to solve this problem. In general see now Case C-118/08 *Transportes Urbanos y Servicios Generales SAL* [2010] ECR I-; see J. Martín y Pérez de Nanclares 47 [2010] *Common Market L. Rev.* 1861

<sup>122</sup>On the risks of retendering for successful claimants see S. Treumer 'Enforcement (Denmark)' § 8.

<sup>123</sup>Concerning for instance the UK reactions to Case C-406/08 *Uniplex* [2010] ECR I-0000 see M. Trybus 'An Overview of the UK' § 1.4.

<sup>124</sup>D.C. Dragoş, B. Neamţu and R. Velişcu 'Remedies in Public Procurement in Romania' § 1 (recalling how the first implementation instrument left ineffectiveness out).

<sup>125</sup>Just consider the treatment of pre-award notice by M. Burgi 'Enforcement of EU Public Procurement Rules' § VI.2.

<sup>126</sup>F. Lichère and N. Gabayet 'Enforcement of EU Public Procurement Rules in France' § 8.III.2.3.

<sup>127</sup>M. Comba 'Enforcement of EU Procurement Rules' § 1; in turn the specific provisions on public contracts were then made a chapter of the new *Codice del processo amministrativo*: see V. Parisio, F. Gambato Spisani and G. Pagliari 'I riti speciali' above fn 62, 717 ff.

<sup>128</sup>M. Trybus 'An Overview of the UK' § 1.



authorities as one of the partitions of public law, such as France, and jurisdictions classing them under private (or budgetary) law, such as Germany, the UK, and to some extent Denmark. Those Member States in the first group did not need more than a few technical fine-tuning to their legislation and case law to accommodate the new remedies provided by Directive 2007/66/EC. To the other jurisdictions the new remedies – and even some of the old – are rather novel and foreign, and implementation normally does not go beyond what is expressly required by EU law. Italy is somewhat of a touchstone. Traditionally public law ruled the award of the contract but private law ruled its conclusion and performance. Directive 2007/66/EC has strengthened a tendency already present to link more closely award and conclusion under the empire of public law, avoiding a situation where contracts passed in breach of public law are still playing their effects.

Differences in approach are still quite present. However, the quite dramatic original divergences among the Member States – some of which, such as Germany, were not even providing remedies for disaffected competitors – have been considerably reduced. This is not only the result of harmonization. National courts are often looking into the case law of the EU courts to design the conditions under which different remedies are to be granted. This has been the case for instance in Denmark concerning interim relief.<sup>129</sup> Better knowledge of the national case law would probably further contribute towards spontaneous convergence.<sup>130</sup>

At the same time, same basic limits in the harmonization process, coupled with a very hands-off approach to review by EU courts, inevitably hinder convergence. This is notably the case with the grounds for annulment of illegal procurement decisions, both the legislation and the case law being both limited and quite deferential to the choices of contracting authorities. The same can be said as to damages, and of course the two are linked, since illegality is one requisite of liability and self-restraint in finding illegality brings along fewer possibilities to successfully sue in tort.

The overall impression from the comparative law research on remedies in public procurement following implementation of Directive 2007/66/EC is that remedies are strong where they have always been, in France particularly but also in Italy. They remain less ‘effective’ in jurisdictions where they have traditionally been so, such as England and to a certain extent Denmark. It is probably fair to say that the remedies directives (the old and the new ones) have changed the situation for better in some jurisdictions, such as in Germany and – but not without problems – in Romania. One could however even question whether the lamented “certain number of weaknesses in the review mechanisms in the Member States” which prompted the adoption of Directive 2007/66/EC could not have been addressed by strengthening the old remedies – annulment and damages in particular – rather than by introducing new ones.

Be it as it might be, to seek accrued convergence would most probably than not mean going deeper and deeper into the residual procedural autonomy of the Member States. The remedies directives having been revised not long ago, it will fall on the shoulder of the Court of justice to decide for the next future the pace of the evolution – if any – of the remedies for breaches of EU public procurement and concession law.

<sup>129</sup>S. Treumer ‘Enforcement (Denmark)’ § 2.2.

<sup>130</sup>See R. Caranta ‘Pleading for European Comparative Administrative Law’ above fn.