The vigilance of individuals : how, when and why the EU legislates to facilitate the private enforcement of EU law before national courts

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3. Public procurement law

This second part of the study focuses on the selected EU legislation and other relevant developments related to EU legislation on private enforcement. It consists of four chapters, each chapter being dedicated to a particular field of EU law. The present chapter is concerned with the Procurement Remedies Directives relating to EU public procurement law. The first section below introduces these directives by sketching their background and context. The following two sections then focus more in detail on the content of the Procurement Remedies Directives. The remedies set out therein are first outlined and analysed, followed by a discussion of the most important procedural provisions. In the final section attention is paid to other enforcement issues, notably certain alternative mechanisms to ensure compliance and settle disputes as well as the public enforcement mechanisms.

3.1. Introduction

The first subsection below briefly sketches the background of the Procurement Remedies Directives, with particular regard to the 'substantive' EU rules on public procurement.[1] In the following subsection these directives themselves are introduced, particularly by explaining the process leading to their adoption and their objective. Next the 2007 revision of the Procurement Remedies Directives is discussed, together with the 2014 amendment of the EU's substantive public procurement regime. Finally, three additional general remarks are made as regards the broader context in which these directives operate.

3.1.1. Background and substantive law

68. The economic importance of public procurement is significant. Spending by public authorities in the EU on the procurement of works, services and supplies has been estimated to account for around over 18% of EU's

1 The term 'substantive' is used here so as to distinguish the rules in question from the enforcement-related rules laid down in Procurement Remedies Directives 89/665 and 92/13. All public procurement rules are however in a sense inherently procedural, in that they are in essence concerned with the process of selecting an undertaking for the award of a public contract.

accumulated gross domestic product.[2] Traditionally many governments used public procurement, to various degrees and in various manners, to favour domestic undertakings or to achieve certain national policy objectives. This is clearly often difficult to reconcile with the EU's efforts to establish an internal market. Therefore, as from 1971, the EU has stepped in to regulate this field. In that year it adopted a first directive on public work contracts.[3] Over the following decades the EU public procurement regime has been replaced, expanded and updated several times.

69. At present there are two general, *substantive* EU directives on public procurement in force. The first is Directive 2004/18 on public procurement in the so-called 'public' sector ('Public Sector Procurement Directive').[4] This directive covers what could be called 'regular' public contracts awarded by national, regional or local authorities and semi-public entities of the Member States. Typical examples of the types of contracts covered include the construction of a public library, the supply of computers to a municipality or the provision of accounting services to a national ministry.[5] In addition since 1990 the substantive EU public procurement regime has been extended so as to cover also the 'utilities' sectors. To that effect a separate directive has been adopted, which is now Directive 2004/17 ('Utilities Procurement Directive').[6] The latter covers essentially the same sort of contracts as the Public Sector Procurement Directive, but it applies where the contracts are awarded by entities operating in the water, energy, transport and postal services sectors. Since 2009 the two abovementioned directives (collectively: 'Substantive Procurement Directives') are complemented by Directive 2009/81 on public procurement in the fields of defence and security ('Defence Procurement Directive').[7]

The two Substantive Procurement Directives only apply to contracts the estimated value of which exceeds certain threshold values. These thresholds are adjusted at regular intervals and vary somewhat between both directives. At present the thresholds for awards under the Public Sector Procurement Directive stand at approximately € 5 million for public works contracts

2 Commission, Proposal for New Public Sector Procurement Directive 2014/24, COM(2011) 896, p. 2.

3 Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts, OJ 1971, L 185/5.

4 Directive 2004/18/EC concerning the coordination of procedures for the award of public works contracts, public supplies contracts and public service contracts, OJ 2004, L 134/114.

5 Pursuant to Annex II to Public Sector Procurement Directive 2004/18 not all services are fully covered.

6 Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ 2004, L 134/1.

7 Directive 2009/81/EC on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, OJ 2009, L 216/76. On this directive, see further Trybus (2013), p. 3.

and approximately € 130.000 (central government) or € 200.000 (other contracting authorities) for supply and services contracts.[8] In practice this latter directive is often the more important one. It accounts for around 80% of the (published) contract awards, expressed in terms of value.[9]

70. The Substantive Procurement Directives are largely similar in terms of content. As was noted above, they should be understood as part of a broader effort to establish the EU's internal market. They give concrete expression to the 'fundamental freedoms' set out in the EU Treaties, in particular the freedom of establishment and the freedom to provide services relating to the exercise of economic activity in another Member State on a permanent and a temporary basis respectively.[10] Accordingly they have been adopted on the basis of Articles 53, 62 and 114 TFEU. In essence these directives seek to eliminate barriers to the exercise of the said freedoms, ensure the development of effective competition in the award of public contracts and, in so doing, to protect the interests of private parties that wish to offer goods or services to contracting authorities established in another Member State.[11] As such the provisions of these directives are in many cases directly effective and confer rights on the private parties concerned, as they are intended to protect undertakings against arbitrary behaviour on the side of the contracting authority.[12]

The basic idea is that the contracting authorities covered by these directives must publish a notice, containing information on the contract that they intend to award and inviting interested undertakings to submit a bid. The directives further lay down rules for the subsequent contract award procedure, relating *inter alia* to the applicable times periods, the (pre-)selection of tenderers and the criteria to be used for awarding the contract. On the whole the Utilities Procurement Directive tends to leave contracting authorities[13]

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8 Commission Regulation (EU) No 1336/2013 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC in respect of the application thresholds for the procedures for the award of contracts, OJ 2013, L 335/17.

9 Commission, Annual public procurement implementation review 2012, SWD(2012) 342, p. 10.

10 Cf. Drijber & Stergiou (2009), p. 805.

11 CoJ case 31/87, *Beentjes*, para. 21 and 42; CoJ case C-433/93, *Commission v. Germany*, para. 19; CoJ joined cases C-20/01 and C-28/01, *Commission v. Germany*, para. 35; CoJ case C-507/03, *Commission v. Ireland*, para. 27-28.

12 See e.g. CoJ case C-433/93, *Commission v. Germany*, para. 18; CoJ case C-54/96, *Dorsch Consult*, para. 44-45. As noted by Prechal (2005), pp. 110 and 122, this appears to come close to a statement that they confer rights. See also Opinion AG Bot case C-19/13, *Fastweb*, para. 43. See further Fernández Martín (1996), pp. 200-201; Arrowsmith (2005), pp. 161-162 and 1393; Trepte (2007), p. 537; Pijnacker Hordijk, Van der Bend & Van Nouhuys (2009), pp. 20-21. On the relationship between direct effect and the conferral of rights more generally, see para. 31 above.

13 'Contracting authority' is the term used in Public Sector Procurement Directive 2004/18 (Art. 1(9)). Utilities Procurement Directive 2004/17 refers to 'contracting entities' (Art. 2). For practical reasons the former term is used in this study to indicate all bodies covered by the substantive EU procurement rules.

somewhat more flexibility in this respect than its sibling, the Public Sector Remedies Directive.

3.1.2. Procurement Remedies Directives: proposals, adoption and objective

71. Having adopted substantive rules on public procurement at EU level at a relatively early stage, over the years it became clear that *compliance* with these rules left much to be desired. In concrete terms infringements of these rules can take many forms. A public contract can for instance be awarded directly, i.e. without any prior publication and competition, contrary to what is required as a general rule under the Substantive Procurement Directives. Other infringements can consist of the preferential treatment of certain tenderers, for example by providing them with more information, ranking their bids higher without objective justification or the unjustified exclusion of an undertaking from the contract award procedure. The Commission's 1985 white paper on completing the internal market observed that the application of substantive EU law on public procurement was "*minimal*".[14] Moreover it also appeared that the private parties affected by such infringements only sparsely took legal action to remedy the consequences thereof.[15]

72. Therefore in 1987 the Commission published a *proposal* for a directive, which it amended a year later.[16] Here it expanded on the general lack of compliance with the substantive EU public procurement rules. It noted that "*both national and [EU] monitoring arrangements are unable to ensure strict compliance with the [Substantive Procurement Directives], in particular before violation of those rules becomes irreparable*".[17] The Commission also highlighted the particular challenges encountered in a public procurement context. It stated that "*infringements […] generally occur before the definitive award of the contract. Since contract award procedures are of short duration – a decision being taken within a few weeks – any failure to comply with the [EU] rules in question needs to be dealt with urgently and rapidly. Further, most such infringements differ from other types in that the irregularity committed is procedural. A procedural irregularity may be enough to exclude an enterprise from a given award procedure, and this encourages discriminatory practices*".[18] In conclusion it was said that, "*with a view to the optimal functioning of the internal market and in order for the [EU] rules on the award of public contracts to have real impact and change mentalities*", it must be ensured that the private parties concerned have easy

14 Commission, White paper on completing the internal market, COM(85) 310, p. 25.
15 Cf. Study Cleary Gottlieb, Steen & Hamilton (1988).
16 Commission, Proposal for Public Sector Remedies Directive 89/665, COM(87) 134; Commission, Amended proposal for Public Sector Remedies Directive 89/665, COM(88) 733.
17 Commission, Amended proposal for Public Sector Remedies Directive 89/665, COM(88) 733, p. 6.
18 *Ibid.*, p. 7.

access to effective remedies at the national level.[19] To this end the proposed directive aimed to "*ensure minimum coordination and strengthen national procedures by the courts […] so as to ensure that the rules of public contracts are correctly applied*".[20]

This Commission's proposal was not uncontroversial however. In the course of the law-making process it was the object of rather intense and lengthy discussions in Council (which at the time was the sole legislator) and it underwent considerable modifications.[21] Member States objected for instance to the proposed powers for the Commission to intervene directly at national level in cases of alleged infringements of the EU procurement rules, further discussed below.[22] Another controversial issue was the fear that the proposed review procedures might lead to abuses by 'cowboy tenderers' without a meritorious claim.[23]

73. This proposal nonetheless eventually led to the adoption in 1989 of the *Public Sector Remedies Directive*.[24] It applies to contracts in the 'public' sector, as described above.[25] Having adopted a substantive directive relating to the utilities sector in 1990, it was furthermore clear to the Commission that "*[t]he availability of adequate remedies and control procedures is as important in the hitherto 'excluded sectors' as it is in the general field of public procurement*".[26] In that same year it therefore submitted a proposal for a second directive to complement the Public Sector Remedies Directive.[27] After its adoption in 1992 this became the *Utilities Remedies Directive*.[28] The latter covers contracts awarded by entities operating in the water, energy, transport and postal services sectors.

The Utilities Remedies Directive seeks to take account of the particular characteristics of the entities operating in the utilities sectors that it covers.[29] For that reason it contains a number of specific provisions that generally allow for more flexibility, as compared to its sibling, the Public Sector Remedies Directive.[30] The two above directives (collectively: 'Procurement Remedies Directives') are however similar in many respects.[31]

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19 *Ibid*., p. 8.
20 *Ibid*., p. 10.
21 Fernández Martín (1996), p. 206. As regards the legislative history of this directive more generally, see Hebly (2011), pp. 5-262.
22 See para. 104 below.
23 Gormley (1997), p. 157.
24 Public Sector Remedies Directive 89/665.
25 See para. 69 above.
26 Commission, Proposal for Utilities Remedies Directive 92/13, COM(90) 297, p. 8.
27 *Ibid*.
28 Utilities Remedies Directive 92/13.
29 Commission, Proposal for Utilities Remedies Directive 92/13, COM(90) 297, p. 9.
30 The same can be said of the remedies regime set out in Defence Procurement Directive 2009/81.
31 Cf. CoJ case C-455/08, *Commission v. Ireland*, para. 26.

They are therefore treated jointly in this study; they are distinguished only where there is a particular reason for doing so, notably where one of them contains a provision that has not been included in the other directive.[32] Both directives were adopted on the basis of Article 114 TFEU, i.e. the provision of the EU Treaties that allows for the adoption of secondary EU law for the establishment and functioning of the internal market.[33]

74. The Procurement Remedies Directives provide that the existing arrangements at national and EU level for ensuring the "*effective application*" of the Substantive Procurement Directives are "*not always adequate to ensure compliance*", which in turn could deter undertakings from other Member States from participating in contract award procedures.[34] These directives therefore seek to ensure that "*effective and rapid remedies*" are available in case of infringements.[35] As the Court of Justice has clarified, the *objective* of the Procurement Remedies Directives is "*to guarantee the existence of effective remedies for infringements of [EU] law in the field of public procurement or of the national rules implementing that law, so as to ensure the effective application of the [Substantive Procurement Directives]*".[36] At other occasions the Court formulated this objective somewhat differently however, namely "*to ensure that unlawful decisions taken by the contracting authorities may be reviewed effectively and as rapidly as possible*".[37]

3.1.3. Revisions

75. In 2007 the two Procurement Remedies Directives were *substantially revised*, which resulted in their amendment through Directive 2007/66 ('Procurement Remedies Amending Directive').[38] This time the legislative pro-

32 For the same reasons the case law cited in this study, which typically relates to only one of these two directives, is 'generalised', in the sense that it is also understood to relate to the other directive. Where the numbering of the articles is different in these two directives, this is specifically indicated in the footnotes.

33 On Art. 114 TFEU and legal basis generally, see further subsection 10.1.1 below.

34 Recitals 1, 2 and 4 Public Sector Remedies Directive 89/665. See also recitals 1-3 Utilities Remedies Directive 92/13.

35 Recital 3 Public Sector Remedies Directive 89/665. See also recital 6 Utilities Remedies Directive 92/13.

36 CoJ case C-406/08, *Uniplex*, par 26. See e.g. also CoJ case C-392/93, *British Telecom*, para. 26; CoJ case C-314/09, *Stadt Graz*, para. 33, 39 and 43.

37 CoJ case C-455/08, *Commission v. Ireland*, para. 26; CoJ case C444/06, *Commission v. Spain*, para. 44; CoJ case C-100/12, *Fastweb*, para. 25.

38 Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ 2007, L 335/31. On this revision, see further Wilman (2008), p. 115; Bel (2008), p. 106; Golding & Henty (2008), p. 146; Williams (2008), p. NA19.

cess was on the whole relatively swift.[39] This revision generally aimed to "*give greater encouragement to [EU] enterprises to tender in any Member State of the [EU] by providing them with the certainty that they can, if need be, effectively seek effective review if their interests seem to have been adversely affected in procedures for awarding contracts*", with a view to "*prompt[ing] awarding authorities to adopt better publication and tendering procedures for the benefit of all involved*".[40] It follows that the overall objective of the Procurement Remedies Directives remained essentially unchanged after their revision. As was the case when the first of these directives was adopted, the possibility of an increase in 'nuisance actions' was also considered in relation to this revision. The Commission considered this risk to be limited however.[41] The amendments proposed by the Commission as part of this revision were rather narrowly focused. The precise amendments finally adopted are discussed in further detail in the following. Suffice to note here that this amendment essentially sought to address the following two main shortcomings.[42]

The first was the problem of '*illegal direct awards*'. This refers to the situation where a public contract is awarded, contrary to the Substantive Procurement Directives, to an undertaking without any preceding publication and competition having taken place.[43] The Court of Justice had earlier identified this as the most serious type of infringement of EU public procurement law.[44] Such infringements are often difficult to detect, both for the Commission and for a private party that might wish to contest the decision to 'directly' award the contract. After all no publication or other form of transparency has taken place. The second main shortcoming identified was the so-called '*race to signature*'. This refers to the situation where, upon the completion of a contract award procedure, an aggrieved private party has brought or intends bringing a case, for instance challenging the decision to award the contract at issue to a competitor, but the contract is concluded anyhow before that dispute is resolved. Before the 2007 revision of the Procurement Remedies Directives, in most Member States concluded contracts were in principle to be respected, even where they were the result of a contract award procedure that was not compliant with EU public procurement

39 Agreement between the co-legislators was reached in first reading of the ordinary legislative procedure. At the outset the Commission had noted that "*virtual consensus*" existed among Member States and interested parties alike at least as regards the main problems to tackled. See Commission, Proposal for Procurement Remedies Amending Directive 2007/66, COM(2006) 195, p. 4. The Commission's proposal has been criticised in the legal doctrine however for imposing an unnecessary and inappropriate degree of uniformity. See e.g. Arrowsmith (2005), p. 1438. As regards the legislative history of this directive more generally, see further Hebly (2011), pp. 543-860.

40 Commission, Proposal for Procurement Remedies Amending Directive 2007/66, COM(2006) 195, p. 2.

41 Commission, Impact assessment report on remedies in the field of public procurement, SEC(2006) 557, p. 30.

42 *Ibid*., pp. 8-11.

43 See para. 75 above.

44 CoJ case C-26/03, *Stadt Halle*, para. 37.

law.[45] And even where national law allowed for the setting aside of concluded contracts, claims to this effect were still found to be often rejected on the basis of a balance of convenience test applied by the national court seised. As a consequence in such a case the contract award decision can in effect not be reviewed – and annulled where necessary – at the pre-contractual stage. All that then remains for the aggrieved private party concerned is the possibility of bringing an action for damages.

76. In addition in 2011 the Commission published proposals for another revision, this time of the Substantive Procurement Directives.[46] This led in 2014 to the adoption of two *new substantive directives*, i.e. Directive 2014/24 on public procurement ('New Public Sector Procurement Directive') and Directive 2014/25 on procurement by entities operating in the water, energy, transport and postal services sectors ('New Utilities Procurement Directive'). These two new directives, which are to be transposed into national law by April 2016, repeal and replace the abovementioned current Substantive Procurement Directives.[47]

For the present purposes three points are of importance in this connection. First, while these new directives imply certain significant changes to the substantive rules in question, the main structure and objective of those rules, outlined above, remains unaltered. Second, an entirely new directive was also adopted, i.e. Directive 2014/23 on the award of concession contracts ('Concessions Awards Directive').[48] This latter directive is concerned with the award of a particular type of public contracts that had hitherto largely remained unregulated as a matter of secondary EU law. Not only does this imply a widening of the scope of the EU legislation in this regard, the Concessions Awards Directive also involves an amendment of the Procurement Remedies Directives so as to adapt the latter to the amended substantive regime, bringing also infringements of the Concessions Awards Directive within their scope.[49] Lastly, while (apart from the aforementioned amendment) this revision of the EU's substantive rules on public procure-

45 As was e.g. the case in the Netherlands pursuant to national case law (HR case 16747, *Uneto v. De Vliert*).

46 See Commission, Proposal for New Utilities Procurement Directive 2014/25, COM(2011) 895; Commission, Proposal for New Public Sector Procurement Directive 2014/24, COM(2011) 896; Commission, Proposal for Concessions Awards Directive 2014/23, COM(2011) 897. On this revision and the resulting proposals, see further Commission, Green paper on the modernisation of EU public procurement policy, COM(2011) 15; Kotsonis (2011a), p. NA51; Williams (2012), p. NA101.

47 Directive 2014/24/EU on public procurement, OJ 2014, L 94/65; Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors, OJ 2014, L 94/243. On the latter directive, see further Kotsonis (2014), p. 169.

48 Directive 2014/23/EU on the award of concession contracts, OJ 2014, L 94/1. On this directive, see further Craven (2014), p. 188.

49 See Art. 46 and 47 Concessions Awards Directive 2014/23.

ment expressly leave the Procurement Remedies Directives unaffected,[50] the new directives acknowledge that "*there is still considerable room for improvement in the application of the [EU] procurement rules*".[51] Against this background they contain certain public enforcement-related provisions, which are further discussed below.[52]

3.1.4. Additional general remarks

77. A first additional remark concerns the fact that the Procurement Remedies Directives provide for common rules on review procedures for public procurement disputes inevitably implies that the Member States' scope for autonomous decision-making is reduced in this respect. Where necessary, Member States had to amend their existing national laws so as to ensure compliance with these directives. Nevertheless efforts were made to *respect existing national practices* as much as possible.[53] As the Commission highlighted in 1990, "*[c]onsiderable flexibility is left for the Member States to implement the directive's requirements in accordance with their particular approaches to administrative and judicial review, including the procedural and other conditions applying to such remedies [so as to] facilitate the insertion of the new remedies into existing national structures*".[54] Similarly at the time of the 2007 revision it stated that "*Member States will retain their power to appoint bodies responsible for the review procedures and to maintain the national procedural rules applicable to such reviews (respect for the Member States' procedural autonomy)*".[55]

On many points this translates into the wording of the Procurement Remedies Directives. For example, as is discussed in further detail below, a significant number of the measures provided for are merely optional or can be implemented in various manners.[56] Accordingly, as the Court of Justice noted, these directives leave "*Member States discretion in the choice of the procedural safeguards it provides, and the formalities relating thereto*".[57] The harmonisation established is thus 'partial'; it does not entail 'complete' (or 'maximum') harmonisation.[58] That means *inter alia* that, without prejudice to their obligations to comply with the requirements of these directives and

50 Recital 122 New Public Sector Directive 2014/24; recital 128 New Utilities Procurement Directive 2014/25.
51 Recital 121 New Public Sector Directive 2014/24; recital 127 New Utilities Procurement Directive 2014/25.
52 See para. 105 below.
53 Cf. Commission, Report on the impact and effectiveness of EU public procurement legislation, SEC(2011) 853, p. 73. See also Weiss (1993), p. 104; Bovis (2007), p. 370; Trepte (2007), pp. 530 and 544.
54 Commission, Proposal for Utilities Remedies Directive 92/13, COM(90) 297, p. 15.
55 Commission, Proposal for Procurement Remedies Amending Directive 2007/66, COM(2006) 195, p. 7.
56 See e.g. Art. 1(4), 1(5), 2b, 2d(2) and 2d(3) Procurement Remedies Directives 89/665 and 92/13.
57 CoJ case C-568/08, *Combinatie Spijker*, para. 57.
58 CoJ case C-570/08, *Simvoulio*, para. 37.

to respect EU law generally, Member States are entitled to lay down further-going rules on the issues covered by these directives.

78. Certain *particularities* of public procurement law and the disputes relating thereto should also be highlighted. An obvious point is that, although there are certain limited exceptions,[59] this field of law concerns rules that regulate the relationship between a (semi-)public body on the one hand and one or more private parties (undertakings) on the other hand. In many national jurisdictions such relationships are subject to a particular legal regime, which can however differ considerably in terms of content and character across the EU.[60] In particular, in many Member States, such as Germany, France, Spain and Belgium, this field of law is regulated by a mixture of administrative and civil law. This typically means that decisions up to and including the stage of the award of the contract are subject to review by the administrative courts, while disputes related to the execution of the contract, liability and claims for damages are subject to civil law. But there are also jurisdictions, for instance in England and the Netherlands, where review is in principle exercised only by the civil courts.

Disputes relating to contract award procedures furthermore generally concern more than two parties. The very aim of these procedures is after all to have several undertakings competing for the public contract at issue. This implies that in many disputes account must also be taken of the legitimate interests of third parties, normally the other (potential) tenderers whose bid was either not successful or who were not allowed to submit a bid in the first place. Speed is often also a key concern.[61] Swift resolution of public procurement disputes, notably before the conclusion of the public contract at issue, means that the aggrieved undertaking or undertakings can still have a chance to win the contract. It also means that the contract award procedure – and consequently the award and execution of the contract – is not too much delayed because of the dispute, which is generally in the interest of all parties concerned. There will moreover normally be a public interest of some sort at stake in the execution of the contract. One could think of the interests related to the timely completion of public infrastructural works or the timely supply of certain goods to a hospital or a school. This circumstance may have an important impact on the outcome of a case, in particular where a balance of convenience test is applied, as the public interests of this kind could quickly be seen as outweighing the 'individual' interests of the aggrieved private parties concerned.

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59 Substantive Procurement Directives 2004/17 and 2004/18 sometimes also cover private undertakings. See e.g. Art. 56 Public Sector Procurement Directive 2004/18 on concessionaires and Art. 2(2)(b) Utilities Procurement Directive 2004/17 on undertakings operating on the basis of special or exclusive rights.

60 See further Bovis (2007), pp. 381-397; Hebly, De Boer & Wilman (2007), p. 155; Treumer & Lichère (2011), pp. 105-328. See also Study Italian Authority for the Supervision of Public Contracts (2010).

61 See also para. 78 above.

79. The EU's Procurement Remedies Directives should further be understood in their *international context*. This context consists in particular of the relevant instrument of the World Trade Organisation ('WTO') in this field, i.e. the Agreement on Government Procurement ('GPA'). The GPA is an international agreement to which, besides countries such as the United States, Canada, South Korea and Switzerland, both the EU and its Member States are a party.[62] It is the successor of an earlier agreement concluded in 1979 in the context of the General Agreement on Tariffs and Trade ('GATT').[63] Negotiations on the new agreement started in 1986 and were concluded in 1994.[64] The GPA entered into force in 1996.[65] The main objectives and means of the substantive procurement rules set out in the GPA are comparable to those of the EU.

Most importantly for the present purposes, the GPA also contains specific provisions on so-called 'challenge procedures'.[66] It thus also gives private parties a role in enforcing the substantive rules at issue. This characteristic sets this international agreement apart from its predecessor and most other WTO agreements.[67] This GPA framework for challenge procedures could be called a slimmed-down version of the EU's regime established in the Procurement Remedies Directives. It leaves the countries concerned significant space to provide for a system that is consistent with their respective legal, constitutional and administrative traditions.[68] Nonetheless it lays down a number of key obligations. There is a general obligation to "*provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the [GPA] arising in the context of procurements in which they have, or have had, an interest*". The GPA also clarifies that limitation periods can be set for undertakings that wish to make use of these procedures, with a minimum length of 10 days. Such disputes must either be dealt with before a court or an impartial and independent review body. In terms of remedies, "*rapid interim measures to correct breaches of the [GPA] and to preserve commercial opportunities*" must be made available under the GPA.

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62 Given the diverging range of obligations and its optional nature under WTO law, the GPA is effectively rather a series of bilateral treaties than a single multilateral arrangement. See Arrowsmith (2005), p. 1330.

63 Decision 80/271/EEC concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations, OJ 1980, L 71/1.

64 See Decision 94/800/EC concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), OJ 1994, L 336/1.

65 In March 2012 agreement was reached on the revision of the GPA. Pursuant to this revision some of the GPA provisions referred to above are clarified, but not substantially altered. On this revision, see further Zhang (2011), p. 483; Anderson (2012), p. 83; Williams (2014), p. NA 29.

66 Art. III and XX GPA. These challenge procedures apply in addition to the 'regular' WTO dispute settlement regime, which is essentially an intergovernmental affair, provided for in Art. XXII GPA.

67 Arrowsmith (2003), p. 385.

68 *Ibid*.

Here it is added that "*[s]uch action may result in suspension of the procurement process*", although "*[o]verriding adverse consequences for the interests concerned, including the public interest may be taken into account in deciding whether these measures should be applied*". The remedies further include "*correction of the breach of the [GPA] or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest*".

3.2. Remedies

Having sketched the background of the Procurement Remedies Directives in the foregoing section, attention now turns to their content. As their (shorthand) name indicates, a set of remedies lies at the heart of the Procurement Remedies Directives. The relevance of these remedies depends in particular on the stage that the contract award procedure is in, especially whether or not that procedure has already led to the conclusion of the public contract at issue. The first subsection below concentrates on the remedies relating to the pre-contractual stage, i.e. interim measures and the setting aside of unlawful decisions. The following two subsections subsequently discuss two remedies that are primarily of relevance in the stage after the conclusion of the contract, namely actions for damages and a contractual remedy that can lead to concluded public contracts being considered ineffective.

3.2.1. Interim measures and setting aside injunctions

80. Concerning the pre-contractual stage, the two Procurement Remedies Directives provide that the competent national courts (or the other review bodies designated by the Member State concerned[69]) must, in the first place, have the power to take "*at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringements or preventing further damage to the interests concerned*". These *interim measures* do not finally determine the legal situation, but rather provide for a provisional arrangement.[70] Pursuant to the directives this power must include in any case the possibility to suspend on-going contract award procedures or the implementation of any decision taken by the contracting authority.[71]

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69 On these directives' rules on the forum before which applications for review must be brought, see further para. 98 below. For reasons of simplicity, in the above reference is made only to 'courts'.

70 Cf. CoJ case C-568/08, *Combinatie Spijker*, para. 61.

71 Art. 2(1)(a) Procurement Remedies Directives 89/665 and 92/13. Cf. Art. 2(4) Public Sector Remedies Directive 89/665 and Art. 2(3a) Utilities Remedies Directive 92/12, which provide that the initiation of review procedures generally need not necessarily have automatic suspensive effect.

The directives further expressly provide that a balance of interests test is permissible in this connection.[72] Accordingly, when deciding on an application for interim measures, account may be taken of the probable consequences of these measures for all interests likely to be harmed as well as the public interest. Where the negative consequences could exceed the benefits, it may be decided not to grant the measures, without prejudice to any other claim that the private party-applicant in question may bring. The application of this test can be problematic in practice however, in the sense that the national courts seised can tend to give greater weight to the public interests that may be at stake (related to not endangering or delaying the completion of the public contract in question) than to the 'private' interests of the private party-applicant.[73] In 1996 an EU-wide study found that this could be an important impediment to the availability of this remedy.[74] The Commission noted a similar tendency in the context of the 2007 revision, without however proposing addressing this concern through legislative amendments.[75]

The Court of Justice has clarified that it is in principle permissible for a national court to take account of the chances of success of an action on the merits when deciding an application for interim measures under the Procurement Remedies Directives, in light of the absence of any express EU rules on this matter and the EU law principle of effectiveness.[76] On the other hand, it has held that an application for interim measures cannot be made dependent on the applicant previously having brought proceedings on the merits, even where the latter is a mere formality.[77]

81. In the second place, under the Procurement Remedies Directives the competent courts must be empowered to *set aside* unlawful decisions of the contracting authority. One could think of a decision to award the contract to a particular party, or to exclude a tenderer, in violation of the Substantive Procurement Directives. These directives specify that this power to set aside unlawful decision includes the possible removal of discriminatory technical, economic or financial specifications in the tender documents.[78] This addition can be of significant relevance in practice. For the setting of such specifications can be an (indirect) means to prevent undertakings from other Member States from participating or having a fair chance in a contract award procedure. Examples of such unlawful specifications include the specification in the tender documents of the name of a particular product or

72 Art. 2(5) Public Sector Remedies Directive 89/665; Art. 2(4) Utilities Remedies Directive 92/13.
73 See also para. 78 above.
74 Study Herbert Smith (1996), pp. 10-11.
75 Commission, Impact assessment report on remedies in the field of public procurement, SEC(2006) 557, p. 15.
76 CoJ Order case C-424/01, *CS Communications*, para. 26-33.
77 CoJ case C-214/00, *Commission v. Spain*, para. 99-100. See also CoJ case C-236/95, *Commission v. Greece*, para. 11.
78 Art. 2(1)(b) Procurement Remedies Directives 89/665 and 92/13.

the requirement of a particular environmental certificate, without making it clear that equivalent products or certificates are also allowed.[79]

82. Lastly, the Utilities Remedies Directive – but not the Public Sector Remedies Directive – offers the Member States an *alternative* for the two abovementioned remedies, i.e. interim measures and the setting-aside of unlawful decisions. Instead of these two remedies Member States may provide for the power to take "*other measures*" with the aim of correcting any identified infringement and preventing injury to the interests concerned. This could concern making an order for the payment of "*a particular sum*" in cases where the infringement has not been corrected or prevented.[80] This arrangement has been introduced because the aforementioned remedies were considered to directly affect the decision-making of the entities operating in the utilities sector covered by this directive. That was seen as unacceptable, given the autonomy that these entities enjoy in the legal systems of certain Member States.[81]

The Commission's proposal originally stipulated that the amount of this sum should be not less than 1% of the value of the contract at issue, so as to ensure a minimum level of deterrence. However this suggestion was rejected by the Council.[82] Instead a more general provision has been included, which states that this sum should be set "*at a level high enough to dissuade the contracting entity from committing or persisting in an infringement*".[83] The Court of Justice later clarified that a Member State could decide to leave it to its judiciary to set this sum on a case-by-case basis.[84]

3.2.2. Actions for damages

83. The Procurement Remedies Directives also provide for two forms of relief that are of particular relevance in the post-contractual stage, i.e. after the contested contract has been concluded. One of these is the possibility for the competent court to award *damages*. To this end the directives quite simply state that Member States must ensure that the measures taken concerning the review procedures include provision for powers to "*award damages to*

79 CoJ case C-359/93, *Commission v. Netherlands*, para. 28; CoJ case C-368/10, *Commission v. Netherlands*, para. 70.

80 Art. 2(1)(c) Utilities Remedies Directive 92/13.

81 Commission, Proposal for Utilities Remedies Directive 92/13, COM(90) 297, pp. 11-12; Commission, Amended proposal for Utilities Remedies Directive 92/13, COM(91) 158, pp. 6 and 8.

82 Council, doc. 7333/91, p. 5.

83 Art. 2(5) Utilities Remedies Directive 92/13. At the time of the adoption of this directive the Council and the Commission stated that payment of this sum to an entity that is directly or indirectly linked to the contracting authority through a common budget is not to be considered dissuasive. See Council, doc. 7250/91, p. 3.

84 CoJ case C-225/97, *Commission v. France*, para. 23-28.

persons harmed by an infringement".[85] While this provision is common to both directives, there is a difference between them where actions for damages are concerned.

84. On the one hand the *Public Sector Remedies Directive* contains no further guidance on issues such as the heads of damages to be compensated, the procedures to be followed or the criteria to be applied. The Commission had made a (modest) suggestion in its initial proposal for this directive in 1987. It mentioned as heads of damages "*costs of unnecessary studies*, *foregone profits and lost opportunities*".[86] But this part of the proposal was not retained by the EU legislature (at that time only the Council).

85. On the other hand the situation is to some extent different under the *Utilities Remedies Directive*, which, as was noted above, was adopted a few years after the Public Sector Remedies Directive. In addition to the above-mentioned general provision on damages claims, it is specified there that, where a claim is made for damages representing the *costs of preparing a bid* or of participating in an award procedure, the applicant shall be required "*only to prove an infringement of [EU] law in the field of procurement or national rules implementing that law and that he would have had a real chance of winning the contract and that, as a consequence of that infringement, that chance was adversely affected*".[87] The industrial and commercial public service character of the utilities was deemed to make it more difficult for private parties to obtain the pre-contractual forms of relief discussed in the previous subsection. As the Commission explained in its proposal, the above provision on bidding costs therefore seeks to ensure that in all Member States claims for damages are a practical proposition and thus a genuine incentive to compliance.[88] The essence is that aggrieved private parties need *not* to proof that they would have been awarded the contract but for the infringement in order to receive compensation for their bidding costs.[89] Providing such proof was considered extremely difficult in many cases. Instead these private parties must 'only' demonstrate that they had a *real chance* of winning the contract at issue in order for them to be awarded damages.

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85 Art. 2(1)(c) Public Sector Remedies Directive 89/665; Art. 2(1)(d) Utilities Remedies Directive 92/13. Pursuant to Art. 2(6) Public Sector Remedies Directive 89/665 and Art. 2(1) Utilities Remedies Directive 92/13 the Member States may further provide that, where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside.

86 Commission, Proposal for Public Sector Remedies Directive 89/665, COM(87) 134, p. 7 (Art. 1(3)). This aspect of the proposal was not explained in the explanatory memorandum. It was not retained in the amended proposal.

87 Art. 2(7) Utilities Remedies Directive 92/13.

88 Commission, Proposal for Utilities Remedies Directive 92/13, COM(90) 297, pp. 12-13.

89 Cf. the statement made to this effect by the Council and the Commission, laid down in Council, doc. 7250/91, p. 4.

In its proposal for the Utilities Remedies Directive the Commission had originally proposed going a step further, by specifying that the amount of these bidding costs would be deemed to be at least 1% of the value of the contract.[90] It had called this "*a limited step designed to ensure that in all Member States claims for damages are a realistic possibility*". According to the Commission, this would be sufficient to meet the EU's immediate objectives in this field. It acknowledged that claims for other losses not covered here, such as lost profits, raise "*complex issues*" and would "*for the time being*" continue to be resolved under national law. It further stated that a high level of harmonisation of the quantification of damages would "*certainly encounter difficulties*" and therefore was "*an unrealistic objective*", at least at that stage (i.e. in 1990), while adding that in the longer term it would have to be considered whether further action at EU level would be necessary. Even this limited step as regards the *ex ante* quantification of certain damages proved to be a bridge too far however. It was deleted in the amended Commission proposal at the request of the European Parliament.[91] The latter argued that the amount of damages should be determined in each individual case, as bidding costs cannot be linked to the value of the contract at issue.[92]

86. In its 1996 green paper on public procurement in the EU the Commission returned to the issue of actions for damages for infringements of EU public procurement law under the Procurement Remedies Directives.[93] Certain *discrepancies and shortcomings* were noted as regards the relevant provisions of national law implementing the directives. In particular, the green paper pointed to diverging rules and difficulties in practice as regards the provision of proof and the quantum of damages. National courts were said to sometimes only award symbolic damages or compensation of the bidding costs. The Commission therefore floated the idea of making provision for "*liquidated damages of a sufficiently dissuasive sum, exceeding the damage suffered*". Yet in its 1998 follow-up communication it did not further elaborate on this these issues,[94] despite the fact that around the same time a study, prepared at the Commission's request, had found that "*no more than a handful*" of damages cases had arisen in the Member States.[95] That was found to be the case even in Member States where other forms of public procurement-related litigation was not unusual. This general lack of actions for damages under the Procurement Remedies Directives was attributed to

90 Commission, Proposal for Utilities Remedies Directive 92/13, COM(90) 297, pp. 13 and 19.

91 See Commission, Amended proposal for Utilities Remedies Directive 92/13, COM(91) 158, p. 19. Here it is simply stated that the extent of damages payable is to be determined by national law.

92 See European Parliament, Opinion on the proposal for Utilities Remedies Directive 92/13, OJ 1991, C 106/82.

93 Commission, Green paper on public procurement in the EU, COM(96) 583, pp. 15 and 19.

94 Commission, Communication on public procurement in the EU, COM(1998) 143.

95 Study Herbert Smith (1996), p. 18. See also Brown (1998), p. 93; Treumer (2006), p. 159.

several factors, i.e.: the fact that such proceedings tend to be formalised, costly and time-consuming; the out-of-court settlement of such disputes; uncertainty especially as regards the quantification of damages; and the difficulty of proving that, but for the infringement, the applicant would in all likelihood have won the contract, as required in some jurisdictions.

On the whole it appears that in public procurement litigation private party-applicants prefer the remedies that are available at the pre-contractual stage, discussed in the previous subsection (interim measures and setting-aside injunctions). A relevant factor in this regard is likely to be that, as is widely acknowledged, undertakings are mostly interested in winning the contract, rather than engaging in lengthy legal proceedings or obtaining damages awards.[96] The aforementioned remedies are generally better suited from that perspective. Another relevant factor is that the chances of success of damages claims are generally considered to be rather limited and, where such a claim is successful, the amount of damages awarded is often seen as too low to offset the damage actually suffered and the legal costs incurred.[97] It has further been suggested that the generally limited manner in which the Procurement Remedies Directives' provisions on damages claims have been transposed into national law by the Member States also plays a role in this respect.[98] Against this background, legal scholars and practitioners alike have over the years called for including more detailed provisions in these directives.[99]

87. In the context of the aforementioned 2007 revision of the Procurement Remedies Directives the Commission once more assessed the existing regime as regards actions for damages for infringements of EU public procurement law.[100] It noted that the numbers of actions for damages brought remained *very low*, certainly when compared to the other available remedies. Although there can be notable differences between the various jurisdictions, and more recently there appears to have been a modest increase, other reports largely confirm this assessment.[101] Here the Commission took the view that these actions suffer from certain *inherent limits*. It pointed, among other things, to the lack of real corrective effects. This refers to the fact that,

96 Commission, Amended proposal for Utilities Remedies Directive 92/13, COM(91) 158, p. 13. See also Fernández Martín (1996), p. 213; Trepte (2007), pp. 562-563; Bowsher & Moser (2006), p. 196; Caranta (2011a), p. 87; Fairgrieve & Lichère (2011), p. 193.

97 Cf. Commission, Responses to the consultation on the operation of national review procedures in the field of public procurement, 2004 (undertakings and lawyers). See e.g. also Fairgrieve & Lichère (2011), pp. 192-194.

98 Treumer (2006), p. 162. On the situation in several Member States, see Bowsher & Moser (2006), p. 195; Lichère (2006), p. 171; Ruch-Larsen (2006), p. 179; Slavicek (2006), p. 223; Fairgrieve & Lichère (2011).

99 E.g. Fernández Martín (1996), pp. 213-215; Treumer (2006), p. 164; Trepte (2007), p. 558.

100 Commission, Impact assessment report on remedies in the field of public procurement, SEC(2006) 557, pp. 12-14 and 16-17. On this revision, see also para. 75 above.

101 Caranta (2011a), pp. 87-88; Fairgrieve & Lichère (2011), p. 192; Treumer (2011a), pp. 149-150. As regards the Netherlands, see also Hebly & Wilman (2010), p. 326.

even if the claim is successful, the private party concerned will still not win the contract. These private parties may moreover feel – correctly or not – that they would compromise their future business relationship with the contracting authority concerned if he were to initiate legal action ('don't bite the hand that feeds you'; fear of 'blacklisting').[102] The fact that this would evidently be at odds with the EU procurement rules does not necessarily make this fear less real in practice, as is widely acknowledged both in reports based on field research[103] and in the legal literature more generally.[104] In its assessment the Commission noted that this fear limits the deterrent effect of actions for damages. It further acknowledged the practical difficulties associated with bring this type of actions, such as the aforementioned comparatively low chances of success and modest amounts awarded. In this connection it observed that under most national laws applicants must prove that they either would have won, or at least had a serious chance of winning, the disputed contract. Providing such proof is often difficult.[105] These problems may be even more pressing in cases of illegal direct awards, given the inherent lack of transparency in those cases.[106] It was further noted that damages claims constitute actions on the merits, to be brought before ordinary courts. As such, unlike actions for most actions for interim relief, they can last for years and incur high legal costs.

That being so, the Commission considered that "*damages, in the specific context of public procurement procedures, present a less attractive or efficient means of sanction than pre-contractual remedies*".[107] It added that making actions for damages a realistic and deterrent 'threat' for contracting authorities would involve a rather far-going overhaul of the Procurement Remedies Directives. This could be achieved by removing or relaxing the conditions as regards private parties proving that they had a serious chance of winning the contract. In the Commission's view, "*this would directly touch upon the basic national principles governing contractual liability (i.e. the rules on compensation where loss of a chance has to be proved by the plaintiff) with few benefits (i.e. no corrective effects on the award procedure and the contract signed)*". It also pointed to the possible costs for taxpayers associated with the payment of damages by contracting authorities, which are mostly (semi-) public bodies. The option

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102 See e.g. also Commission, Amended proposal for Public Sector Remedies Directive 89/665, COM(88) 733, p. 10.

103 Cf. the study by the UK Department of Trade and Industry, referred to in Arrowsmith, Linarelli & Wallace (2000), pp. 759-760 and the study carried out for the Netherlands' Ministry of Economic Affairs, published as Hebly, De Boer & Wilman (2007), p. 145.

104 Fernández Martín (1996), p. 212; Bovis (2005), pp. 138-139; Arrowsmith (2005), pp. 1435-1436; Trepte (2007), p. 553; Brown (1998), pp. 93-94; Treumer (2011b), p. 29; Caranta (2011a), pp. 81-82; Treumer (2011a), p. 157.

105 Cf. Dahlgaard Dingel (1999), p. 239; Arrowsmith, Linarelli & Wallace (2000), pp. 752 and 759-760; Bovis (2007), pp. 438-439; Trepte (2007), p. 559; Caranta (2011b), p. 175.

106 See para. 75 above.

107 Commission, Impact assessment report on remedies in the field of public procurement, SEC(2006) 557, p. 12.

of reinforcing private parties' possibilities to claim damages for infringements of EU public procurement law under the Procurement Remedies Directives was therefore discarded at an early stage of the revision process.[108] The above considerations were at the same time apparently no reason to delete the already existing provisions on damages, discussed above; these were left untouched.

88. The foregoing does not mean however that no damages cases are brought before the national courts under the Procurement Remedies Directives. Especially in more recent years a number of these cases have led to preliminary references. The resulting rulings by the Court of Justice shed light on the provisions of these directives at issue. The first such case is the Court's 2003 ruling in *GAT*, issued pursuant to an Austrian preliminary reference.[109] In this case a tenderer had been excluded, allegedly for unlawful reasons, from a contract award procedure for the supply of road sweeping vehicles. That private party therefore sought compensation in damages. In the following process of judicial review the court seised observed however that there had been *another* infringement of the applicable public procurement rules. If this court were to raise this point of its own motion (*ex officio*), as it was required to do under national law, this could imply that the applicant would have suffered damage anyway. That, in turn, would mean that the damage resulting from the allegedly unlawful exclusion would not need to be compensated. The Court was therefore asked whether the Procurement Remedies Directives precluded a rule of national law providing for an obligation of own motion judicial review. In its reply it held that it is for the domestic law of each Member State to determine whether, and in which circumstances, the competent court may raise of its own motion an infringement of the applicable EU law. Neither the objective of these directives, nor any of their specific provisions was considered to preclude such a rule of national law. The Court added however that under the Procurement Remedies Directives an action for damages could nonetheless not be dismissed on the ground, raised of a national court's own motion, that the contract award procedure had been anyway been unlawful. For this would be incompatible with the directives' objective of ensuring rapid and effective review for an aggrieved party.

The second case is the Court's 2010 judgment in *Combinatie Spijker*, which concerned a dispute relating to a public works contract for the renewal of two bridges in the Netherlands.[110] The dispute led to a string of litigation before various national courts regarding both the decision to award the contract to a particular tenderer and a subsequent claim for damages. As regards the latter, the Court of Justice was asked whether EU law determines the

108 *Ibid*., p. 26. For amendments that could conceivably have been made in light of the abovementioned difficulties, see Reich & Shabat (2014), p. 50.

109 CoJ case C-315/01, *GAT*, para. 46-55.

110 CoJ case C-568/08, *Combinatie Spijker*, para. 85-92.

criteria for the determination of the damage and if so, what these criteria are. The Court first observed that the abovementioned provisions on damages claims laid down in the Procurement Remedies Directives contain no statement either as to the conditions under which a contracting authority may be held liable or the amount of the damages it may be ordered to pay. Second, it clarified that these provisions are an expression of the principle of Member State liability for loss and damage caused as a result of breaches of EU law for which a Member State can be held responsible, as set out in its *Francovich* case law.[111] This means that the conditions for such liability apply in this connection (i.e. the rule of EU law infringed must be intended to confer rights on private parties, the infringement must be sufficiently serious and there must be a direct causal link between the infringement and the damage suffered). Third, it was noted that, in the absence of EU law provisions in this area, also after the 2007 revision, it is for the internal legal order of each Member State to determine the applicable criteria once these conditions have been complied with, subject to the principles of equivalence and effectiveness.[112]

Third and finally, of relevance is the *Stadt Graz* case, which also dates from 2010.[113] At issue here was a contract award procedure for a contract to supply asphalt to the city of Graz in Austria. An unsuccessful tenderer disputed that the winning undertaking had complied with all the relevant requirements. The contract having been awarded to the latter, the applicant claimed damages from the contracting authority. National law made such claims dependent on the contracting authority being at fault, whereby a rebuttable presumption that this was the case was provided for. In its judgment, the Court of Justice started by noting that the implementation of the directives' provision on damages in principle comes under the procedural autonomy of the Member States. However it found the rule of national law at issue nonetheless to be precluded. It observed that the wording of the directives did not establish a connection between the right to damages and a requirement of fault, a conclusion that it considered to be borne out by the general context and aim of the remedy of damages as provided for in these directives.[114] The Court added that it makes little difference in this respect that in the case at hand national law provided for a rebuttable presumption of fault, as it nonetheless creates the risk that a private party is deprived of the right to damages or at least that it is only belatedly being able to obtain such compensation. This was seen as incompatible with the effective and rapid judicial remedies that the Procurement Remedies Directives seek to guarantee.

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111 CoJ joined cases C-6/90 and C-9/90, *Francovich*, discussed in para. 59 above. Such a link between these two directives and the principle of Member State liability had already been suggested earlier in the legal literature. See e.g. Leffler (2003), p. 154; Arrowsmith (2005), p. 1425; Treumer (2006), pp. 161 and 165.

112 On these two latter principles, see further section 2.2 above.

113 CoJ case C-314/09, *Stadt Graz*, para. 34-43.

114 See also CoJ case C-275/03, *Commission v. Portugal*, para. 37.

3.2.3. Contractual remedy

89. It has been seen in the previous subsection that in the context of the 2007 revision of the Procurement Remedies Directives their provisions on actions for damages were left untouched. By contrast that revision did lead to the introduction of an entirely new *contractual remedy*, i.e. a class of action intended to make good infringements of EU law by seeking to nullify or to otherwise make ineffective the contractual arrangements entered into by the parties concerned. The introduction of this new remedy should be seen against the background of the case law of the Court of Justice. In particular, initially the Court had held that under the Procurement Remedies Directives as they stood before the revision the fate of concluded contracts was essentially a matter for national law.[115] This was in line with an express provision in these directives according to which the effects of the exercise of the powers of the courts after the conclusion of the contract were to be determined by national law and that gave the Member States the possibility to limit these powers to awarding damages.[116] Most Member States used this latter possibility.[117] Many believed this to be in conformity with the Procurement Remedies Directives.[118]

This belief appeared to have been put in doubt however by subsequent case law, in particular the Court's 2007 ruling in *Commission v. Germany*.[119] The latter case was a follow-up to an earlier decision by the Court in infringement proceedings brought by the Commission that Germany had not respected its EU law obligations, because two German local governments had each concluded a contract with an undertaking in violation of EU public procurement law.[120] Subsequently one of the two disputed contracts was not terminated. The Commission therefore brought a second case, now seeking a declaration by the Court of Justice that Germany had not complied with the earlier judgment. In the latter case it was held that, as long as the disputed contract remains in force, the infringement of EU public procurement law continued. The Court dismissed Germany's arguments based on the aforementioned specific provision of the Procurement Remedies Directives on concluded contracts, the legitimate expectations of the private parties with whom the contract had been concluded and the principles of *pacta sunt servanda* and legal certainty, as these can play no role in infringe-

115 CoJ case C-314/01, *ARGE*, para. 40 and 48-50.

116 Art. 2(7) Public Sector Remedies Directive 89/665 and Art. 2(6) Utilities Remedies Directive 92/13, as they stood before the 2007 amendment. Subsequently these provisions have been retained in an amended form, clarifying that they are subject to the directives' provisions on ineffectiveness.

117 See para. 75 above.

118 See Treumer (2011b), pp. 32-33, with further references.

119 CoJ case C-503/04, *Commission v. Germany*, para. 33-36. See also CoJ case C-125/03, *Commission v. Germany*, para. 15. In addition see CoJ case C-81/98, *Alcatel*, discussed in para. 97 below.

120 CoJ joined case C-20/01 and C-28/01, *Commission v. Germany*, para. 36-39.

ment proceedings, which are essentially a matter between the Commission and the Member State concerned.[121] This largely leaves open the question what importance should be attached (if any) to those arguments in proceedings initiated by a private party before a national court. The introduction of the new contractual remedy of ineffectiveness, discussed in further detail below, is therefore not merely a codification of the above case law.[122] Nonetheless it evidently put the issue of how to deal with contracts concluded in violation of EU public procurement law firmly on the legislative agenda.

90. Since 2007 both Procurement Remedies Directives stipulate that Member States must ensure that "*a contract is considered ineffective*" by the competent national court.[123] This remedy must be made available in relation to what are considered the *most serious infringements* of substantive EU public procurement law.[124] It concerns in particular the illegal direct award of contracts (i.e. without any prior publication and competition in violation of the applicable EU public procurement rules) and the conclusion of a contract during a mandatory standstill period that is meant to allow the other private parties concerned to challenge the contract award decision.[125]

The logic behind this is that the ineffectiveness of a contract will normally mean that (the remainder of) the contract will be put out to (re-)tender. That implies that all interested parties have in principle a new and fair chance of winning it. Consequently competition is restored.[126] This can be an important incentive for private parties to apply for this remedy. As was noted above, they are often more interested in winning contracts than obtaining damages awards.[127] The risk of a public contract being considered ineffective, as well as the subsequent obligation to (re-)start a contract award procedure, is moreover likely to be an unattractive outcome for contracting authorities, if only because of the delays this would involve. As such it can act as a deterrent for those authorities.

91. Concerning the precise *legal effects* of this new remedy, the recitals of the Procurement Remedies Amending Directive clarify that this ineffectiveness should not be 'automatic'. Instead it is to be ascertained by, or the result of,

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121 See further subsection 2.4.1 above.

122 That is illustrated by the timing of the relevant events. The Commission's proposal for the amendment dates from May 2006 and political agreement was reached by June 2007, whereas the above judgment was rendered in July 2007. In this sense, see also Pries & Friton (2011), pp. 523-524. For another view, see Caranta (2011), p. 77.

123 Art. 2d(1) Procurement Remedies Directives 89/665 and 92/13.

124 Art. 2d(1) Procurement Remedies Directives 89/665 and 92/13. As regards the position of contract having been concluded pursuant to other infringements of EU public procurement law than the ones mentioned above, see para. 304 below.

125 Concerning these illegal direct awards and standstill periods, see para. 75 above and para 97 below respectively.

126 Recital 14 Procurement Remedies Amending Directive 2007/66.

127 See para. 87 above.

a decision by a court.[128] For that reason the provision in question speaks of the contract being "*considered*" ineffective, rather than it 'being' ineffective. The recitals state that the term 'ineffectiveness' implies that "*the rights and obligations of the parties under the contract […] cease to be enforced and performed*".[129] The Court of Justice has further held that, in the situations contemplated in this provision on ineffectiveness, the measures that may be taken are to be determined solely by the rules laid down in these directives.[130]

Other than that Member States are however generally left considerable flexibility as to how to give effect to this provision in their respective domestic legal systems. In particular, the directives stipulate expressly that the consequences of a contract being considered ineffective are provided for by national law.[131] They specify that national law may either provide for the retroactive cancellation of all contractual obligations (i.e. *ex tunc*) or limit the scope of the cancellation to those obligations which still have to be performed (i.e. *ex nunc*). It appears that in practice good use has been made of this flexibility. For instance, German law provides for ineffectiveness 'from the beginning', which is presumed to refer to *ex tunc* effects, while Romanian law relies on the concept of nullity which also presupposes retroactive effects.[132] By contrast in Denmark the main rule is *ex nunc* with the possibility of imposing *ex tunc* effects in certain specific cases and in England the national legislature opted instead for 'prospective ineffectiveness', i.e. the possibility of nullifying only those contractual obligations that are still to be performed.[133] In Italy and France the court seised may hold the contract to be ineffective even where the applicant did not make an express request to this effect.[134]

This flexibility is nonetheless limited under the Procurement Remedies Directives in that, where the national legislator opts for *ex nunc* effects, certain 'alternative penalties' must also be imposed. In a separate provision these directives further expand on what these penalties entail.[135] To begin with, they must be effective, proportionate and dissuasive. More specifically, the directives stipulate that they can consist of the imposition of fines or the shortening of the duration of the contract. A damages award does not qualify as such however. It is also explicitly stated in the directives that review bodies may be conferred broad discretion to take into account all relevant factors in this regard.

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128 Recital 13 Procurement Remedies Amending Directive 2007/66.
129 Recital 21 Procurement Remedies Amending Directive 2007/66.
130 CoJ case C-19/13, *Fastweb*, para. 42.
131 Art. 2d(2) Procurement Remedies Directives 89/665 and 92/13. Cf. CoJ case C-19/13, *Fastweb*, para. 52.
132 Burgi (2011), p. 138; Dragos, Neamtu & Veliscu (2011), pp. 191-193.
133 Treumer (2011c), p. 279; Trybus (2011), p. 222.
134 Comba (2011), p. 249; Lichère & Gabayet (2011), p. 319.
135 Art. 2e(2) Procurement Remedies Directives 89/665 and 92/13.

The margin of manoeuvre that is thus left to the Member States is greater than what the Commission had originally proposed. For the latter had suggested using the term 'invalid' rather than 'ineffective'.[136] In addition, pursuant to the Commission's proposal it would have been for the national courts to "*draw all the consequences on the illegal contract, such as those concerning the recovery of any sums which may have been paid by the awarding authority*".[137] No reference to national law was provided for in this respect. Quite to the contrary, implicit in this proposed approach was that, as a general rule, the contracts at issue would not have effects either between the parties concerned or with regard to third parties.[138] The fact that during the legislative process amendments were made on these points can, just as the aforementioned rather narrow scope of this remedy (in that it is limited to only the most serious infringements), largely be ascribed to the reservations of at least some Member States in relation to EU involvement with matters of contract law.[139]

92. The Procurement Remedies Directives allow for certain *exceptions* to be made in relation to the foregoing. These come in various forms. One such exception is the possibility for contracting authorities to publish a notice of its intention to 'directly' award the contract, including a justification of why this is deemed compatible with the EU public procurement rules, followed by a standstill period of at least 10 days before actually concluding the contract in question.[140] The idea is that this allows potentially interested undertakings to be aware of the intended direct award and the underlying reasons, so that they can contest it before the courts should they wish to do so. Where such 'voluntary' *ex ante* transparency has been ensured, the resulting contract can, after the expiry of the standstill period and in the absence of a legal challenge, no longer be considered ineffective under these directives. That means that the Member States are precluded from enacting any other rule, pursuant to which the effects of the contract would still not be maintained in a situation, even though the above requirements were met.[141]

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136 Commission, Proposal for Procurement Remedies Amending Directive 2007/66, COM(2006) 195, p. 24 (Art. 2f(2)).

137 *Ibid*., p. 12 (recital 13).

138 See *ibid*., p. 24 (Art. 2f(3)).

139 E.g. Council, doc. DS 650/07. In this document three Member States argue that "*[t]he basis of validity and effectiveness of contracts belong to the sphere of civil law, which belongs exclusively to the competence of the Member States*". See e.g. also Council, doc. DS 703/06; Council, doc. DS 802/06. Cf. Art. 73 New Public Sector Procurement Directive 2014/24 and Art. 90 New Utilities Procurement Directive 2014/25 on the possible "*termination*" of concluded contracts during their term in certain cases, "*under the condition determined by the applicable national law*".

140 Art. 2d(4) Procurement Remedies Directives 89/665 and 92/13.

141 CoJ case C-19/13, *Fastweb*, para. 33-54.

The Member States further have the option under these directives of providing that the national court seised may decide to dismiss the application for ineffectiveness where there are "*overriding reasons relating to a general interest*".[142] Also in that case provision must be made for 'alternative penalties' of the type discussed in the previous paragraph. The directives stipulate that economic interests in the effectiveness of the contract only qualify as such overriding reasons if, in exceptional circumstances, ineffectiveness would lead to disproportionate consequences. Economic interests directly linked to the contract can in any case not be overriding reasons for the present purposes. Examples of the latter are cited, namely the costs resulting from the delay of the execution of the contract, the launching of a new procurement procedure, the change of economic operator performing the public contract in question or the legal obligations resulting from that contract. It has been noted that this possibility of exceptions in the general interest might become a loophole.[143] This fear seems on the one hand all the more realistic, given the experiences gained in relation to the balance of interests test that can be applied in relation to actions for interim measures, discussed earlier.[144] On the other hand the provision in question seeks to reduce this risk as much as possible through the rather restrictive formulation of this exception, as set out above. Indeed, it has also been argued that this provision now seems to have been formulated so restrictively that it might be difficult to give examples of considerations that could fall under the scope of this exception.[145] All in all the idea has clearly been leave a degree of flexibility and discretion to the courts when applying this remedy, while at the same time seeking to minimise the risk of abuse.

93. Finally, *practical experience* with the contractual remedy of ineffectiveness is so far limited as a consequence of its relatively recent introduction. There are reasons to believe that this remedy could prove a valuable private enforcement instrument. The possibility of being awarded the contested public contract can act as an important incentive to potential applicants, which are generally undertakings that are interested in that contract. For the contracting authorities concerned it can also have an important deterrent effect, given that the negative consequences of a contract being considered ineffective can be considerable (delays, extra costs, possible political fall-out, etc.).

Yet there are also several factors that might mean that the system created under these directives will be less frequently and successfully used than intended. In particular, its potential importance appears to be restricted by the aforementioned limitation to the most serious infringements, the considerable leeway left to the Member States as regards the precise effects of this

142 Art. 2d(3) Procurement Remedies Directives 89/665 and 92/13.
143 Cf. e.g. Caranta (2011), p. 77; Trybus (2011), p. 224.
144 See para. 80 above.
145 Treumer (2011b), p. 36.

remedy, the various exceptions, as well as the relatively strict limitation periods that can apply.[146] On a more practical level, it remains to be seen whether, especially in cases of illegal direct awards, (potential) applicants will be able to obtain sufficient evidence and information so as to be in a position to bring a case and if so, whether the said incentives to sue are sufficient to overcome any hesitations that aggrieved bidders often have.[147] The practical use of this remedy has therefore sometimes been questioned in the legal literature.[148]

3.3. Procedural provisions and related issues

The above remedies are complemented by a number of provisions of a procedural nature, the most important of which are assessed in this section. First, the rules on the directives' scope and on legal standing are discussed. This is followed by an assessment of the rules on limitation periods and standstill periods. Finally, the provisions on forum, procedure and what is referred to here as the 'general rules' are considered.

3.3.1. Scope and legal standing

94. The *scope* of the Procurement Remedies Directives essentially coincides with the Substantive Procurement Directive to which they relate.[149] Accordingly a contract that is covered by the Public Sector Procurement Directive is also covered by the Public Sector Remedies Directive. The same parallelism applies as regards the Utilities Procurement Directive and Utilities Remedies Directive in relation to contracts in the utilities sector.[150] In this manner the two Procurement Remedies Directives thus cover in principle all decisions that are taken by contracting authorities concerning contract award procedures falling under the EU's Substantive Procurement Directives. As was noted earlier, under the new substantive EU public procurement regime this logic is retained, subject to a widening of the scope of the Procurement Remedies Directive so as to cover also infringements of the substantive rules set out in the more recently adopted Concessions Awards Directive.[151] In this context the term 'decision' is to be interpreted broadly. It covers any act of a contracting authority adopted in relation to a public contract which falls within the material scope of one of the Substantive Procurement Directives and which is capable of producing legal effects, regardless of whether that act is adopted outside a formal contract award procedure or as part

146 On these limitation periods, see para. 96 below.
147 See para. 87 above.
148 E.g. Lichère & Gabayet (2011), p. 317; Trybus (2011), p. 224; Reich & Shabat (2014), p. 65.
149 Art. 1(1) Procurement Remedies Directives 89/665 and 92/13.
150 Cf. CoJ case C-214/00, *Commission v. Spain*, para. 50 and 79.
151 See para. 76 above.

thereof.[152] This means that a decision *not* to initiate such a procedure can also be covered. The scope of the Procurement Remedies Directives is therefore rather wide.

However that evidently does not mean that there are no limits to these directives' scope. Two such limits stand out. To begin with, not all infringements of the rules of substantive EU public procurement law are covered. In particular, the Procurement Remedies Directives do not cover infringements of the Defence Procurement Directive. This latter directive contains a set of enforcement-related provisions of its own.[153] Although there are certain differences, which generally provide for additional flexibility, these provisions of this latter directive are largely similar to those of the Procurement Remedies Directives. In addition only contracts covered by substantive *EU* law on public procurement are covered by these directives. Contracts covered by 'purely' *national* public procurement rules, notably national rules other than those transposing the Substantive Procurement Directives, are not covered. The Commission had originally proposed to include the latter rules as well.[154] This would have meant that the Procurement Remedies Directives also apply for instance to disputes relating to public contracts of a value below the thresholds set out in the Substantive Procurement Directives, but which are nonetheless subject to national public procurement rules. The EU legislature (at the time only the Council) rejected this aspect of the Commission's proposal however. In the Procurement Remedies Directives this issue is now merely addressed in an indirect manner, in that it is stipulated that there should be no discrimination between undertakings claiming harm in the context of a procedure for the award of a contract as a result of the distinction made by these directives between national rules implementing EU law and other ('purely') national rules.[155]

95. Under the Procurement Remedies Directives the Member States must further ensure that review procedures are available "*under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement*".[156] Through this rule it is thus established which private parties have *legal standing* (*locus standi*) before the courts des-

152 CoJ case C-26/03, *Stadt Halle*, para. 34-35. See also CoJ C-92/00, *Hospital Ingenieure*, para. 48-52.

153 Art. 55-64 Defence Procurement Directive 2009/81.

154 See Commission, Proposal for Public Sector Remedies Directive 89/665, COM(87) 134, p. 6 (Art. 1).

155 Art. 1(2) Procurement Remedies Directives 89/665 and 92/13.

156 Art. 1(3) Procurement Remedies Directives 89/665 and 92/13. In addition, at the time of the aforementioned revision Art. 2a(2) was inserted, clarifying in which cases a private party is "*concerned*" by a particular provision of these directives. This is no rule on legal standing proper. However it indirectly establishes which private parties are entitled to contest an alleged infringement, given that a party that is not 'concerned' in the abovementioned sense will normally not have a sufficient interest.

ignated by the Member States. In essence under this provision any – legal or natural[157] – person that has, or has had, a legitimate interest in the outcome of the award procedure is entitled to bring legal proceedings.[158] The requirement of a (legitimate) interest, which is common to the laws of most Member States, was inserted in the text of this provision by the Council.[159] The Commission had proposed to grant legal standing to *any person entitled to tender* for the award at issue. The eventual wording, which is somewhat more restrictive, has been designed to allow any private party concerned to institute a review procedure under these directives, without however "*jeopardising*" the procedural laws of the Member States as they stood.[160] It follows that the Member States are not required to allow *any* private party to bring legal proceedings under these directives.[161]

The Court of Justice has clarified that the above provision ensures legal standing for the aggrieved private parties bringing a claim, but that it does not necessarily extend to the defendants, i.e. the contracting authorities that allegedly infringed the EU procurement rules and which may wish to appeal a decision taken in first instance (although Member States are not precluded from ensuring legal standing also for these latter parties on the basis of national law).[162] It further appears that persons invoking merely a general or public interest or making an obviously unmeritorious claim can be barred.[163] Similarly a tenderer that has had its own bid declared invalid, and therefore is no longer a participant in the contract award procedure, can be held to have insufficient interest in having subsequent decisions taken in the context of that procedure reviewed, provided however that this party has been in a position to previously contest the decision as regards its own bid.[164] On the other hand the Court has held that the interest of a private party in initiating legal proceedings cannot be made conditional on a prior referral to a non-judicial conciliation committee.[165] Nor can the formal capacity of tenderer or candidate be required. Thus, a private party which

157 CoJ case C236/95, *Commission v. Greece*, para. 11.

158 Commission, Proposal for Utilities Remedies Directive 92/13, COM(90) 297, p. 17.

159 Cf. Commission, Communication on the Council's position on the proposal for Public Sector Remedies Directive 89/665, SEC(89) 1196, p. 7. See also Fernández Martín (1996), p. 207.

160 Council, doc. 7834/89 ADD 1, p. 7. See also the statement by the Council and the Commission that "*within the meaning of this Directive any person excluded from participation in a procedure for the award of a public contract owing to an alleged infringement is a person having or having had an interest in obtaining a public contract and who has been harmed or risks being harmed. In particular, the fact of having suffered financial loss shall not be considered a requirement for the admissibility of a review*", laid down in Council, doc. 7490/89, p. 10.

161 CoJ case C-249/01, *Hackermüller*, para. 18; CoJ case C-230/02, *Grossmann*, para. 26.

162 CoJ case C-570/08, *Simvoulio*, para. 35-36.

163 Cf. recital 122 New Public Sector Directive 2014/24; recital 128 New Utilities Procurement Directive 2014/25; Dahlgaard Dingel (1999), p. 228; Trepte (2007), p. 552.

164 CoJ case C-249/01, *Hackermüller*, para. 26-29. See also CoJ case C-100/12, *Fastweb*, para. 26-30.

165 CoJ case C-410/01, *Fritsch*, para. 31-34. See also CoJ case C-230/02, *Grossmann*, para. 42.

did not submit a bid because he found the specifications of the tender documents to be discriminatory will normally have legal standing, in as far as its actions relates to those specifications.[166] Yet, as the Court rules in *Grossmann*, such a party can be denied access to a court or another review body for lack of interest if that party did not seek any review of the decision to include these specifications until after the contract had been concluded. In this ruling it held that by acting in that manner that party compromised the directives' objective of effective and rapid review.[167] The Court has further repeatedly assessed national rules on legal standing in relation to members of a consortium, consisting of several legal persons, bringing actions under the directives. Here it distinguished between actions for the annulment of the award decision and actions for damages.[168]

3.3.2. Limitation periods and standstill periods

96. Provisions concerning *limitation periods* applicable to private parties wishing to initiate legal proceedings were inserted in the Procurement Remedies Directives as part of the 2007 revision of these directives. These periods come in various forms. In particular, they vary in light of the remedy sought, as discussed in the previous section. In the first place, Member States may so set such limitation periods for applications for the *review of decisions* taking by contracting authorities.[169] This provision applies not only to applications for review of contract award decisions, but more generally to any application for review of decisions taken in the context of or in relation to a contract award procedure falling within the scope of the Procurement Remedies Directives. These periods should have a length of at least ten or 15 days, depending on the means of communication used. The fact that these periods are rather short is related to the predominance of the interest of the rapid resolution of public procurement disputes and consequently the completion of the contract award procedure.[170] In the second place, for actions seeking to have a concluded contract *considered ineffective* longer minimum time limits apply.[171] The latter must be either 30 days where a contract

166 CoJ case C-230/02, *Grossmann*, para. 25-30; CoJ case C-26/03, *Stadt Halle*, para. 40.

167 CoJ case C-230/02, *Grossmann*, para. 34-40.

168 For these first types of actions a requirement that the action be brought by all consortium members *collectively* (as opposed to one member individually) was held to be permissible, while for the second type it was not. See CoJ case C-57/01, *Makedoniko Metro*, para. 64-73; CoJ case C-129/04, *Espace Trianon*, para. 20; CoJ joined cases C-145/08 and C-149/08, *Club Hotel Loutraiki*, para. 65-80. Note that this latter case concerned a situation falling outside the scope of Procurement Remedies Directives 89/665 and 92/13, which was examined in particular under the principle of effective judicial protection. On the differences between these two types of actions, see also Opinion AG Sharpston joined cases C-145/08 and C-149/08, *Club Hotel Loutraki*, para. 99-125.

169 Art. 2c Procurement Remedies Directives 89/665 and 92/13.

170 See para. 78 above. As discussed in para. 79 above, the GPA provides in this respect for a minimum period of ten days.

171 Art. 2f Procurement Remedies Directives 89/665 and 92/13.

award notice has been published or the parties concerned have been informed directly, or six months from the conclusion of the contract. Finally, in all other cases, notably where *actions for damages* are concerned, the limitation periods are to be determined by national law.[172]

The above rules are largely a codification of abundant earlier case law of the Court of Justice on this topic. The general point of departure there is that reasonable limitation periods are in principle acceptable in contract award procedures, subject to the conditions that the effectiveness of the Procurement Remedies Directives is not compromised and the principles of equivalence and effectiveness are respected.[173] The Court has held that the full implementation of the objective of these directives to ensure effective and especially rapid review would be undermined if private parties were allowed to initiate legal proceedings at any time of the contract award procedure, thus possibly forcing the contracting authority to restart the entire procedure.[174] However the abovementioned conditions were found to have been infringed in cases where the limitation period had not been set out expressly or where the contracting authority had created uncertainty in this regard.[175] The Court has further clarified that the starting point for these periods ought to be the moment on which the infringement became known to the private parties concerned.[176] In this connection the importance of adequately informing these parties before any such time period can start to run has also been underlined.[177] Indeed, the occurrence of new events subsequent to the expiry of the set limitation period, of which the private party concerned was not and could not reasonably have been aware, can imply that this period will start to run again, as from the date at which that party was adequately informed by the contracting authority or otherwise became aware of the events in question.[178]

97. Also introduced in 2007 were three new articles concerning *standstill periods*. These provisions should also be understood against the background of earlier case law of the Court of Justice. Of particular relevance is its 1999 landmark ruling in *Alcatel*.[179] This case concerned a contract award procedure initiated by an Austrian ministry for the supply of automatic data transmission systems. Having completed the procedure, on the same day

172 Art. 2f(2) Procurement Remedies Directives 89/665 and 92/13.
173 On these two principles, see section 2.2 above.
174 CoJ case C-470/99, *Universale Bau*, para. 77; CoJ case C-327/00, *Santex*, para. 50-52; CoJ case C-241/06, *Lämmerzahl*, para. 50-51; CoJ case C-456/08, *Commission v. Ireland*, para. 51-52; CoJ case C-314/09, *Stadt Graz*, para. 37.
175 CoJ case C-327/00, *Santex*, para. 61; CoJ case C-241/06, *Lämmerzahl*, para. 57; CoJ case C-456/08, *Commission v. Ireland*, para. 57-58 and 74-75.
176 CoJ case C-470/99, *Universale Bau*, para. 78.
177 E.g. CoJ case C-406/08, *Uniplex*, para. 30-32; CoJ case C-251/09, *Commission v. Cyprus*, para. 57-58. See also CoJ case C-19/13, *Fastweb*, para. 48.
178 CoJ case C-161/13, *Idrodinamica*, para. 47.
179 CoJ case C-81/98, *Alcatel*, para. 29-43.

the contract award decision was taken and the contract was concluded with the successful tenderer. The other tenderers were only informed afterwards. Upon application by one of these other tenderers, the national court seised observed that EU public procurement law had been infringed in the course of the contract award procedure. However, the contract having already been concluded, in the circumstances of the case at hand national law only allowed for an action for damages. The Court of Justice essentially found this to be incompatible with the Procurement Remedies Directives, even if at that time they did not provide expressly for a standstill period to be respected between the contract award decision and the conclusion of the contract. For this would in effect render meaningless the directives' remedies that are meant to be exercised at the pre-contractual stage, i.e. interim measures and the setting aside of unlawful decisions.[180] The Court stressed that these directives seek to guarantee the availability of effective and rapid review at a stage where infringements can still be rectified. As a follow-up, the Commission launched a string of infringement cases against Member States that did not foresee such a standstill period in their national law. The resulting judgments confirmed and further elaborated on the *Alcatel* case. In particular, in *Commission v. Austria*, the Court of Justice highlighted the objective of complete legal protection.[181] It held that this principle presupposes that, prior to the conclusion of the contract, all parties concerned must have sufficient time to examine the validity of the contract award decision. It also underlined that this implies that those parties must be informed of that decision.[182] In other cases it ruled that, even where the possibility of judicial review can lead to a concluded contract being annulled *ex post*, this is in principle not sufficient to compensate for the impossibility of a private party to challenge the contract award decision before the conclusion of the contract.[183]

Subsequently the Commission found in the context of the 2007 revision of the Procurement Remedies Directives that there were significant differences in the manner in which the Member States had given effect to this earlier case law, leading to loopholes and uncertainties.[184] It therefore proposed codifying the relevant case law at EU level. The main objective of the rules in question is in essence to ensure that the pre-contractual stage is prolonged where necessary, so as to allow in particular for a realistic possibility for a private party to initiate proceedings for interim measures or the setting

180 See subsection 3.2.1 above. The CoJ's ruling in *Alcatel* concerned only the seting aside of unlawful decisions, but it would appear to apply also to the granting of interim relief. In a similar sense, see Trepte (2007), pp. 555 and 564.

181 CoJ case C-212/02, *Commission v. Austria*, para. 21-24.

182 See also CoJ case C-455/08, *Commission v. Ireland*, para. 30-34; CoJ case C-406/08, *Uniplex*, para. 30-31.

183 CoJ case C-444/06, *Commission v. Spain*, para. 45; CoJ case C-327/08, *Commission v. France*, para. 58.

184 Commission, Impact assessment report on remedies in the field of public procurement, SEC(2006) 557, p. 10.

aside of unlawful decisions. Before this revision, lack of sufficient time was thought to have been an important reason why during the pre-contractual stage it could prove difficult to successfully bring a case. As was explained above, contracting authorities sometimes concluded the contract at issue as quickly as possible, in particular before any legal proceedings challenging a contract award decision could be brought or completed, given that such concluded contracts were normally left unaffected by the review (the so-called 'race to signature').[185]

The resulting articles in the revised Procurement Remedies Directives essentially provide for a standstill period, which is to be respected by the contracting authority, of at least either ten or 15 days (depending on the means of communication used). Subject to certain exceptions, the contract may not be concluded during this period.[186] Any such communication to the private parties concerned must moreover contain a summary of the reasons for the contracting authority's decision in question. These rules are complemented by similar provisions providing for the automatic suspension of ongoing contract award procedures pending the decision by the national court, at least where review in first instance is concerned.[187] Obviously, during this latter period the contract may not be concluded either, so as not to make the pending review largely meaningless in practice. The abovementioned provision on the Member States being able to provide that, after the conclusion of the contract, the powers of the courts under the directives are limited to merely awarding damages was retained. It was however made expressly subject to the directives' other provisions in this respect, notably those on ineffectiveness.[188]

3.3.3. Forum, procedure and general rules

98. The Procurement Remedies Directives contain rules on *forum*, i.e. on the court or other body designated to rule on the cases brought under these directives. On the whole the Member States are left considerable freedom to make their own choices in this respect. The term generally used in these directives is 'review body', which is a very broad term indeed. As such the directives leave it in principle to the Member States to decide whether the claims brought are to be decided by a body that is judicial in character, i.e. a civil or administrative court, or by another body, such as a non-judicial administrative body. In certain cases the directives moreover specifically require these review bodies to be "*independent of the contracting authority*".[189]

185 See para. 75 above.

186 Art. 2a and Art. 2b Procurement Remedies Directives 89/665 and 92/13.

187 Art. 1(5) and 2(3) Procurement Remedies Directives 89/665 and 92/13; Art. 2(4) Public Sector Remedies Directive 89/665; Art. 2(3a) Utilities Remedies Directive 92/13.

188 Art. 2(7) Public Sector Remedies Directive 89/665; Art. 2(6) Utilities Remedies Directive 92/13.

189 Art. 2d and 2e Procurement Remedies Directives 89/665 and 92/13 (relating to the contractual remedy, discussed in subsection 3.2.3 above).

Where a Member State chooses the first option, i.e. it designates a *judicial* body, no further requirements apply. But specific requirements are set out for the situation where the designated bodies are *not judicial* in nature.[190] These requirements aim to ensure that these bodies nonetheless offer equivalent guarantees in terms of independence and impartiality.[191] They entail, in a nutshell, the following. First, the body concerned must hear both sides and must provide reasons for its decisions in writing. Second, it should be ensured that an appeal can be lodged before a body that is not only independent of the contracting authority, but that is also empowered under the EU Treaties to refer a preliminary question to the Court of Justice.[192] Third, the members of this independent appeal body must be appointed and leave office under the same conditions of the members of the judiciary as regards the authority responsible for their appointment, their period in office and their removal. And at least the president of this body must have the same legal and professional qualifications as members of the judiciary. Finally, the decisions of this appeal body must be legally binding. Thus, where a Member States designates a non-judicial body, at least the possibility of a review on appeal by a body of a quasi-judicial nature and through a quasi-judicial procedure is to be ensured, so as to guarantee an independent, impartial and fair review of the contracting authorities' decisions at least in second instance and also that preliminary questions can be referred where necessary. Yet those rules do not exclude review by administrative or specialised bodies.

The directives further provide that the power to award the remedies set out therein may be conferred on *separate bodies* responsible for different aspects of the review procedures.[193] This latter provision is meant to accommodate the Member States that require that an unlawful decision is first set aside by an administrative court, after which damages claims can be brought before a civil court.[194] In this respect the Member States represented in Council considered it "*not […] advisable to amend this general system of administrative law for the public procurement sector alone*".[195]

In light of the flexibility resulting from the above provisions, it is unsurprising that in practice the Member States' review systems differ considerably between them. As regards the review in first instance, most have established some form of specialised non-judicial or quasi-judicial public procurement review body, generally of an administrative nature. This can for example take the form of a special complaints board (Denmark), certain designated public procurement chambers (Germany), a competition office (Czech Republic) or a public procurement commission (Estonia). The deci-

190 Art. 2(9) Procurement Remedies Directives 89/665 and 92/13.

191 Commission, Communication on the Council's position on the proposal for Public Sector Remedies Directive 89/665, SEC(89) 1196, p. 9.

192 On the conditions for qualifying as a 'court or tribunal' within the meaning of Art. 267 TFEU on the preliminary reference procedure, see further para. 22 above.

193 Art. 2(2) Procurement Remedies Directives 89/665 and 92/13.

194 See para. 78 above.

195 Council, doc. 7834/89 ADD 1, p. 7.

sions taken by these bodies are normally subject to appeal before the – civil or administrative – courts of the Member States in question.[196] Yet in several Member States public procurement disputes covered by the Procurement Remedies Directives are to be brought immediately before the ordinary courts. These are mostly either exclusively or partially administrative courts, as is the case for instance in Italy, France and Portugal. Where Member States opted for a 'mixed' system of review by administrative as well as civil courts of the sort referred to above, the latter tend to be competent to consider actions for damages whereas the administrative courts are to rule in the other cases. By contrast in Member States such as the United Kingdom, Sweden and the Netherlands civil courts are in principle competent to hear all public procurement disputes brought under these directives.[197]

99. Turning to the relevant rules of procedure, most noticeable are the Procurement Remedies Directives' rules on '*pre-trial contacts*', according to which the Member States are entitled to require a party wishing to initiate proceedings to first notify the contracting authority of the alleged infringement and its intention to seek review.[198] A considerable number of Member States has made use of this option, including Germany, Greece and Poland.[199] Such pre-trial contacts may help to facilitate an amicable settlement, which can be attractive from the point of view of costs and speed. But it can also lead to delays. The directives therefore specify that this possibility should not lead to the limitation periods or standstill periods, discussed in the previous subsection, being affected. In other words, the delay that such pre-trial contacts involve should not be such that the private party-complainant is time-barred should it subsequently wish to bring legal proceedings, not should the contested public contract be concluded with another party in the meantime.

Along similar lines, but going a step further, is the possibility of requiring a private party to first *seek review* with the contracting authority.[200] Only a limited number of Member States have made use of this possibility. One of them is Spain, where reportedly over 90% of the disputes are settled pursuant to such a request for internal review by the authority concerned.[201] Also in this case the directives seek to ensure that there are no serious adverse consequences for the private party seeking review, notably by providing that such an application to the contracting authority must result in the

196 Commission, Report on the impact and effectiveness of EU public procurement legislation, SEC(2011) 853, pp. 69-70.
197 Commission, Annual public procurement implementation review 2012, SWD(2012) 342, p. 34.
198 Art. 1(4) Procurement Remedies Directives 89/665 and 92/13.
199 Commission, Report on the impact and effectiveness of EU public procurement legislation, SEC(2011) 853, p. 69.
200 Art. 1(5) Procurement Remedies Directives 89/665 and 92/13.
201 Commission, Annual public procurement implementation review 2012, SWD(2012) 342, p. 33.

immediate suspension of the possibility to conclude a contract. Afterwards, the party concerned must again be left a minimum standstill period so as to ensure an opportunity to apply to the courts.[202]

The directives further require it to be ensured that the decisions taken by the national courts (or other review bodies) seised can be effectively *enforced*.[203]

100. Finally, certain what could be called '*general rules*' have been laid down in the Procurement Remedies Directives. This term refers to the generally formulated provisions that are not related to a specific remedy or procedural issue, but that rather apply across the board. It is stated that Member States must ensure that decisions taken by the contracting authorities "*may be reviewed effectively and, in particular, as rapidly as possible*" on the grounds that such decisions have infringed EU law in the field of public procurement or national law transposing that law.[204] This provision sums up the essence of what these directives seek to achieve.[205] These general rules have proven to be an important interpretative aid in several cases. An example is the aforementioned *Grossmann* ruling, where the Court held that under the Procurement Remedies Directives a private party can be denied access to court for lack of interest if that party failed to seek review of the decision to include certain specifications in the tender documents until after the contract had been concluded, as such behaviour compromises the directives' objective of effective and rapid review.[206] Another example is the *Stadt Graz* case, which has also already been discussed above. In this case it was found, for largely similar reasons as in *Grossmann*, that even a rebuttable presumption of fault set under national law in relation to actions for damages are incompatible with the Procurement Remedies Directives.[207]

3.4. Other enforcement issues

Apart from the measures facilitating the private enforcement of EU law discussed in the foregoing sections, other means of ensuring the compliance with and the enforcement of substantive EU public procurement law are not entirely absent. Below two alternative compliance mechanisms that are peculiar to the Utilities Remedies Directive and the scope for alternative dispute resolution are first discussed. Attention then turns to the role of public enforcement in the present context.

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202 On these standstill periods, see also para. 97 above.
203 Art. 2(8) Procurement Remedies Directives 89/665 and 92/13.
204 Art. 1(1) Procurement Remedies Directives 89/665 and 92/13.
205 Indeed, the CoJ has at times identified this as their objective, even if it has not always been consistent in this respect. See para. 74 above.
206 CoJ case C-230/02, *Grossmann*, para. 37. See para. 95 above.
207 CoJ case C-314/09, *Stadt Graz*, para. 43. See para. 88 above.

3.4.1. Alternative compliance mechanisms and alternative dispute resolution

101. Up until 2007 the Utilities Remedies Directive contained two specific *alternative mechanisms to ensure compliance* with the relevant rules of substantive EU public procurement law. It concerns, in the first place, the 'attestation mechanism'.[208] This entailed a voluntary system under which contracting authorities had the possibility of having the conformity of their contract award procedures assessed through periodic audits. The second mechanism is the 'conciliation procedure'.[209] The latter allowed aggrieved private parties to request the Commission to appoint an independent conciliator. If the Commission agreed, this conciliator was then to be drawn from a list established by the former in consultation with the representatives of the Member States. This procedure could only be used with the agreement of the contracting authority and would not result in any legally binding decisions. At the time of the adoption of the Utilities Remedies Directive, in 1992, considerable attention was paid to these two innovative forms of dispute prevention and resolution.[210] This suggests that it they were thought to be able to play an important role in practice. In the context of the 2007 revision the Commission observed however that they had failed to generate any significant interest on the side of the parties concerned. Having regard also to the administrative costs associated with keeping them in place, it was decided that these mechanisms were no longer to be retained.[211] The provisions in question were therefore deleted from these directives.

102. Although the provision on the abovementioned centralised 'conciliation procedure' was thus deleted in 2007, that is not to say that *alternative dispute resolution* cannot play a role in resolving disputes relating to the application of EU public procurement law. It has been seen in the foregoing that the Court of Justice has held it to be incompatible with the Procurement Remedies Directives' rules on legal standing if national law makes recourse to a non-judicial reconciliation a mandatory requirement for having legal standing.[212] Many Member States have nonetheless set up bodies that aim at finding extrajudicial solutions to public procurement disputes, such as an

208 Art. 3-7 Utilities Remedies Directive 92/13, as it stood before the 2007 amendment.

209 Art. 9-11 Utilities Remedies Directive 92/13, as it stood before the 2007 amendment.

210 By means of a rough illustration, 12 of the 18 articles of the initial Commission proposal for this directive related to these two mechanisms. The importance attached to these mechanisms is moreover illustrated by the attention paid to them in the explanatory memoranda to the initial and amended Commission proposal. See Commission, Proposal for Utilities Remedies Directive 92/13, COM(90) 297; Commission, Amended proposal for Utilities Remedies Directive 92/13, COM(91) 158.

211 Recitals 29 and 30 Procurement Remedies Amending Directive 2007/66. See also Commission, Impact assessment report on remedies in the field of public procurement, SEC(2006) 557, pp. 13-14.

212 CoJ case C-410/01, *Fritsch*, para. 31-34. See para. 95 above.

arbitration panel or an ombudsman.[213] On the whole especially aggrieved private parties generally tend to prefer settling disputes amicably whenever possible, in light *inter alia* of the aforementioned fears of harming the business relationship with the contracting authority and the length and costs of legal proceedings.[214] Field research carried out in England and the Netherlands reveals for example a clear preference on the side of those parties for non-judicial forms of dispute resolution in one form or another.[215]

However, despite these advantages, resolving public procurement disputes in this manner can also entail certain risks and drawbacks. In particular, public procurement rules generally aim at ensuring transparency and competition, rather than 'one-on-one' negotiations behind closed doors between contracting authorities and certain undertakings. Alternative dispute resolution mechanisms are typically based precisely on the latter approach however.[216] For example, the Procurement Remedies Directives would not reach their underlying aim of strengthening compliance with substantive EU public procurement law if an out-of-court settlement were to lead to an aggrieved private party agreeing to drop its claim in return for being awarded a future contract without competitive tendering. In other words, there is a risk that a dispute is resolved at the expense of the public interest or the interests of third parties. The resulting tension comes to light in relation to the EU level 'conciliation procedure', mentioned above. With a view to avoiding the abovementioned risk, this mechanism included the requirement that any agreement reached must be in accordance with EU law and that interested third parties (notably other undertakings interested in the public contract at issue) should be allowed to intervene in the conciliation proceedings.[217] At the same time these requirements are likely to be among the reasons why this mechanism generated so little interest in practice, leading to its abolishment.

3.4.2. Public enforcement

103. In the introduction to this chapter it was noted that over the years serious shortcomings have been identified as regards the compliance with EU public procurement law. Despite the adoption and subsequent revision of the Procurement Remedies Directives, these difficulties are not a thing of the past. Indeed, as the EU legislature noted in 2014, "*there is still considerable*

213 Commission, Report on the impact and effectiveness of EU public procurement legislation, SEC(2011) 853, p. 69.

214 See para. 87 above. See also Commission, Report on the impact and effectiveness of EU public procurement legislation, SEC(2011) 853, pp. 71-73.

215 See Wood Report (2004), p. 54; study carried out on behalf of the Netherlands' Ministry of Economic Affairs, published as Hebly, De Boer & Wilman (2007), p. 147.

216 Cf. Trepte (2007), pp. 373-374 and 376-577. See also Arrowsmith (2005), p. 1435; Caranta (2011), p. 84.

217 Art. 10(4) and Art. 11 Utilities Remedies Directive 92/13, as it stood before the 2007 amendment.

room for improvement" in this regard.[218] One conceivable response to these shortcomings would be to ensure, as a matter of EU law, that effective public enforcement structures are in place.[219] At central, EU level this could entail granting the Commission particular powers to investigate and address (alleged) infringements. As regards public enforcement at national level one could further think in particular of the establishment of authorities charged with supervising and enforcing the correct application of the EU's substantive rules on public procurement. This is generally not the case at present however. As is set out below, with respect to the enforcement of the rules in question, public enforcement in effect plays only a modest role as a matter of EU law. This might well be related to the fact that the addressees – and therefore the potential infringers – of those rules are typically (semi-)public authorities themselves. It appears that the EU legislature is rather hesitant to make those authorities subject to significant public enforcement powers entrusted to other public authorities, regardless of whether the latter are EU or national authorities, thus leaving the burden of enforcement instead to the private parties concerned.

104. Concerning the possibilities at *EU level*, especially in its 1987 proposal for the Public Sector Remedies Directive the Commission initially placed considerable emphasis on certain innovative forms of public enforcement.[220] It had sought to obtain for itself rather far-going powers to intervene directly at national level. This took two forms. First, it was proposed to entitle the Commission to intervene in national review procedures, as a sort of *amicus curiae*, regarding matters of EU law. Second, this proposal included a suggestion for the Commission to be empowered to suspend on-going contract award procedures in certain cases. Arguably in the Commission's view these two proposed forms of centralised public enforcement were at least as important as the proposed measures that sought to facilitate the private enforcement of EU public procurement law, discussed in the foregoing.[221] But the EU legislature (at that time only the Council) judged this proposed form of direct intervention to be "*foreign to the system for the application of [EU] law provided for in the [EU] Treaties [and] to the legal systems of the Member States*" and it did not wish "*to introduce so fundamental a change in the procedural law of the Member States and to apply it only to one sphere of*

218 Recital 121 New Public Sector Directive 2014/24; recital 127 New Utilities Procurement Directive 2014/25. See further para. 76 above.

219 See also section 2.4.2 above.

220 See Commission, Proposal for Public Sector Remedies Directive 89/665, COM(87) 134. See also Commission, Amended proposal for Public Sector Remedies Directive 89/665, COM(88) 733.

221 Again by means of a rough illustration, in the initial Commission proposal only one article concerned the remedies available to private parties, whereas three articles related to the proposed Commission's powers. The importance that the Commission attached to these powers is moreover evident from the attention paid thereto in the explanatory memoranda to the initial and amended Commission proposal.

[EU] law".[222] This aspect of the proposal was therefore rejected. In the case of the proposed powers for the Commission to suspend on-going contract award procedures this rejection was even unanimous.[223] A few years later, when discussing the proposal for Utilities Remedies Directive, the European Parliament argued in favour of granting the Commission similar powers to intervene directly in national proceedings. However this time the Commission itself decided against proposing such an arrangement. It argued that, given its limited resources, it could not verify the compliance of each and every entity with the applicable EU public procurement rules and that more costs-effective alternatives existed.[224]

The Commission was nevertheless not left entirely empty-handed however. Both Procurement Remedies Directives contain a 'corrective mechanism'.[225] This foresees that the Commission can notify a Member State when it considers that a "*serious infringement*" of EU procurement law has been committed and request its correction. Within 21 days, the Member State concerned must then confirm that the infringement has been corrected, explain why no such correction has been made or inform the Commission that the contract award procedure in question has been suspend. But the directives contain no provisions as to possible subsequent steps. The Court of Justice has clarified that in this regard the Member State concerned are not obliged to 'automatically' comply with the Commission's request.[226] Where a Member State refuses to do so, this effectively leaves the Commission only the option of initiating 'regular' infringement proceedings.[227] Evidently, as the Court has confirmed, this corrective mechanism can neither derogate from nor replace the system established by the EU Treaties in this respect.[228] In 2007 the Commission observed that this corrective mechanism had not been used since the early 1990s. It cited difficulties in acting swiftly before the conclusion of the contract and in gathering convincing evidence of the alleged infringement.[229] As part of the revision amendments were made so as to 'refocus' this mechanism on serious infringements of EU public procurement law.[230] However, as such, these amendments seem unlikely to substantially alleviate the said difficulties. Neither do they alter the fact that, as was

222 Council, doc. 7834/89 ADD 1, p. 5.
223 Commission, Communication on the Council's position on the proposal for Public Sector Remedies Directive 89/665, SEC(89) 1196, p. 10. See Fernández Martín (1996), p. 221.
224 Commission, Amended proposal for Utilities Remedies Directive 92/13, COM(91) 158, pp. 4-6 and 14.
225 Art. 3 Public Sector Remedies Directive 89/665; Art. 8 Utilities Remedies Directive 92/13.
226 Cf. CoJ Order case C-387/08 P, *VDH*, para. 23-25.
227 On these infringement proceedings, see subsection 2.4.1 above.
228 CoJ case C-359/93, *Commission v. Netherlands*, para. 13; CoJ case C-79/94, *Commission v. Greece*, para. 11. As is illustrated by these two cases, in practice the Commission tends to consider the notification issued under the corrective mechanism as a letter of formal notice initiating the infringement proceedings.
229 Commission, Impact assessment report on remedies in the field of public procurement, SEC(2006) 557, p. 13.
230 Recital 28 Procurement Remedies Amending Directive 2007/66.

explained above, the Commission's powers under this mechanism are actually rather limited. It remains to be seen therefore whether this mechanism will be used more frequently and with more success in the time to come.

105. Turning to what could be called the more 'classical' forms of public enforcement in the EU legal order, i.e. through the involvement of *national authorities* charged with supervising and enforcing the application of EU public procurement law, the EU's approach has been somewhat ambivalent. In its 1996 green paper on public procurement the Commission noted that the establishment of such authorities might have advantages, arguing that their very existence could already help prevent infringements. The Member States were therefore "*invited*" to consider this option.[231] In its communication of two years later the Commission underlined that it did not have the resources to act itself as "*a kind of 'super enforcement authority'*".[232] It therefore instead "*encouraged*" the setting-up of independent authorities by the Member States as contact points for rapid, informal solution of public procurement-related problems and for authorities from other Member States and the Commission.[233] Neither the Procurement Remedies Directives nor the Substantive Procurement Directives at present set out an obligation to this effect however. The latter directives merely provide (since 2004) that the Member States *may* establish national public procurement authorities of this kind.[234] This seems little more than stating the obvious. Most Member States have actually established a public supervision authority of some sort, although this is often only an *ex post* audit body or a non-independent procurement office with limited powers.[235]

The more recent amendments to the EU's public procurement rules did not fundamentally alter this situation.[236] In the context of the 2007 revision of the Procurement Remedies Directives the possibility of including an EU law obligation to establish an independent national authority, empowered to notify alleged infringements to contracting authorities and if necessary bring cases before the national courts, was again raised. The Commission acknowledged that this could help solve disputes quickly and in an informal manner. An important further advantage is that enforcement measures would not necessarily depend on the decision of an undertaking whether or not to initiate legal proceedings. As was noted above, apart from possible legal constraints, in practice private parties are often deterred from doing so for fear of repercussions and financial constraints.[237] But in 2007 a majority

231 Commission, Green paper on public procurement in the EU, COM(96) 583, p. 17.
232 Commission, Communication on public procurement in the EU, COM(1998) 143, p. 13.
233 *Ibid*.
234 Art. 81 Public Sector Procurement Directive 2004/18; Art. 72 Utilities Procurement Directive 2004/17.
235 Commission, Report on the impact and effectiveness of EU public procurement legislation, SEC(2011) 853, pp. 63-65.
236 See subsection 3.1.3 above.
237 See in particular para. 87 above.

of Member States took an unfavourable view of this option. Invoked were fears of being 'overwhelmed' by nuisance cases, as well as the costs of setting up and operating the authorities.[238] This obligatory public enforcement option was therefore discarded, despite having received strong support from the private sector.[239] What remains as a matter of EU law at present is the Public Procurement Network. This is principally an informal forum for the exchange of information and best practices between the public authorities concerned.[240]

This issue later re-emerged in the context of the aforementioned revision of the EU's substantive public procurement rules in 2014.[241] In that context the Commission proposed an obligation for the Member States to designate a single, independent 'oversight body', which would be charged *inter alia* with monitoring the application of the relevant rules, issuing own initiative opinions and helping to settle complaints.[242] These already not very ambitious proposals were watered down further during the legislative process. The new substantive public procurement directives only provide for an obligation to designate "*one or more authorities, bodies or structures*" that are responsible for 'monitoring' the application of the relevant rules and for 'indicating' possible problems to "*national auditing authorities, courts or tribunals or other appropriate authorities or structures, such as the ombudsman, national parliaments or committees thereof*".[243] This seems a very modest step indeed.

It is therefore clear that in this field EU law does not provide for 'proper' public enforcement at national level, in the sense that neither under the rules that are currently in force, nor under the recently adopted new substantive public procurement directives the Member States are required to designate an authority with significant powers to investigate and effectively address (alleged) infringements of EU public procurement law.

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238 Commission, Impact assessment report on remedies in the field of public procurement, SEC(2006) 557, pp. 25, 26 and 39-42; Commission, Proposal for Procurement Remedies Amending Directive 2007/66, COM(2006) 195, pp. 4-5.

239 In the consultation preceding the 2007 revision over 85% of the undertakings expressed a preference for obliging the Member States to set up such an independent authority. Of the consulted lawyers and professional and non-governmental organisations, around 60% and almost 70% respectively held this view. See Commission, Responses to the consultation on the operation of national review procedures in the field of public procurement, 2004. Similar strong support has been found during field research carried out in the Netherlands. See Hebly, De Boer & Wilman (2007), p. 147.

240 See further http://www.publicprocurementnetwork.org.

241 See para. 76 above.

242 See Commission, Proposal for New Utilities Procurement Directive 2014/25, COM(2011) 895, pp. 107-108 (Art. 93); Commission, Proposal for New Public Sector Procurement Directive 2014/24, COM(2011) 896, pp. 101-102 (Art. 84).

243 Art. 83 New Public Sector Directive 2014/24; Art. 99 New Utilities Procurement Directive 2014/25. See also Art. 45 Concessions Awards Directive 2014/23. As regards the possibility for interested parties to bring possible infringements to the attention of the competent national authorities, see recital 122 New Public Sector Directive 2014/24 and recital 128 New Utilities Procurement Directive 2014/25.

3.5. Summary

106. Having been adopted in 1989 and 1992, the two – very similar – Procurement Remedies Directives seek to strengthen compliance with substantive EU public procurement law, such against the background of the objective of realising an EU-wide internal market for public contracts. Member States are obliged under these directives to ensure that four remedies are available to the private parties concerned in proceedings before the national courts. It concerns interim measures, the setting aside of unlawful decisions, actions for damages and, since their revision in 2007, a contractual remedy in the form of concluded contracts being considered ineffective. These remedies are complemented by a set of common rules on a number of procedural issues, which include rules on legal standing that specify which parties are entitled to initiate legal proceedings under these directives and rules of forum regarding the bodies competent to decide on the actions in question. The Procurement Remedies Directives also provide for rules on limitation periods and standstill periods, so as to ensure respectively that the aforementioned actions are brought rapidly and that the private parties concerned have a realistic possibility to do so. In this field EU law imposes only very limited specific public enforcement obligations on the Member States.