



FACULTY OF LAW  
University of Lund

Erik Olsson

The full force and effect of Public  
Procurement remedies – the  
general principles of directive  
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Xavier Groussot

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# Summary

Apart from the substantive public procurement rules, harmonising national provisions for the award of public contracts, the Community also strives to ensure compliance with those rules. For that purposes the Remedies Directive 89/665/EEC has been adopted to ensure that effective and rapid remedies are available to aggrieved bidders. This directive has recently been amended by Directive 2007/66/EC to deal with the ineffectiveness of public procurement remedies as identified in practice. Above all, the amended Remedies Directive officially introduces a standstill period between the award decision and the signature of the contract and provides for the sanction of ineffectiveness when the most serious breaches of public procurement rules occur, i.e. illegal direct award and race to signature. Although the amendment is not due to be implemented until December 2009, it is argued in this thesis that these two innovations of the new Remedies Directive should be applicable already today. It is our belief that the ECJ has already introduced the standstill period with the *Alcatel* judgment, whereas the recent *Commission v Germany* judgments show that illegal direct award may result in the termination of the contract. Furthermore, we are of the opinion that respecting the standstill period and the sanction of ineffectiveness transpire from the general principles of Community law such as the principle of effectiveness and effective judicial protection. In order to comply with the principle of effectiveness in the field of public procurement, it is necessary to ensure the full force and effect of the substantive and the Remedies Directive and protect the rights of an individual to have public contracts awarded in a transparent, open and non-discriminatory manner. Similarly, effective judicial protection, when applied to this area, demands that all aggrieved bidders have the right to obtain an effective remedy against measures, which they consider to be contrary to the principles laid down in substantive public procurement directives. Since the existing remedies under Directive 89/665/EEC do not comply with these requirements, established case law on general principles like *Simmenthal* and *Johnston* demands that the conflicting national legislation is set aside. In the present case, the legislation to be disapplied is the national legislation implementing Article 2(6) of Directive 89/665/EEC, since it is this Article that prevents the disappointed tenders from obtaining an effective remedy after the contract has been concluded. After the legislation is set aside, the national court can solve the case by correct interpretation of Directive 89/665/EEC in light of the *Alcatel* and the *Commission v Germany* judgments or by using the amended Remedies Directive 2007/66/EC as a guideline. Either way, the national court will ultimately be obliged to demand that the contracting authorities respect the standstill period and apply the sanction of ineffectiveness in cases of race to signature and illegal direct award.

# Sammanfattning

Offentlig upphandling är reglerat inom EG-rätten både vad avser materiella regler för upphandlingsprocessen och vad avser de rättsmedel som skall finnas att tillgå vid överträdelse av dessa regler. Rättsmedelsdirektivet 89/665 har nyligen blivit ändrat genom direktiv 2007/66 i syftet att stärka och effektivisera dessa rättsmedel så att individens skydd mot överträdelser av den materiella gemenskapsrätten skall kunna tillgodoses fullt ut. De ändringar som det nya tillägget innebär sker främst mot bakgrund av de ineffektiviteter som har identifierats hos det gamla direktivet vad gäller otillåten direktupphandling och otillbörligt påskyndande av kontraktsskrivning. För att bättre handskas med dessa överträdelser av regelverket, inför tillägget en tio-dagars vänteperiod mellan tilldelningsbeslutet och kontraktstilldelningen. Det inför också en möjlighet att ogiltigförklara kontrakt som slutits som ett resultat av en otillåten direktupphandling. Det nya direktivtillägget skall vara implementerat till slutet av december 2009. De rättsmedel som direktivtillägget kommer att införa följer dock i författarens mening redan av EG-domstolens praxis i Alcatel och Kommissionen mot Tyskland. Som denna uppsats kommer att visa är dessa rättsmedel också en direkt konsekvens av direkt effektiva artiklar i det gamla rättsmedelsdirektivet samt en naturlig följd av EG-rättens fulla effektivitet och individens rätt till ett effektivt rättsskydd. Dessa EG-rättsliga principer kräver både en möjlighet för individen till att effektivt kunna pröva tilldelningsbeslutet samt en möjlighet att riva upp kontrakt som tilldelats i strid mot de materiella upphandlingsreglerna. I det fall den nationella rätten inte skulle erbjuda sådana rättsmedel är den nationella domstolen skyldig att bortse från de nationella bestämmelser som hindrar dessa möjligheter till ett effektivt rättsskydd samt att, om så är nödvändigt, skapa förutsättningar för sådana rättsmedel till fördel för individen. I detta arbete bör den nationella domstolen tillämpa de lösningar som det nya direktivtillägget erbjuder och använda dessa som en hävstång både för tolkning av EG-rättsliga principer såväl som för tolkning av det nuvarande rättsmedelsdirektivet. Med andra ord bör den nationella domstolen inte vänta på att implementeringstiden för direktivtillägget skall gå ut utan bör redan idag tillämpa de lösningar som föreskrivs av både det nya direktivtillägget, EG-domstolens praxis och de generella EG-rättsliga principerna om effektivitet och rätten till ett effektivt rättsskydd.

# Preface

Starting my final semester of law I had little idea of what I was going to write my thesis about and perhaps even less of an idea of what I was going to make of the first years of my future career as a lawyer. As I write these words, a couple of months short of a year later, I am quite pleased to declare that things are looking very different. During the term of the last year I have competed in the European Moot Court Competition, finished this thesis and landed my first job as an intern at the Swedish Competition Authorities. However, looking back at the last year these accomplishments are a distant second to the awards of the journey as such. Participating in the European Moot Court Competition has been an inspiring and challenging experience and has introduced me to the subject of public procurement, which I now work with and strive to make my field of expertise. During the process of the competition I have also found what I hope will be life-long friends in my team mates and I owe them all special gratitude for discussing the topic of this thesis with me for hours and hours on end. It could not have been written without them.

I also would like to give an additional special thanks to Ziva Popov, the teams defendant pleader, who is now working with public procurement at a law firm in Slovenia. Her skills as a lawyer and as a writer will always be an inspiration to me and I owe whatever quality this thesis has entirely to her influence. Thank you.

Secondly, I would like to give my thanks Xavier Groussot for his huge patience and tireless mentorship both as coach for the moot court team and in my work with this essay. Perhaps most of all for teaching me what I would like to call Xaviers first rule of law: “If you rely on general principles you are never wrong.”

To these people and all of the other tutors and inspiring people I have had the pleasure of meeting I owe both this thesis and what turned out to be the most rewarding year of my life.

Lastly I would like thank my girlfriend Moa, who made this year possible simply by not leaving me although I often, by working late and long hours, gave her just cause to do so.

# 1 Introduction

## 1.1 Historical overview

Although the main object of this thesis is to evaluate the effectiveness of remedies in public procurement, it is important to have a basic understanding of substantive public procurement rules, how they have developed in the European Community and the rationale behind them. In the following historical overview, which should serve as an introduction in this thesis, I will try to present what the objects of public procurement are and why Community legislation on their enforcement is necessary.

The economical importance of public procurement is undeniable. According to the Commission estimates, the total EU procurement market amounts to €1500 billion, accounting for over 16% of the Union's GDP.<sup>1</sup> As the stakes behind the regulation of public procurement and the integration of public markets in the EU are high, it is not surprising that this field has become one of the main priorities of the Commission. Although the EC Treaty<sup>2</sup> does not contain any explicit rules on public procurement, there is no doubt that provisions on non-discrimination, the removal of barriers to intra-community trade, the freedom to provide services and the right to establishment, can be applied in order to regulate government purchases and combat discriminatory procurement practices in the Member States.<sup>3</sup> However, it was early recognized that the protection given in these general provisions was not sufficient to secure the development of a free public procurement market. The first and foremost reason for this was the difficulty in proving discrimination in this field. Secondly, it was difficult for foreign tenders to access information of a national tendering procedure, not only due to intentional fault by the contracting authority but also due to a lack in knowledge and possibility of authorities in how to call for such a tender. Thirdly, differing technical specification also hindered free completion in this field.

Due to the diversity of public law systems in the EU and the peculiarities in existing domestic public procurement rules, it was soon realized that a further harmonisation was needed as to ensure the effectiveness and transparency of public markets.<sup>4</sup> It should be noted that basic legislation on coordination for the award of public supply and works contracts has existed

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<sup>1</sup> European Commission, *A Report on the Functioning of Public Procurement Markets in the EU: benefits from the application of EU Directives and Challenges for the Future*, 3 Feb. 2004, p. 4.

<sup>2</sup> Treaty Establishing the European Community, OJ C 325, 24 Dec. 2002 (consolidated text) [hereinafter the EC Treaty].

<sup>3</sup> Articles 12 EC, 28 EC, 49 EC and 43 EC, respectively.

<sup>4</sup> Bovis, C. (1998) "The Regulation of Public Procurement as a Key Element of European Economic Law", *European Law Journal*, Vol. 4, No. 2, p. 225, 227, 228.



since the seventies.<sup>5</sup> However, its implementation, applicability and compliance have been largely ineffective. Thus, it was only after the Commission's White Paper and the adoption of the Single European Act that the question of public procurement was given top priority as part of the striving for the creation of a single market. It was also emphasised that there could be a huge economical gain in having a harmonized system for award of public contracts. Public procurement was recognised as a non-tariff barrier and attention was given to the fact that protectionist public purchasing was distorting competition in the relevant national markets. To counteract this phenomenon, new legislation was put in place by the end of the eighties as part of the legislative package for the completion of the internal market. Harmonizing directives were adopted to regulate the award of public works, supply and services contracts and additionally, the field was extended to include that of the utilities sector.<sup>6</sup> The aim of these directives was above all to integrate the public markets of the Member States, establish an effective competitive regime, abolish discrimination on grounds of nationality and eliminate preferential public procurement trends that favour national champions. It was expected that a common public purchasing behaviour, based on the principles of openness, transparency and non-discrimination – the three key principles of European public procurement – would result in efficiency gains at European and national levels.<sup>7</sup>

According to the Commission, these reforms paid off and the legislative changes introduced in public procurement markets had their intended effect. The procurement procedures became indeed more open, non-discriminatory and transparent, which resulted in increased cross-border competition in procurement activities, price convergence and lower level of prices for goods and services purchased by public authorities.<sup>8</sup> Stimulated by this success, the Commission launched a new debate on public procurement,<sup>9</sup>

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<sup>5</sup> Commission Directive 70/32/EEC of 17 Dec. 1969 on provision of goods to the State, to local authorities and other official bodies, OJ L 13, 19 Jan. 1970, Council Directive 77/62/EEC of 21 Dec. 1976 coordinating procedures for the award of public supply contracts, OJ L 13, 15 Jan. 1977, Council Directive 71/304/EEC of 26 July 1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches, OJ L 185, 16 Aug. 1971, Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts, OJ L 185, 16 Aug. 1971.

<sup>6</sup> Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, OJ L 199, 9 Aug. 1993, Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, OJ L 199, 9 Aug. 1993, Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ L 209, 24 Jul. 1992, Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ L 82, 25 Mar. 1994.

<sup>7</sup> Bovis, C. (1998) "The Regulation of Public Procurement", fn. 4, p. 222, 223, 229.

<sup>8</sup> European Commission, *A Report*, fn. 1, p. 2, 3, 24.

<sup>9</sup> European Commission, Green paper, *Public Procurement in the European Union: Exploring the Way Forward*, 27 Nov. 1996, COM(1996) 583 fin. European Commission,

which ultimately led to the adoption of two new directives, comprehensively regulating the so-called classical<sup>10</sup> and utilities sector,<sup>11</sup> which replaced the entire pre-existing secondary legislation on public procurement. The main objectives of this “legislative package” are, first, to simplify and clarify previous legislation, and secondly, to increase flexibility in order to take account of new practices and adapt the rules to modern administrative needs in an economic environment.<sup>12</sup> To what extent the two directives have succeeded in achieving the stated objectives is disputed,<sup>13</sup> but it suffices to say that Europe got a modernised, simplified and consolidated legislation on public procurement, which is operational since 31 January 2006.

Apart from the substantive rules,<sup>14</sup> aimed at harmonising national provisions for the award of public contracts, emphasis was also placed on Member States’ compliance with those rules and the availability of remedies to interested parties and aggrieved tenderers.<sup>15</sup> It was soon realised that the mere creation of procedures for the award of public contracts would be ineffective in achieving the aim of liberalising procurement markets, unless there also existed procedural rules for enforcement on the Community level.<sup>16</sup> Such an approach is rather unusual. It is normally not necessary to harmonise or to approximate procedural rules and remedies, as it is a general duty of Member States under Article 10 EC to ensure the fulfilment of Community obligations.<sup>17</sup> This power of Member States to determine procedures and procedural rules governing enforcement and judicial protection is referred to as procedural autonomy and Community legislation rarely sets the standards of enforcement required in order to ensure compliance with Community law.<sup>18</sup> For this reason, one is inclined to

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Commission Communication, *Public Procurement in the European Communities*, 11 Mar. 1998, COM(1998) 143 fin.

<sup>10</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 Mar. 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30 Apr. 2004.

<sup>11</sup> Directive 2004/17/EC of the European Parliament and of the Council of 31 Mar. 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134, 30 Apr. 2004.

<sup>12</sup> Williams, R. (2004) “The New Procurement Directives of the European Union”, *Public Procurement Law Review*, Issue 4., p. 154.

<sup>13</sup> See for example S. Arrowsmith (2004) “An Assessment of the New Legislative Package on Public Procurement”, *Common Market Law Review*, Vol. 41, p. 1322-1325.

<sup>14</sup> The distinction between “substantive” and “procedural” rules in public procurement is well established in the doctrine, but somewhat of a paradox. The term “procedural rules” is commonly used to describe provisions contained in the remedies directives. However, the “substantive rules”, enshrined in the Directives 2004/17/EC and 2004/18/EC, are intended to coordinate procedures for the award of public contract, which in essence makes them “procedural” as well.

<sup>15</sup> Bovis, C. (1998) “The Regulation of Public Procurement”, fn. 4, p. 222, 223.

<sup>16</sup> Tyrell, A., Bedford, B. (1996) *Public procurement in Europe: enforcement and remedies*, London, Butterworth, p. 1.

<sup>17</sup> Bovis, C. (1997) *EC Public Procurement Law*, Harlow, Longman, p. 51.

<sup>18</sup> Jans, J. H. et al (2007) *Europeanisation of Public Law*, Groningen, Europa Law Publishing, p. 40, 41. Note, however, that procedural autonomy may be limited by certain general principles, developed by case law of the ECJ (see Case 33/76 *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 01989). More extensively on procedural autonomy and its limitations see Section 4.1.2.

conclude that the mere existence of a remedies directive in a specific field of law might indicate that such a field is of special importance to the Community. The field of public procurement is certainly exceptional, not only due to the immense worth of awarded public contracts, but also because the provisions of the substantive directives in this field generally have direct effect, creating rights for individuals, which must be enforceable. However, the substantive public procurement directives do not contain any provisions on their enforcement and furthermore, the existing arrangements at national and Community law do not always adequately ensure compliance with the relevant Community provision. It therefore became apparent that in the absence of specific remedies, Community undertakings would be deterred from submitting tenders and the principles of openness, transparency and non-discrimination would not be achieved.<sup>19</sup>

Thus, the two remedies directives were adopted, Directive 89/665/EEC<sup>20</sup> and Directive 92/13/EEC,<sup>21</sup> to ensure adequate application and compliance with the substantive directives. Apart from a general obligation on the Member States to ensure that the decisions taken by the contracting authorities may be reviewed effectively and rapidly,<sup>22</sup> the directives also set out in detail the remedies that review bodies must have at their disposal. Three tailor-made remedies should be available, namely interim measures, an action to have unlawful decisions set aside and damages.<sup>23</sup> Actions for obtaining them, can be brought either before the awarded contract is signed (pre-contractual remedies) or after the signature (post-contractual remedies). Despite this harmonisation, the process varies from Member State to Member State according to how the various options offered in the directives have been transposed into national law.<sup>24</sup> Nevertheless, the envisaged remedies should provide an effective tool, which enables the tenderers to penetrate both domestic and foreign public markets and force the contracting authorities to have open, transparent and non-discriminatory public procurement procedures.<sup>25</sup>

However, the years of application revealed several areas where the remedies directives did not achieve the stated objective, namely providing for an effective and rapid review of decisions taken by the contracting authorities. In particular, the Commission realised that the remedies directives do not always make it possible to effectively correct the breaches of public

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<sup>19</sup> Tyrell, A., Bedford, B. (1996) *Public procurement in Europe*, fn. 16, p. 2.

<sup>20</sup> Council Directive 89/665/EEC of 21 Dec. 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ L 395, 30 Dec. 1989 [hereinafter the Remedies Directive or the Remedies Directive 89/665/EEC].

<sup>21</sup> Council Directive 92/13/EEC of 25 Feb. 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ L 76, 23 Mar. 1992.

<sup>22</sup> Article 1(1) of Directive 89/665/EEC and Directive 92/13/EEC.

<sup>23</sup> Article 2(1) of Directive 89/665/EEC and Directive 92/13/EEC.

<sup>24</sup> European Commission, Commission Staff Working Document, *Impact Assessment Report – Remedies in the Field of Public Procurement*, 4 May 2006, SEC(2006) 557, p. 5.

<sup>25</sup> Tyrell, A., Bedford, B. (1996) *Public procurement in Europe*, fn. 16, p. 3, 4.

procurement directives. Remedies proved to be inefficient especially in the case of illegal direct award and race to signature of public contracts. These two types of infringements have been found as seriously affecting the majority of the Member States and constituting real obstacles to a well-functioning and competitive public procurement market.<sup>26</sup> An extensive debate has been launched and Directive 2007/66/EC,<sup>27</sup> amending the existing remedies directives, has been adopted to deal with the abovementioned inefficiencies. The amended Remedies Directive is a follow-up to the update of the substantive public procurement directives. Above all, it is intended to improve effectiveness of review procedures by officially introducing the “standstill period” between the award and the signature of the contract,<sup>28</sup> coupled with the possibility of rendering the contract “ineffective”, if it was awarded illegally or if the standstill period has not been respected.<sup>29</sup> These new rights for rejected tenderers are intended to create stronger incentives for businesses to bid for contracts anywhere in the Union. The Member States have to implement the amendment by December 2009, but the question remains, what happens in the meantime?

## 1.2 Purpose

In light of the above question, the purpose of this thesis will be to discuss whether the innovations of the amended Remedies Directive 2007/66/EC, are already applicable, although the period for its implementation has not yet expired. The Community institutions, the Member States and European entrepreneurs involved in public procurement procedures are well aware that the remedies currently available are not effective, especially as regards to the most serious breaches of public procurement rules.<sup>30</sup> Considering the fact that the problems have been clearly identified, will aggrieved bidders really have to wait until December 2009 to be able to effectively protect and enforce their rights stemming from the substantive procurement directives? In the following, it will be argued that this is not necessary.

First, it will be shown that the Court, when dealing with cases concerning public procurement remedies, has already developed and imposed on the Member States requirements reminiscent of the standstill period and the ineffectiveness of contracts and that this case law can be relied on at the present date. Secondly, it will be argued that the obligation on the national courts and administrative bodies to ensure effective remedies also stems

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<sup>26</sup> European Commission, *Impact Assessment Report*, fn. 24, p. 6, 7, 15, 16.

<sup>27</sup> Directive 2007/66/EC of the European Parliament and of the Council of 11 Dec. 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ L 335, 20 Dec. 2007 [hereinafter the amended Remedies Directive or the Remedies Directive 2007/66/EC].

<sup>28</sup> New Article 2a of Directive 89/665/EEC and Directive 92/13/EEC.

<sup>29</sup> New Article 2d of Directive 89/665/EEC and Directive 92/13/EEC.

<sup>30</sup> European Commission, *Impact Assessment Report*, fn. 24.

from the general principle of effectiveness and the fundamental right to effective judicial protection. By relying on these principles and the case law of the Court, the aggrieved tenderer should be able to achieve the setting aside of national legislation, which prevents him from obtaining an effective remedy. It will also be suggested how national courts should fill the gap after setting aside conflicting national legislation, as to enable the disappointed bidders to obtain a remedy that effectively protects their interests even after the contract has been concluded.

### **1.3 Methods**

To achieve the stated purpose, a traditional legal method will be used. First, the current legislation regulating remedies on public procurement will be analysed. The areas where inefficiency exists will be identified and the solutions of the amended Remedies Directive tackling these problems will be presented. Then, the existing two main lines of case law on remedies in public procurement will be examined and the doctrine commenting on it will be critically assessed. The requirements of effectiveness of Community law as developed by case law will be analysed as well as the general principle of effective judicial protection. These broader principles will then be applied to the specific field of remedies in public procurement in order to assess whether the problems of inefficiency can be solved thereby.

### **1.4 Delimitations**

This thesis will focus only on procedural issues, that is to say the problems and inefficiencies of review procedures under the Remedies Directive 89/665/EEC, leaving the substantive rules, regulating the procedures for the award of public contracts to be examined in other articles of this publication.

Although, there is inefficiency of public procurement remedies both in the classical and the utilities sector, this thesis will concentrate only on the former, namely on the inefficiencies of Directive 89/665/EEC. No further reference will be made to Directive 92/13/EC, although it is believed that the proposed solutions concerning the inefficiency of remedies in the classical sector can be applied to utilities sector as well.

Lastly, it should be noted that the discussion is limited to two specific infringements where the inefficiencies are most likely to occur, namely illegal direct award and race to signature of public contracts. Other breaches of EU directives on public procurement will not be dealt with and the question of efficiency of remedies for those infringements will not be addressed. Thus, the findings and proposed solutions should be seen mainly in the light of illegal direct award and race to signature, which are arguably the most flagrant violations of public procurement law.

## **2 Current areas of inefficiency and forthcoming solutions**

Before focusing on the main issue of this thesis, which is to establish whether aggrieved bidders are able to efficiently protect their interests at the current state of law, it is first necessary to understand the existing legislative situation. The following subsections will therefore briefly present the core provisions of the Remedies Directive 89/665/EEC, the understanding of which is essential for any further discussions. Moreover, two situations where the existing remedies have been recognised as being particularly inefficient will be described. Lastly, the solutions of the amended Remedies Directive 2007/66/EC tackling those issues will be presented.

### **2.1 The Remedies Directive 89/665/EEC**

#### **2.1.1 Effective, rapid and non-discriminatory remedies must be available**

The substantive public procurement regime, the legislative history of which was briefly presented in the introduction, created a coordinated set of procedures for the award of public contracts. However, to guarantee compliance with those rules and the underlying principles of transparency, openness and non-discrimination, it was necessary to ensure that decisions taken by the contracting authorities may be effectively reviewed. This obligation of the Member States to provide contractors with an effective and rapid means of reviewing the award procedures is imposed in Article 1(1) of the Remedies Directive. This provision is clear, precise and unconditional<sup>31</sup> and, as will be argued below, undeniably has direct effect.<sup>32</sup>

Furthermore, the Member States are according to Article 1(2) obliged to ensure that the protection against infringements of EC public procurement rules is equal to that afforded to national rules. This means that the measures taken should be similar to national review proceedings, without any discriminatory character.<sup>33</sup>

Lastly, Article 1(3) provides that review procedures must be made available at least to any person having or having had an interest in obtaining a public contract and who has been or risks being harmed by an alleged infringement. However, the Member State may require that the person seeking the review must previously have notified the contracting authority of the alleged infringement.

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<sup>31</sup> Tyrell, A., Bedford, B. (1996) *Public procurement in Europe*, fn. 16, p. 2.

<sup>32</sup> See Section 5.3.1.

<sup>33</sup> Bovis, C. (1997) *EC Public Procurement Law*, fn. 17, p. 51.

## 2.1.2 Types of remedies and their limitations

In order to fulfil the abovementioned obligations, Article 2(1) of the Remedies Directive requires Member States to provide for three types of remedies in the area of public procurement: interim measures, setting aside of an unlawful decision and damages. The first two are generally classified as pre-contractual remedies, aimed at preventing infringements of public procurement rules before the contract is signed, thus allowing the contract to be awarded in line with the public procurement directives. Damages, on the other hand, are commonly regarded as a post-contractual remedy, primarily aiming to provide compensation in the event of an infringement.<sup>34</sup>

Before the contract is signed, an action for interim measures can be brought by way of interlocutory procedures to correct the alleged infringement or prevent further damage.<sup>35</sup> In addition, the possibility of setting aside decisions taken unlawfully must be ensured.<sup>36</sup> According to the Directive, decisions that may be set aside include those containing discriminatory technical, economic or financial specifications in the documents relating to the contract award procedure.<sup>37</sup> However, as clarified by case law, the unlawful decision awarding a public contract, which is the most important decision of the contracting authority, also falls within the scope of this Article and may be set aside.<sup>38</sup>

In the post-contractual stage, which is after the contract has been signed, the provisions of the Remedies Directive are more restrained. Article 2(6) provides that after the conclusion of a contract, the Member States may limit remedies to only awarding damages. Thus, the Member States have been authorised to limit the possibility of setting aside to pre-contractual situations only and they have largely taken advantage of this exemption. Consequently, the possibility in the EU public procurement regime to have an awarded contract set aside once it has been signed is extremely limited.<sup>39</sup> Moreover, even if there is a possibility to set aside an unlawful decision in a contract award procedure, the effect on a contract concluded as a result of that procedure is to be determined by national law.<sup>40</sup>

To some extent, the irreversibility of concluded contracts can be understood, especially when seen in light of the principle of legal certainty, the protection of legitimate expectations of the contracting party and the

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<sup>34</sup> European Commission, *Impact Assessment Report*, fn. 24, p. 6.

<sup>35</sup> Article 2(1)(a) of Directive 89/665/EEC.

<sup>36</sup> Article 2(1)(b) of Directive 89/665/EEC.

<sup>37</sup> *Ibid.*

<sup>38</sup> Case C-81/98 *Alcatel Austria AG and Others, Siemens AG Österreich and Sag-Schrack Anlagentechnik AG v Bundesministerium für Wissenschaft und Verkehr* [1999] ECR I-07671, para. 32, 38.

<sup>39</sup> Hentry, P. (2006) "Is the Standstill a Step Forward?: The Proposed Revision to the EC Remedies Directive", *Public Procurement Law Review*, Issue 5, p. 254.

<sup>40</sup> Article 2(6), first indent of Directive 89/665/EEC.

principle of *pacta sunt servanda*.<sup>41</sup> Furthermore, the interests of third parties, such as subcontractors or financiers, who are not in any way responsible for the infringements on part of the contracting authority, are also protected through this limitation.<sup>42</sup> Lastly, such an approach may be justified by the need to protect general interests and to avoid the considerable disruptions that could be caused if an important public project was delayed or interrupted.<sup>43</sup> Moreover, once the contract is concluded, it enters the sphere of contractual law, which is still largely within the competence of national legislation and not Community law.

Although Article 2(6) may be objectively justified by numerous legal and economical reasons, this provision has proven to be the main source of inefficiency of public procurement remedies, especially with regard to illegal direct award and race to signature. After all, a chisel can be the tool of choice for both sculptor and assassin.

## 2.2 Identifying the inefficiencies of current legislation

### 2.2.1 Illegal direct award

Illegal direct award is a term used to describe the direct award of a public contract, which should have been subject to a transparent and competitive award procedure, but where the contracting authority completely disregarded public procurement rules.<sup>44</sup> The contracting authority directly awards the public contract to a contractor, without the required prior publication in the Official Journal of the European Union. This practice prevents the best value for money from being obtained and undermines both the interests of business and general public interests. The reasons for such an infringement range from willingness to favour a particular contractor in which the contracting authority has an interest, to corrupt practices.<sup>45</sup> In any event, an illegal direct award is obviously unlawful and the Court has recognised it as “the most serious breach of Community law in the field of public procurement on the part of a contracting authority”.<sup>46</sup> Nevertheless,

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<sup>41</sup> Joined Cases C-20/01 and C-28/01 *Commission of the European Communities v Federal Republic of Germany* [2003] ECR I-03609, para. 38, Case C-503/04 *Commission of the European Communities v Federal Republic of Germany* [2007] ECR I-06153, para. 31.

<sup>42</sup> Golding, J., Hentry, P. (2008) “The New Remedies Directive of the EC: Standstill and Ineffectiveness”, *Public Procurement Law Review*, Issue 3, p. 151.

<sup>43</sup> Hentry, P. (2006) “Is the Standstill a Step Forward?”, fn. 39, p. 254.

<sup>44</sup> Illegal direct award is to be distinguished from situations when the contract is justifiably awarded without prior publication of the contract notice in the Official Journal of the EU. Such an award, which is in accordance with Article 31 of Directive 2004/18/EC, is considered to be a legal direct award.

<sup>45</sup> European Commission, *Impact Assessment Report*, fn. 24, p. 7, 8.

<sup>46</sup> Case C-26/03 *Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* [2005] ECR I-00001, para. 37.



illegal direct award is the most common breach and the most frequently tackled procurement issue in infringement proceedings under Article 226 EC.<sup>47</sup>

The problem with remedying illegal direct award is that as soon as the public contract is concluded, Member States are according to Article 2(6) of the Remedies Directive, allowed to limit review procedures to only awarding damages, which are a less efficient remedy.<sup>48</sup> The current Remedies Directive does not provide for the conditions under which unlawful decisions should be set aside and is, in fact, silent on the question whether such decisions must be set aside when an infringement has been proven. Instead, this issue is left to the complete discretion of the Member State. Consequently, there is no obligation in the Remedies Directive, which would require the Member State to rescind the concluded contract, even when it is proved that the award procedure has been carried out in breach of EC public procurement regime.<sup>49</sup> Thus, in cases of illegal direct award, disappointed tenderers must content themselves with a review limited to damages, but such a review does not allow an illegally awarded contract to be opened again for competition.<sup>50</sup> Although the aggrieved bidder might be successful in obtaining damages, the illegally awarded contract will continue to exist and could produce effects for years.

Even in Member States that permit an unlawful decision to be set aside once the contract has been concluded, the chances of this remedy actually being awarded are minimal. The balance of convenience test, which is in practice applied by the national courts in such situations, often leads to the claim being rejected, where an overriding public interest is involved. According to the Commission, the review bodies, when balancing the negative consequences of a measure for public interest with the benefits for the aggrieved tender, tend to interpret the concept of public interest too widely and rule in favour of the contracting authority, even in cases where the infringement is clearly established.<sup>51</sup> In any event, Article 2(6) provides that the effects, which the setting aside of an award decision has on the concluded contract, are determined by national law. It is therefore possible that the concluded contract continues to exist despite the setting aside of an unlawfully awarded decision.

Considering the high number of illegally awarded contracts, the contracting authorities seem to be aware that there is a lack of specific and effective remedies for direct awards. They seem to perceive illegal direct award as an extremely flexible type of award, which is often left without an effective sanction. It is even feared that some contracting authorities consciously

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<sup>47</sup> Hentry, P. (2006) "Is the Standstill a Step Forward?", fn. 39, p. 255.

<sup>48</sup> See Section 2.2.3.

<sup>49</sup> Tyrell, A., Bedford, B. (1996) *Public procurement in Europe*, fn. 16, p. 4, 5.

<sup>50</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council 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, 14 June 2006, COM(2006) 195 fin., p. 2.

<sup>51</sup> European Commission, *Impact Assessment Report*, fn. 24, p. 10, 15.

choose to carry out an illegal direct award rather than conducting a formal procurement procedure, which clearly shows that the current remedies legislation does not adequately discourage such a practice.<sup>52</sup>

## 2.2.2 Race to signature

Another issue with regard to which the existing remedies proved to be inefficient is the so-called race to signature. This term is used to describe a situation where an action for remedies is brought by a disappointed tenderer, but the contracting authority signs the contract, before the action is resolved, thereby making the consequences of the disputed award decision irreversible.<sup>53</sup> To some extent, this issue has already been dealt with in *Alcatel*<sup>54</sup> and *Commission v Austria*,<sup>55</sup> where the Court required the Member State to provide for a standstill period between the award and the conclusion of the contract. Yet, there are considerable inconsistencies between the Member States as regards the existence and length of the standstill period. Its effectiveness seems to be questionable as well, as the consequences of not respecting the standstill period for the contracting authorities are not defined.<sup>56</sup>

According to the Commission, race to signature causes tangible problems in at least three situations. The first problem arises, when there is no time limit between the notification of an award decision and the signature of a contract or this time limit is not fully effective. In such cases, the possibility of applying for pre-contractual remedies is obstructed, as aggrieved tenderers are prevented from effectively challenging the award decision due to the lack of time. Secondly, there might be a problem when national rules demand that the aggrieved tenderer has to inform the contracting authority before bringing a legal challenge. This may have the effect of encouraging the contracting authority to force the signature of the contract in order to make the consequences of the challenged award procedure irreversible. Thirdly, it has been proven problematic when a review procedure is commenced before an independent review body. Since this does not automatically stop a contract from being signed, the contracting authority, which has received notice of an action being brought, can still sign the contract and remove the effectiveness of a pre-contractual remedy.<sup>57</sup>

The inefficiencies arising in the situation where the contracting authority signs the contract shortly after it has been awarded are similar to those

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<sup>52</sup> European Commission, *Impact Assessment Report*, fn. 24, p. 7, 9, 19.

<sup>53</sup> Koskinen, L. (2006) "Reform of Public Procurement Remedies: A First Look at the Commission Proposal for an Amending Directive", EIPASCOPE, No. 3, p. 20. Available at: [http://www.eipa.eu/files/repository/product/20071025172708\\_Scop06\\_3\\_3.pdf](http://www.eipa.eu/files/repository/product/20071025172708_Scop06_3_3.pdf) (26 May 2008).

<sup>54</sup> Case C-81/98 *Alcatel*, fn. 38, para. 43.

<sup>55</sup> Case C-212/02 *Commission of the European Communities v Republic of Austria* [2004] n.y.r., para. 23.

<sup>56</sup> European Commission, *Impact Assessment Report*, fn. 24, p. 10.

<sup>57</sup> *Ibid.*, p. 11.

occurring in the case of illegal direct award. Once the contract is concluded, the consequences of the challenged award procedure in the majority of cases become irreversible and remedies are limited to only damages. With race to signature, the contracting authority is able to establish a *fait accompli* and protect itself from having to restart the whole award procedure, while retaining only a small risk of being subject to a claim for damages.<sup>58</sup> Unsuccessful tenderers, on the other hand, are deprived of an effective pre-contractual remedy and forced to bring any further complaint in the form of damages. However, as will be made clear from the upcoming section this remedy is inefficient in protecting tenderer's interests.

### 2.2.3 Inefficiency of damages

Article 2(1)(c) of the Remedies Directive provides for the award of damages to persons harmed by an infringement of public procurement law. However, the circumstances in which damages can be obtained are not regulated in detail and the provisions of the Directive do not contribute much to the creation of clear legal situation.<sup>59</sup> There are no guidelines on the conditions for and extent of compensation. These matters seem to be left to the discretion of the Member States, subject only to general conditions introduced by Court with regard to Member State liability for breaches of Community law and the general principle of effectiveness.<sup>60</sup>

Nevertheless, some authors argue that damages in the field of Community public procurement law are becoming increasingly important and there have been some examples of successful actions in various Member States.<sup>61</sup> Although this may be true, it cannot be interpreted as meaning that damages are the most efficient remedy. I believe that the increased recourse to action for damages can be ascribed to the fact that damages are, as a consequence of Article 2(6), often the only remedy available to disappointed bidders. Furthermore, the probability of succeeding in a claim for damages is much lower than that in a pre-contractual remedies action. As will be shown below, aggrieved bidders have to deal with a number of difficulties, which render damages a less attractive remedy. This deters the unsuccessful tenderer from bringing a damages action, especially when procurement rules are breached by virtue of illegal direct award or race to signature.

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<sup>58</sup> European Commission, *Impact Assessment Report*, fn. 24, p. 10, 11.

<sup>59</sup> Treumer, S. (2006) "Damages for Breach of the EC Public Procurement Rules – Changes in the European Regulation and Practice", *Public Procurement Law Review*, Issue 4, p. 161.

<sup>60</sup> Pachnou, D. (2003) *The effectiveness of bidder remedies for enforcing the EC public procurement rules: a case study of the public works sector in the United Kingdom and Greece*, University of Nottingham, p. 121-123. Available at: [http://www.nottingham.ac.uk/shared/shared\\_procurement/theses/Despina\\_Pachnou\\_thesis.pdf](http://www.nottingham.ac.uk/shared/shared_procurement/theses/Despina_Pachnou_thesis.pdf) (26 May 2008).

<sup>61</sup> Treumer, S. (2006) "Damages for Breach", fn. 59, p. 160, 169.

### 2.2.3.1 Requirements of proof

The Remedies Directive is silent on matters regarding the required standards and burden of proof. It is established, however, that in order to get damages the aggrieved bidder must show that a procurement breach has occurred and that he has been injured by it.<sup>62</sup> This in practice means that the disappointed economic operator must prove that he was genuinely a tenderer, who had a serious chance of winning the contract.<sup>63</sup> Yet, producing sufficient evidence may be a considerable hurdle, especially in case of illegal direct award. The lack of transparency of the process leading up to the conclusion of the contract makes it hard for the aggrieved bidder to establish a direct causal link. Especially so, as he has to establish a hypothetical case, evidencing that he would have won the contract in a case where he has not even submitted a bid. Courts will naturally be sceptical toward bidders' theoretical claims concerning the prices and quality of works, supplies or services. The problem is worsened if the contracting authority argues that the contract, if it had been advertised, would have been awarded to the most economically advantageous tender.<sup>64</sup>

As regards to the burden of proof, it is placed on the aggrieved tenderer, who is required to show that a procurement breach has occurred and that the contract would have been awarded to him, had it not been for the breach.<sup>65</sup> There is nothing in the Remedies Directive indicating that this burden could be reversed, which renders the operation of this remedy inefficient and contrary to the general principle of effectiveness.<sup>66</sup> The position of disappointed tenderers in the case of illegal direct award is further aggravated by the lack of available information, which is a consequence of the lack of openness and transparency in the award procedure.

### 2.2.3.2 Damages to be compensated

The Remedies Directive gives no guidance regarding the loss to be compensated or the calculation of such compensation. However, it is considered that the case law of the Court concerning the Member States liability for breaches of Community law is applicable.<sup>67</sup> Especially, the requirements established in *Brasserie du Pêcheur* that reparation must be commensurate with the loss or damage sustained and that the exclusion of

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<sup>62</sup> Leffler, H. (2003) "Damages Liability for Breach of EC Procurement Law: Governing Principles and Practical Solutions", *Public Procurement Law Review*, Issue 4, p. 166.

<sup>63</sup> European Commission, *Impact Assessment Report*, fn. 24, p. 12; European Commission, Proposal, fn. 50, p. 2.

<sup>64</sup> Leffler, H. (2003) "Damages Liability", fn. 62, p. 166.

<sup>65</sup> *Ibid.*, p. 166, 167.

<sup>66</sup> Pachnou, D. (2003) *The effectiveness of bidder remedies*, fn. 60, p. 85. However, both Leffler and Pachnou have argued for analogical application of the Court's case law on sex discrimination in employment, requiring the burden of proof to be reversed, to render the damages a more efficient remedy.

<sup>67</sup> Treumer, S. (2006) "Damages for Breach", fn. 59, p. 161, Leffler, H. (2003) "Damages Liability", fn. 62, p. 161.

loss of profit as a head of damage is prohibited, seem to be relevant for infringements of public procurement as well.<sup>68</sup>

Therefore, it appears that loss of profit should be compensated, when public procurement rules are breached. The basic rationale behind this is that the aggrieved bidder should be put in the position he would have been in, had the procurement breach not occurred. However, obtaining compensation for lost business opportunities, that is to say the compensation for the lost chance of winning the contract and the profit thereof, is more questionable.<sup>69</sup>

In practice, any financial award is limited to the reimbursement of costs incurred in the bidding process and it may not even cover the legal costs of bringing an action. Furthermore, claiming bidding costs in the case of illegal direct award is virtually impossible, since the economic operator was not able to participate in a public procurement procedure due to the lack of transparency.<sup>70</sup>

### **2.2.3.3 Preclusion of liability through time limits**

The Remedies Directive provides no time limits for bringing an action for damages. However, in a number of Member States the legislation sets up time limits for such claims, with the consequence that an application, not complying with the time limit, is refused.<sup>71</sup> Although these time limits may be short, the Court has accepted their legality. It has been ruled that the Remedies Directive does not preclude national legislation, which provides that the application for review of a contracting authority's decision must be commenced within a certain time limit, provided that the time limit in question is reasonable.<sup>72</sup> Allowing the applicability of short time limits is particularly problematic in connection to illegal direct award, since the time limit provided for claiming damages may expire before the economic operator becomes aware of the fact that the contract had been concluded. In that event, the illegal direct award is left completely without a remedy and the contracting authority is released of liability for its infringement.

### **2.2.3.4 No real corrective effect**

Lastly, and perhaps most importantly, it is argued that damages have no corrective effect in cases of illegal direct award. Even where a contract is found to have been awarded illegally and compensation is granted to the aggrieved bidder, the signed contract will, as a consequence of Article 2(6),

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<sup>68</sup> Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-01029, para. 82, 88.

<sup>69</sup> Leffler, H. (2003) "Damages Liability", fn. 62, p. 161.

<sup>70</sup> European Commission, *Impact Assessment Report*, fn. 24, p. 12.

<sup>71</sup> Treumer, S. (2006) "Damages for Breach", fn. 59, p. 167, 168.

<sup>72</sup> Case C-470/99 *Universale-Bau AG, Bietergemeinschaft: 1. Hinteregger & Söhne Bauges.m.b.H. Salzburg, 2. ÖSTÜ-STETTIN Hoch- und Tiefbau GmbH v Entsorgungsbetriebe Simmering GmbH* [2002] ECR I-11617, para. 79.

remain in force. Although the bidder is successful in obtaining financial compensation, he will ultimately not be awarded the contract. On the contrary, his future business relationship with the contracting authority will be irrevocably damaged and his chances of having another contract awarded will be diminished.<sup>73</sup> Therefore, disappointed bidders are hesitant to bring a contracting authority before the national court, since they have an interest in maintaining good relations in the future.<sup>74</sup> Consequently, the contracting authorities, knowing that illegal direct award will most likely result only in damages (if the action will be brought at all) and that there will be no obligation to restart the award process, are not deterred from engaging in such unlawful practices.

Finally, it is argued that damages are a remedy, which is primarily intended to protect individual interests, while the compliance with and effective application of substantive procurement directives are ensured only indirectly. If there is only a possibility of awarding damages and even that remedy does not have corrective and deterring effects, the Community interest of having public contracts awarded in a transparent, open and non-discriminatory manner is not adequately protected.

## **2.3 Solutions of the amended Remedies Directive 2007/66/EC**

The above analysis of the current situation in public procurement remedies revealed substantial weaknesses in the review procedures. Most concerning is the fact that by virtue of Article 2(6) of Directive 89/665/EEC, which allows the Member States to limit remedies to only awarding damages after the contract has been concluded, illegal direct award and race to signature cannot be efficiently remedied. In particular, it is not possible to ensure compliance with Community law at the time when infringements could still be corrected, i.e. in the pre-contractual stage, before the conclusion of the contract.<sup>75</sup> Knowing that the signature of the contract, even if awarded illegally, establishes a *fait accompli*, which might only be subject to a less efficient damages claim, the contracting authorities might feel inclined to disrespecting substantive public procurement rules. The inefficiency of remedies has also been recognised as detrimental to the achievement of the underlying principles of Community public procurement law.

To improve the effectiveness of review procedures concerning the award of public contracts and strengthen the guarantees of transparency, openness and non-discrimination, the amended Remedies Directive 2007/66/EC has been adopted. It introduces a mandatory standstill period and a serious sanction of ineffectiveness in the case of illegal direct award and of failure

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<sup>73</sup> European Commission, *Impact Assessment Report*, fn. 24, p. 12.

<sup>74</sup> Bovis, C. (1997) *EC Public Procurement Law*, fn. 17, p. 107.

<sup>75</sup> Recital 3 of the Preamble to Directive 2007/66/EC.

to apply the standstill period.<sup>76</sup> Hopefully, these two legal tools will create a stronger incentive for businesses to bid for contracts anywhere in the Union, building a confidence that procurement procedures are fair and making sure that the contract will ultimately go to the tenderer making the best offer.<sup>77</sup>

### 2.3.1 Standstill period

In line with the Court's judgments in *Alcatel*<sup>78</sup> and *Commission v Austria*,<sup>79</sup> the new Article 2a of Directive 2007/66/EC introduces a standstill period, which ensures the tenderer sufficient time to examine the award decision and assess whether it is appropriate to initiate a review procedure.<sup>80</sup> According to Article 2a(2) the duration of the standstill period should be at least 10 days from the day following the date on which the contract award decision is sent if rapid means of communications are used (e.g. fax or email). In case of ordinary means of communication (e.g. regular mail), the standstill period should be least 15 days following the date on which the contract award decision is sent or at least 10 days following the date of the receipt.<sup>81</sup> It should be noted, however, that the standstill period required by the amended Remedies Directive only provides for a minimum standstill period, meaning that Member States are free to introduce or to maintain periods in excess thereof.<sup>82</sup>

The standstill period is to be applied in three principle situations. First, it will become active where a public contract has been awarded after a prior application for review. Such an application will result in the immediate suspension of the contract and this suspension will not end until 10 or 15 days (depending on what means of communication are used) after the day on which the contracting authority replies to the application. Thereby the unsuccessful tender will have a minimum of 10 or 15 days during which he can decide whether to make an application for review to an independent review body. The second situation is applicable where there has been no application for review sent to the contracting authority prior to the award decision. In such a situation, the standstill period will begin following the communication of the contract award and all relevant information. The 10 or 15 day period will allow an unsuccessful tender to decide whether or not they which to make an application for review. The third situation in which standstill period is applicable is when there has been an application for review to an independent review body. In such a situation, the standstill period might lapse before such a body has rendered its decision. To avoid this problem the amended directive states that the conclusion of the contract

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<sup>76</sup> New Articles 2a and 2d of Directive 89/665/EEC.

<sup>77</sup> Williams, R. (2008) "A New Remedies Directive for the European Community", Public Procurement Law Review, Issue 2, p. 19.

<sup>78</sup> Case C-81/98 *Alcatel*, fn. 38.

<sup>79</sup> Case C-212/02 *Commission v Austria*, fn. 55.

<sup>80</sup> Recital 6 of the Preamble to Directive 2007/66/EC.

<sup>81</sup> Article 2a(2).

<sup>82</sup> Recital 5 of the Preamble to Directive 2007/66/EC.

shall be suspended until the review body has rendered a decision on either interim measures or application for review. It is up to the member state how they wish to implement this.<sup>83</sup>

Apart from the standstill period, the new Article 2a also determines what information shall be supplied together with the communication of the award decision to each tenderer and candidate concerned. This provision is indeed a very important tool for the unsuccessful tenderer in making an informed decision whether to seek review. Therefore, the amended Remedies Directive requires that a summary of the relevant reasons for the award decision be communicated to unsuccessful tenderers, including information on the reasons for rejecting their applications, on the characteristics and relative advantages of the tender selected, as well as the name of the successful tenderer.<sup>84</sup>

Lastly, and perhaps most significantly, the Directive clearly spells out the consequences of not respecting the standstill period, namely ineffectiveness of the contract. This consequence, which eventually forces the contracting authority to re-tender the contract, will hopefully prove effective in preventing race to signature.

## 2.3.2 Ineffectiveness

To combat illegal direct award of public contracts, which the Court described as the most serious breach of Community law in the field of public procurement, the new Article 2d introduces the effective, proportionate and dissuasive sanction of ineffectiveness.<sup>85</sup> This seems to be the most effective way to restore competition, given that the procedure for the award of contract will have to be reopened, creating new business opportunities for those economic operators, which have been illegally deprived of their possibility to compete.<sup>86</sup>

Although ineffectiveness was envisaged only as a last resort and as an exceptional consequence to a serious breach of the substantive public procurement directives,<sup>87</sup> the adopted Remedies Directive 2007/66/EC went beyond the initial proposal and provided for a wide application of this sanction. According to the provisions of the amended Remedies Directive, ineffectiveness applies in three principal situations. First, the contract is considered ineffective if it was awarded by virtue of illegal direct award, that is to say awarded without prior publication of a contract notice or prior

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<sup>83</sup> Golding, J., Hentry, P. (2008) "The New Remedies Directive", fn. 42, p. 148. See also Articles 1(5), 2a and 2(3).

<sup>84</sup> The information to be provided is specified in Article 41(2) of Directive 2004/18/EC, subject to the provisions of Article 41(3) of that Directive.

<sup>85</sup> Recital 13 of the Preamble to Directive 2007/66/EC.

<sup>86</sup> Recital 14 of the Preamble to Directive 2007/66/EC.

<sup>87</sup> Hentry, P. (2006) "Is the Standstill a Step Forward?", fn. 39, p. 260. See also Proposal, fn. 50, Article 2f.



call for competition and this is not allowed under the substantive directives.<sup>88</sup> Secondly, the ineffectiveness applies when a contract is concluded in breach of automatic suspension or the standstill period, if this infringement has deprived the tenderer of the possibility to obtain a pre-contractual remedy and is combined with an infringement of Directive 2004/18/EC, which affected his chances of winning the contract.<sup>89</sup> Thirdly, a contract will be deemed ineffective, if it is based on large framework agreements or dynamic purchasing systems where there has been a specific infringement of the substantive public procurement rules and the Member State has invoked the derogation from the standstill period.<sup>90</sup>

The consequences of ineffectiveness are to be determined by national law, although the Member States do not enjoy complete discretion in this regard. Article 2d(2) of the amended Remedies Directive allows the Member States to choose only between retroactive cancellation of all contractual obligations (*ex tunc* ineffectiveness) or cancellation of those obligations which still have to be performed (*ex nunc* ineffectiveness). This significantly limits the Member States' discretion and aims to ensure that the consequences have the required level of deterrence.

As apparent from the Preamble to the amended Remedies Directive, ineffectiveness should not be an automatic sanction, but rather a result of the decision of an independent review body.<sup>91</sup> However, some authors emphasise that this is not entirely consistent with the actual provisions of the amended Directive. The newly inserted Article 2d lists a number of situations where ineffectiveness applies, suggesting that such a sanction is automatic in these situations. They argue that this should have been left to the review body to decide taking into account all circumstances of the case.<sup>92</sup>

The amended Remedies Directive also allows certain derogations from ineffectiveness.<sup>93</sup> Even though the contract has been awarded illegally, it is not considered ineffective, if overriding reasons relating to a general interest require that the effect of the contract should be maintained. However, economic interests are only considered as overriding reasons in exceptional circumstances, when ineffectiveness would lead to disproportionate consequences. Moreover, economic interests directly linked to the contract concerned (i.e. costs resulting from the delay, costs of a new procurement procedure, costs of the change of the economic operator etc.) can never constitute overriding reasons of general interest. As some authors note, it is difficult to imagine many cases in which overriding reasons in general interest would not involve economic interests that are not in some way linked to the contract. They also argue that such limitation of the ability of a

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<sup>88</sup> Article 2d(1)(a).

<sup>89</sup> Article 2d(1)(b).

<sup>90</sup> Article 2d(1)(c) in connection with 2b(c).

<sup>91</sup> Recital 13 of the Preamble to Directive 2007/66/EC.

<sup>92</sup> Golding, J., Hentry, P. (2008) "The New Remedies Directive", fn. 42, p. 150.

<sup>93</sup> Article 2d(3).

national judge to take into account economic interests seems unnecessarily narrow and unduly prescriptive.<sup>94</sup> We, however, disagree with such an opinion, especially since the Commission established in its Impact Assessment Report that national courts tend to interpret overriding public interests too widely.<sup>95</sup> It is reasonable to expect that the same tendency will continue, if the discretion of national judges remains too broad and the limitation therefore seems justifiable.

The described amendments, introducing ineffectiveness and the standstill period are supposed help in counteracting illegal direct awards and race to signature, by giving the aggrieved bidders a realistic possibility to obtain a pre-contractual remedy and providing them with an efficient sanction in case of the most serious breaches of Community public procurement law. However, the instrument introducing these amendments is a directive, which has to be transposed into national laws in order to become fully effective. The Member States have until 20 December 2009 to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive.<sup>96</sup> Does this mean that disappointed tenderers are not entitled to an efficient remedy until this transposition period has expired and that the contracting authorities may continue with illegal practices, without having to respect the standstill period or facing the consequences of ineffectiveness? I believe that this is not the case and that the changes proposed in the amended Remedies Directive 2007/66/EC may be effective already today.

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<sup>94</sup> Golding, J., Hentry, P. (2008) “The New Remedies Directive”, fn. 42, p. 151, 152.

<sup>95</sup> European Commission, *Impact Assessment Report*, fn. 24, p. 10, 15.

<sup>96</sup> Article 3 of Directive 2007/66/EC.

## 3 Analysis of existing case law

After identifying the inefficiencies of the existing legislation and presenting the solutions of the amended Remedies Directive, I focus on the jurisprudence of the Court regarding public procurement remedies. It seems that the Court has always been aware of the deficiencies recently identified by the Commission and has, through its judicial activism, managed to mitigate the harmful effects for disappointed bidders. Surprisingly, the developments of case law are highly reminiscent of the two major innovations in the amended Remedies Directive, namely the standstill period and ineffectiveness of contracts. Below, I will discuss the leading cases dealing with this issue and comment on how they should be interpreted.

### 3.1 *Alcatel* and the standstill

#### 3.1.1 Background and the Court's judgment

The first and perhaps the most important case on the availability of post-contractual remedies is the *Alcatel* judgment where the Court implicitly introduced a requirement of a waiting period between the award decision and the signing of the contract. The dispute arose when the Austrian contracting authority, after publishing an invitation to tender, awarded the contract for the supply of motorway electronics to a company called Kapsch AG. The award decision was not made public and the contract was signed the same day as Kapsch AG received the award decision. Other tenderers who learned of the contract through the press applied for review of the award decision. Their application was dismissed on grounds that once the contract is signed, it is in accordance with Austrian law implementing Article 2(6) of the Remedies Directive no longer possible to apply for interim measures or the setting aside of the award decision. This decision was appealed and the national court found that according to Austrian law, the decision to award the contract is one taken internally and it is consequently not open to challenge. Therefore, it might appear from the outsider's point of view that the decision to award and the conclusion of the contract occur together. In this context, the national court stayed the proceedings and asked if Article 2(1)(a) and (b) combined with Article 2(6) must be interpreted as meaning that the Member States are required to ensure that the award decision is in all cases open to review whereby an applicant may have that decision set aside. The national court furthermore queried whether Article 2(1)(a) and (b) of Directive 89/665 can be deemed directly effective so that so that an action to have the award decision set aside can be made directly on the basis of the Remedies Directive regardless of the structure of the national system.<sup>97</sup>

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<sup>97</sup> Case C-81/98 *Alcatel*, fn. 38, para. 24.

The Court answers the first question by restating the objectives of the Remedies Directive, which is to establish effective and rapid review procedures to ensure compliance with community directives on public procurement.<sup>98</sup> Furthermore, it notes that Article 2(6) cannot be interpreted as to systematically remove the award decision, which is the most important decision of the contracting authority, from full review under Article 2(1), as this would undermine the very purpose of the Directive.<sup>99</sup> Consequently, with the view to establishing effective review procedures, the Court finds that the Member States are required to ensure that the award decision is in all cases open to review in a procedure whereby an aggrieved tenderer may have that decision set aside, notwithstanding the possibility, once the contract has been concluded, of obtaining damages.<sup>100</sup> This judgment has later been interpreted as meaning that Member States who wishes to make use of the option offered in Article 2(6) must implement the Remedies Directive so that a waiting period is imposed between the time for the award decision and the time when the contract is signed. Thereby aggrieved tenders have a short period during which they can challenge this decision before the contract is signed the member state would ensure the possibility of full review of the award decision whilst still being able to limit this review after the fact of the contract.

Regarding the second posed by the national court, the ECJ's answer is more puzzling. First, the Court examines the Austrian national law to find what possibilities are there under administrative law to challenge the award decision in the situation at hand. It finds that since the award decision and the signing of the contract in practice occur together, there is no administrative law measure of which the disappointed tenderers can acquire knowledge and which may be the subject of an application to have it set aside as provided for in Article 2(1)(b).<sup>101</sup> Instead of answering the question if Article 2(1) can be deemed directly effective where the directive has not been fully transposed, the Court reminds that where it is "doubtful" whether or not the national court is in a position to give effect to a provision of Community law, there is an obligation to interpret national provisions to that effect. If such an interpretation is not possible, the Court points out that the individual has a possibility to seek compensation for the damage suffered by reason of failure to transpose the Directive within the prescribed period.<sup>102</sup> Having reminded the national court of the obligations of conform interpretation and a "*Francovich*" action for damages, the Court finds that Article 2(1) cannot be interpreted to the effect that it can be relied upon by individuals where there is no award decision to be challenged.<sup>103</sup>

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<sup>98</sup> Ibid., para. 34.

<sup>99</sup> Ibid., para. 37, 38.

<sup>100</sup> Ibid., para.43.

<sup>101</sup> Ibid., para. 48.

<sup>102</sup> Ibid., para. 49.

<sup>103</sup> Ibid., para 50. It should be noted at this point that the Court actually refers to Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v Bundesrepublik Deutschland* [1996] ECR I-04845, which refined the conditions for

### 3.1.2 A standstill or a challenging period?

The *Alcatel* judgment has provoked numerous comments in doctrine and the debate has not been entirely one sided.<sup>104</sup> I will in this section try to map out the most common interpretations and provide for my view on the case. Regarding the first part of the judgment there is a fair consensus among scholars that it implicitly imposes a waiting period to combat race to signature and ensure that disappointed tenderers have a real opportunity to challenge the award decision. However, there has been some debate as to what character this waiting period should have and when it should be imposed.

After the *Alcatel* judgment, there were two plausible interpretations. Member States could either introduce a “standstill period” between the award decision and the conclusion of the contract or they could allow a “challenge period” after the contract has been signed, during which it would be possible to challenge the award decision to have it set aside. There were different views as to which would be the most effective and beneficial. The imposition of a standstill period has a number of benefits. Such a period could be imposed without being in direct conflict with Article 2(6) since it would not per se challenge the fact that the responsible board can only allow damages once the contract has been signed.<sup>105</sup> It would therefore generally be easier to introduce in most Member States.

On the other hand, a challenging period after the conclusion of the contract, would allow the contracting authority and the successful tenderer to decide whether to proceed directly to the formal conclusion stage, if they deem the risk of challenge to be low. According to renowned scholar of public procurement, Professor Arrowsmith, this option would have been more favourable for countries such as the United Kingdom where, as a result of the cultural aversion to litigation in public procurement, legal challenges are rare. In her view, it seems to be “disproportionately disruptive” to delay the conclusion of every contract simply because of the remote possibility of challenge.<sup>106</sup>

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damages claim under Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR Page I-05357.

<sup>104</sup> There have been a number of articles written on the implications of the *Alcatel* judgment in different Member States. See for instance: Davis, C. (2002) “The European Court of Justice Decision in *Alcatel* – the Implications in the United Kingdom for Procurement Remedies and PFI”, *Public Procurement Law Review*, Issue 5, Arrowsmith, S. (2006) “Implementation of the New EC Procurement Directives and the *Alcatel* Ruling in England and Wales and Northern Ireland: a Review of the New Legislation and Guidance”, *Public Procurement Law Review*, Issue 3, Fletcher, G. (2005) “Plans for Implementing the *Alcatel* Ruling in the United Kingdom”, *Public Procurement Law Review*, Issue 5, Arnould, J. (2003) “The Consequences of the *Alcatel* Austria Case under French Law: The *Sodisform* Judgement of the Administrative Court of Paris”, *Public Procurement Law Review*, Issue 6, Georgopoulos, A. (2000), “The System of Remedies for Enforcing the Public Procurement Rules in Greece: a Critical Overview”, *Public Procurement Law Review*, Issue 2.

<sup>105</sup> Davis, C. (2002) “The European Court of Justice Decision in *Alcatel*”, fn. 104.

<sup>106</sup> Arrowsmith, S. (2006) “Implementation of the New EC Procurement Directives and the *Alcatel* Ruling in England and Wales and Northern Ireland”, fn. 104, p. 132.

It should be said that there are some persuasive arguments against introducing a challenging period. Above all, it would create insecurity regarding the legal status of concluded contracts, which could make it harder to recruit committed finance to the concerned project. Regardless of whether such finance is incorporated in the procurement process or if it is dealt with in a separate contract, it would be uncertain what effects a challenge of the award decision and a declaration of ineffectiveness would have on the status of financing commitments.<sup>107</sup> On the other hand, if a standstill period was introduced, financiers could rest assured that the award decision and the contract could no longer be challenged once this period has past. This would ensure foreseeability as well as the possibility of effective remedies for aggrieved tenders.

Eventually, the Court held in *Commission v Austria* that the imposition of a standstill period was the “correct interpretation” of *Alcatel*, which was also codified in the amended Remedies Directive.<sup>108</sup> The reasons for this are numerous and cannot be covered in their entirety here, but it suffices to say that by the time *Commission v Austria* was rendered the predominant portion of the countries, which attempted to implement *Alcatel*, had opted for the imposition of a standstill period.<sup>109</sup> Somewhat boldly, it could be said that the Court, through this judgment, took what was the prevailing view of the Member States and the Commission and made it the only acceptable interpretation. The fact that the Court did so without any justification has been criticised by some legal scholars.<sup>110</sup>

### 3.1.3 Direct effect of the Remedies Directive?

The second part of the *Alcatel* judgment, in which the Court tries to deal with the question of direct effect of Article 2(1) of the Remedies Directive, is in my view just as interesting as the first part, but has not been subject to quite as much debate in the doctrine. One possible interpretation is that Court’s judgment makes clear that the obligation laid down in the first part of the judgment does not have direct effect. Another plausible view is that it rules out direct effect of Article 2(1) in its entirety. I, however, believe both of these conclusions to be incorrect.

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<sup>107</sup> Davis, C. (2002) “The European Court of Justice Decision in *Alcatel*”, fn. 104, p. 284.

<sup>108</sup> See Case C-212/02 *Commission v Austria*, fn. 55, para.23 and new Article 2a of Directive 89/665/EEC.

<sup>109</sup> European Commission, *Impact Assessment Report*, fn. 24, p. 10

<sup>110</sup> See Dischendorfer, M., Arrowsmith, S. (2004) “C-212/02, *Commission v Austria*: the Requirement for Effective Remedies to Challenge an Award Decision” *Public Procurement Law Review*, Issue 6, p. 165-168. They conclude that the Court’s ruling must be read only against the specific situation in Austria and that it consequently did not rule on the validity of having a challenge period.

The first argument, supporting such an opinion can be found in the Opinion of Advocate General Mischo.<sup>111</sup> He starts by reminding of the requirements of direct effect of directives in accordance with which the obligation imposed in the directive has to be sufficiently clear, precise and unconditional as to leave no discretion to the Member state that could prevent a directive from being directly relied upon.<sup>112</sup> He then concludes that the obligations imposed on the Member State in the present case are clearly determined, giving rise to rights for the individual since who should be able to initiate review proceedings under the Remedies Directive.<sup>113</sup> Furthermore, he notes that the Member States' discretions have already been exhausted upon implementation and can therefore no longer be invoked to prevent recognition of direct effect.<sup>114</sup>

Although the Advocate General clearly establishes direct effect of the Remedies Directive, he does find that recourse to the principle of direct effect might be unnecessary in the present case since the national provisions are, in fact, capable of being applied as to comply with the requirements of the Remedies Directive.<sup>115</sup> This, however, does not undermine the existence of direct effect. Furthermore, such a statement shall not be confused as meaning that where there is a possibility of indirect effect, the application of direct effect is ruled out. Such an assumption seems to have been made by some scholars who, by referring to the judgment in *Dorsch Consult*,<sup>116</sup> arrive at the conclusion that the mere possibility of indirect effect rules out the possibility of direct effect.<sup>117</sup> Instead, the reasoning of Advocate General and the Court should be regarded merely as a reminder directed towards the national court that the practice of using a standstill period has already been developed in national law. This indicates that it is indeed possible to interpret Austrian law as imposing such a standstill period wherefore conform interpretation should to be possible also in this case.<sup>118</sup>

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<sup>111</sup> Opinion of Advocate General Mischo delivered on 10 June 1999 in the Case C-81/98 *Alcatel*, fn. 38.

<sup>112</sup> *Ibid.*, para. 82, 83. For the comment on the requirements of direct effect, see for example Craig, P., de Burca, G. (2007), *EU law: text, cases and materials*, Fourth edition, Oxford, Oxford University Press, p. 279ff. The principle of direct effect was first established in the landmark Case C-26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 00001. Direct effect of unimplemented directives was expressed for the first in the Case C-41/74 *Yvonne van Duyn v Home Office* [1974] ECR 01337.

<sup>113</sup> Opinion of Advocate General Mischo in the Case C-81/98 *Alcatel*, fn. 111, para. 84, 85.

<sup>114</sup> *Ibid.*, para. 92. On the exhaustion of discretion upon implementation see for instance: Case C-441/99 *Riksskatteverket v Soghra Gharehveran* [2001] ECR I-07687.

<sup>115</sup> Opinion of Advocate General Mischo in the Case C-81/98 *Alcatel*, fn. 111, para. 96.

<sup>116</sup> Case C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* [1997] ECR I-04961.

<sup>117</sup> See Gutknecht, B. (1998) "References for a Preliminary Ruling by the Austrian Federal Procurement Office", *Public Procurement Law Review*, Issue 6, p. 174-175.

<sup>118</sup> Conform interpretation or indirect effect can only be used where it is within the national court's jurisdiction, it is not *contra legem* and it is not contrary to the Community principle of legal certainty. See for instance Joined Cases C-397/01 to C-403/01 *Pfiffer* [2004] ECR I-8835, Case C-105/03 *Pupino* [2005] ECR I-5285, para. 47 and Case 80/86 *Kolpinghuis* [1987] ECR 3969 para. 13.

The Court seems to have followed the Opinion of Advocate General, but it is unfortunately not as clear on the issue, giving the impression that direct effect of the relevant provision is ruled out. However, it is my belief that the judgment does not deal with direct effect at all. The first and perhaps most obvious reason for why the *Alcatel* judgment does not rule out direct effect is, as already pointed out by Pachnou, that the concept as such is not mentioned anywhere in the judgment.<sup>119</sup> In fact, the judgment does not only lack mention of direct effect, it lacks mention of any of the requirements of this concept. Although the national court is clearly asking for a ruling on the issue, the Court fails to respond.<sup>120</sup> Instead, the Court examines the provisions of national law, which cannot be regarded as a means of ruling out direct effect. It should be noted that any establishment of direct effect of a directive must examine the precision and clarity of the invoked provision and cannot be dependent on circumstances of national law or practice. The only aspect of national circumstances that can be weighed in a determination of direct effect is whether any discretion is left to the national authorities and if such discretion has been exhausted. However, the judgment does not comment on the issue of discretion and in any event this hurdle to the application of direct effect can be criticized as being a thing of the past.

Although there is no test applied to determine the direct effect of Article 2(1) of the Remedies Directive, the Court clearly rules out the possibility for review bodies to hear applications under this Article, where there is no award decision which might be subject to an application to have it set aside.<sup>121</sup> However, it can easily be argued that the Court's conclusion to this effect was inaccurate on facts.<sup>122</sup> There was indeed an award decision, except it was not open to review, since it was not transparent and therefore not known before the conclusion of the contract. To adopt a position where award decisions can only be challenged effectively if they are visible to the third parties would seriously undermine the possibility of combating illegal direct award. Furthermore, it can be argued that such a position would contradict the later *Stadt Halle* case, where the Court determined what decisions should be challengeable under public procurement rules and adopted a broad interpretation of the decisions amenable to review.<sup>123</sup> The *Alcatel* judgment, which appears to hold that the award decision does not exist simply because it was not taken in a transparent manner, is clearly in conflict with the findings in *Stadt Halle*, in which the Court ruled that a decision not to initiate an award procedure is the first decision amenable to review.<sup>124</sup> It is hard to imagine how such a passive decision can be deemed amenable to review, while the disguised award decision in *Alcatel* is considered nonexistent due to the lack of transparency.

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<sup>119</sup> Pachnou, D. (2003) *The effectiveness of bidder remedies*, fn. 60, p. 91.

<sup>120</sup> Case C-81/98 *Alcatel*, fn. 38, para. 24.

<sup>121</sup> *Ibid.*, para. 50.

<sup>122</sup> Pachnou, D. (2003) *The effectiveness of bidder remedies*, fn. 60, p. 91.

<sup>123</sup> Case C-26/03 *Stadt Halle*, fn. 46, para. 31.

<sup>124</sup> *Ibid.*, para. 33.



### 3.1.4 Indirect effect and *Francovich* in public procurement remedies

Without giving a real answer whether the provision of the Remedies Directive are capable of having direct effect, the ECJ reminds the national court of the obligations of conform interpretation as to provide for an opportunity to challenge the award decision. If the Member State fails to fulfil this obligation or such an interpretation is not possible, the Court stresses the importance of a *Francovich* action for damages.<sup>125</sup> However, I would like to draw attention to the fact that such a solution is obviously unsatisfactory for the injured party. It should not be forgotten that the applicant initiated proceedings, as he was not content with having recourse to only an action for damages after the contract had been concluded. Thus, the Court's offer of a *Francovich* claim, after finding that there should have been recourse to other effective remedies, is quite the catch 22.

Furthermore, it is inconvenient for the applicant to be forced to initiate a new litigation against the State in order to receive *Francovich* based damages. It is also clear from the case law of the Court that the procedural and substantive conditions which must be satisfied in order for a claim against the State to succeed are primarily a matter of national law on state liability.<sup>126</sup> From this follows that state liability for breach of community law may differ from member state to member state creating an inequality in protection between member states.<sup>127</sup>

It should be added that indirect effect as such can be considered to be an inappropriate way to enforce the substantive public procurement directives. In some cases it will be impossible, to interpret a national provision in such a way as to grant to an individual the same right which the directive is intended to grant.<sup>128</sup> This natural limitation of indirect effect, which can be problematic for directives in general, might, in my view, be especially problematic in the field of public procurement.<sup>129</sup> Due to the clear division between public law and contractual law which in many cases is made in connection with the time for the signing of the contract, a judge might feel hindered to apply what are essentially public law rules of procurement into the sphere of what is considered contractual law. Although this might be required by community law, the national court might still find that they do not have the jurisdiction to do so.

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<sup>125</sup> Case C-81/98 *Alcatel*, fn. 38, para. 49.

<sup>126</sup> Case C-91/92 *Faccini Dori v. Recreb S.r.l* and Joined Cases C-6/90 and C-9/90 *Francovich*, fn. 103.

<sup>127</sup> The limits, which Community law imposes, are that the conditions must not be less favourable than those relating to similar domestic claims, and that they must not be framed so as to make it virtually impossible or excessively difficult to obtain reparation. See Joined Cases C-6/90 and C-9/90 *Francovich*, fn. 103, para. 43.

<sup>128</sup> On the inefficiencies of indirect effect see Tridimas, T. (1994) "Horizontal Effect of Directives: A Missed Opportunity", *European Law review*, Vol. 19, No. 6, p. 621-636.

<sup>129</sup> On limitations of indirect effect, see for instance Case C-334/92 *Wagner Miret* [1993] ECR I-06911, where the Court found that Spanish legislation could not be interpreted in conformity with the directive at hand.

Furthermore, there is an inherent element of inequality in all application of indirect effect. Since the possibility of indirect effect is largely dependent on the interpretative leeway granted by the national legislator to the national judiciaries the success of an indirect effect plea will depend on the state where the plea is made. Additionally, it will differ dependent on what legal tradition the national law adheres to. The room for extensive interpretation is arguably bigger in the common law tradition than in the continental legal tradition.

After determining that the courts judgment was unsatisfactory since it did not deal with the direct effect of art 2(1) it remains to be seen if such direct effect can be found in principle.

In principle it suffices to refer to the reasoning of the Advocate General in order to determine that there is such a direct effect.

However I would like to add some thoughts on why the existence of discretion can no longer rule out direct effect.

In every legal order based on the rule of law there is a basic principle that no power of the administration is entirely unfettered.<sup>130</sup> Both community law and national law are in their capacity of being legal orders both based on the rule of law and obliged to comply with the rules of law.<sup>131</sup> This is interesting in relation to direct effect of provisions of community law which leave a wide margin of discretion to the member states in fulfilling their obligations, since this rationale means that there are always limits to such discretion inherent in the legal order. In community law such a rationale was adopted in the *VNO* judgment introducing what some have called a ‘legality review’ as an additional portal to direct effect a long side the conditions of unconditional and sufficiently precise.<sup>132</sup> According to this judgment, individuals may in fact rely on provisions that allow discretion for member states in order to make the national court examine whether the legislator has stayed within the limits of community law when exercising its powers. This early judgment has later been confirmed by the *Kraaijeveld* judgment and in *Landelijke Vereniging tot Behoud van de Waddenzee*, where the Court extended the obligation of legality review to also entailing review of administrative decision.<sup>133</sup> These judgments together with the important *Mangold* Judgment, which will be discussed in further detail below, imply a general responsibility for the National Court to prevent national legislation and decisions of administrative authorities from being applied if this is contrary to community law. Such a responsibility is not dependent on the directives provision being unconditional or sufficiently precise.<sup>134</sup> As it was eloquently put by Advocate General Van Gerven in his Opinion in *Banks*:

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<sup>130</sup> Jans, J. H. et al (2007) *Europeanisation of Public Law*, fn. 18, p. 68-72.

<sup>131</sup> Article 6 TEU.

<sup>132</sup> Case 51/76 *VNO* [1977] ECR 00113. Concerning the concept of ‘legality review’ see Prechal, S. (2005) *Directives in EC Law*, Oxford, Oxford University Press, p. 234ff.

<sup>133</sup> Case C-72/95 *Kraaijeveld* [1996] ECR I-05403 and Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee* [2004] ECR I-07405, para. 65.

<sup>134</sup> Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-09981.

""... in so far as a provision of Community law is sufficiently operational in itself to be applied by a court, it has direct effect. The clarity, precision, unconditional nature, completeness or perfection of the rule and its lack of dependence on discretionary implementing measures are in that respect merely aspects of one and the same characteristic feature which that rule must exhibit, namely it must be capable of being applied by a court to a specific case."<sup>135</sup>

The possibility of direct effect of the obligations of efficient remedies as laid down in art 1 and 2(1) of the directive has later on been confirmed by the Court in *Koppensteiner*.<sup>136</sup> The applicant in the case tried to challenge a decision made by the awarding authority to withdraw an invitation to tender for a public contract regarding some demolition works in connection with the construction of a primary school and three sports halls.<sup>137</sup> The applicant relies on the previous judgment of the court in the *HI* case, where the court had stated that the decision of an awarding authority to withdraw an invitation to tender, must be open to review through which the decision can be annulled on basis that it is found to be contrary to community law.<sup>138</sup> In short the *HI* case laid down the same obligations on the member states regarding the availability of remedies for decisions to withdraw invitations to tender as the first part of the *Alcatel* judgment lay down regarding award decision.<sup>139</sup>

What is at stake in the *Koppensteiner* judgment is whether the rights of the individual stemming from this obligation have direct effect.

The court refers to the obligation of national courts under art 10 of the treaty, to take all appropriate measures to ensure the fulfillment of member states obligation under community law.<sup>140</sup> After finding that national rules preclude the fulfillment of the obligation of effective review as laid down by art 1 and 2(1) of the directive and established by the *HI* case, the court finds that the national court is required to set aside national rules hindering the proper application of these provisions.<sup>141</sup>

This is clearly an admission of the direct effect of art 1 and 2(1), which has also been confirmed by the *Lämmerzahl* judgment.<sup>142</sup>

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<sup>135</sup> Opinion of Advocate General delivered on 27 Oct. 1993 in the Case C-128/92 *Banks & Company Ltd v. British Coal Corporation* [1994] ECR I-01209 [1994], para. 27.

<sup>136</sup> Case C-15/04 *Koppensteiner GmbH v Bundesimmobiliengesellschaft mbH* [2005] ECR I-04855

<sup>137</sup> *Ibid.*, para. 10.

<sup>138</sup> Case C-92/00 *Hospital Ingenieure Krankenhaus-Planungs-Gesellschaft mbH (HI) v Stadt Wien* [2002] ECR I-05553, para. 55.

<sup>139</sup> Compare para. 55 of the Case C-92/00 *Hospital Ingenieure*, fn. 138 with para. 43 of the Case C-81/98 *Alcatel*, fn. 38, para.. For a further analysis of the Case C-92/00 *Hospital Ingenieure* see Fruhmann, M., Dischendorfer, M. (2002) "The reviewability under EC law of the decision to withdraw an invitation to tender", *Public Procurement Law Review*, Issue 6, p. 126-132.

<sup>140</sup> Case C-92/00 *Hospital Ingenieure*, fn. 138, para. 33.

<sup>141</sup> Case C-15/04 *Koppensteiner*, para 36 and 40.

<sup>142</sup> <sup>142</sup> Case C-214/06 *Lämmerzahl GmbH v Freie Hansestadt Bremen* [2007] n.y.r.

It is hard to see why the Court would find direct effect in the Koppensteiner situation and not in the Alcatel situation, as the question raised is essentially the same except for the difference in types of decisions.

In closing I can only add that it is my belief that the Alcatel obligation at this date is clear and precise enough to have direct effect and that whatever the ruling on direct effect meant at the time of the Alcatel judgment, direct effect cannot be ruled out today.<sup>143</sup>

## **3.2 Commission v Germany and ineffectiveness**

Another significant case in the field of public procurement remedies is *Commission v Germany*.<sup>144</sup> Here, the Court had the opportunity to judge upon the consequences of illegally awarded contracts after the Member State had been found to breach Community public procurement rules. The case is of great importance when it comes to determining the limits of Article 2(6) and the borderline between public procurement rules and the autonomy of contractual law.

### **3.2.1 Background and the Court's judgments**

#### **3.2.1.1 Case C-20/01 & 28/01 Commission v Germany**

The abovementioned *Commission v Germany* judgment<sup>145</sup> is to be read in combination with a preceding *Commission v Germany* case,<sup>146</sup> in which an enforcement action was brought under Article 226 EC. Germany was charged for not acting to prevent the infringements of municipalities, which were illegally awarding and concluding public contracts. In its defence, Germany argued that the concluded contracts were protected in Community law by virtue of being established rights and by the principle of *pacta sunt servanda*. Furthermore, it maintained that Article 2(6) of Directive 89/665/EEC specifically refrains from demanding that the concluded contract be terminated or not complied with.<sup>147</sup> The Commission, on the other hand, pled that the Member State cannot rely on the effects of a *fait accompli* perpetrated by itself, in order to avoid legal proceedings.<sup>148</sup>

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<sup>143</sup> Provisions which have originally been found to lack direct effect by the Court have later been found to be sufficiently clear and precise to impose an obligation on the Member State. Compare Case C-236/92 *Comitato di Coordinamento per la Difesa della Cava v. Regione Lombardia* [1994] ECR I-00483 with Case C-365/97 *Commission of the European Communities v Italian Republic* [1999] ECR I-7773.

<sup>144</sup> Case C-503/04 *Commission v Germany*, fn. 41.

<sup>145</sup> *Ibid.*

<sup>146</sup> Joined Cases C-20/01 and 28/01 *Commission v Germany*, fn. 41.

<sup>147</sup> *Ibid.*, para.24.

<sup>148</sup> *Ibid.*, para.27.

Having analyzed the arguments of the parties, the Court found that if the concluded contracts were not terminated, the infringement of public procurement rules would continue to produce effects for decades.<sup>149</sup> It held that although Article 2(6) permits the Member States to preserve the effects of contracts concluded in breach of public procurement rules, its effect cannot be that the contracting authority's conduct is to be regarded as in conformity with Community law. Such an interpretation of Article 2(6) would seriously reduce the scope of the Treaty provisions establishing the internal market.<sup>150</sup> Consequently, the Court found that Germany failed to fulfil its obligations under Community public procurement law.<sup>151</sup>

### **3.2.1.2 Case C-503/04 *Commission v Germany***

Although the Court found infringement of Community law, Germany did nothing to exhaust the effects of their breach and the Commission therefore brought a new action under Article 228 EC for failure to comply with the above judgment.<sup>152</sup> The essential question that the Court needed to resolve was whether Community law requires that the illegally awarded contract be rescinded in order to comply with the previous judgment.

In these proceedings, Germany yet again claimed that Article 2(6), which is aimed at protecting the principles of legal certainty, legitimate expectations, *pacta sunt servanda* and the fundamental right to property, excluded any possibility of terminating the contract and that the measures taken to comply with the previous judgment were sufficient.<sup>153</sup> However, the Court refused to accept such arguments. Concerning the principles underlying Article 2(6), it rightfully pointed out that even if it was justified for the contracting party to use such claims against the contracting authority, the Member States cannot rely on them in order to evade liability for their infringements of Community law.<sup>154</sup> As for the measures taken by Germany to comply with the previous judgment, the Court found that they were aimed exclusively at preventing the conclusion of new contracts, which would constitute similar infringements. However, it did nothing to stop the illegally concluded contract from continuing to have full effect.<sup>155</sup> Since the contract had not been terminated, the failure to fulfil obligations would continue for decades, throughout the entire performance of the illegally concluded contract. The Court therefore found that Germany failed to comply with the previous judgment.<sup>156</sup>

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<sup>149</sup> *Ibid.*, para.37.

<sup>150</sup> *Ibid.*, para.39.

<sup>151</sup> *Ibid.*, para. 68.

<sup>152</sup> Case C-503/04 *Commission v Germany*, fn. 41.

<sup>153</sup> *Ibid.*, 8, 31.

<sup>154</sup> *Ibid.*, para.36.

<sup>155</sup> *Ibid.*, para. 28, referring to para. 72 of the Opinion of AG Trstenjak.

<sup>156</sup> *Ibid.*, para. 29, 30.

### 3.2.2 Obligation to terminate illegally concluded contracts?

In light of the Court's reasoning in these two judgments, the question was raised whether there is an obligation in Community law to terminate contracts concluded as a result of a breach of public procurement rules. Some authors seem to believe that this is the case<sup>157</sup> and I agree with such an interpretation of the combined *Commission v Germany* judgments.<sup>158</sup> Even the German contracting authorities seem to have accepted such a view, which is evident from a national case given in the wake of another *Commission v Germany*.<sup>159</sup> After the Court's judgment in this case, which established a breach of Community law, the contracting authority decided to terminate the illegally awarded contract. The contractor challenged the legality of this termination in national proceedings, but the contracting authority's decision was upheld by the Regional Court, which regarded the ECJ's judgment to be an unforeseen change of circumstances that made adherence to the contract unacceptable for the contracting authority.<sup>160</sup>

The question of termination is most controversial and could potentially have a great impact on the efficiency of remedies in public procurement. To impose an obligation to terminate contracts due to a breach of public procurement law would go against the common perception in legal theory where public law is held separate from contractual law.<sup>161</sup> In most Member States, breaches of public procurement rules have never led to a termination of the contract.<sup>162</sup> Against this background, it is clear that the rulings in *Commission v Germany* mark a break from the legal traditions common to the Member States.<sup>163</sup> Therefore, it is quite curious that they were not given in Grand Chamber, which is customary where a case raises substantial issues of new law. It should, however, be borne in mind that it is common for public procurement cases to be dealt with by smaller chambers of the Court, even where issues of new law are raised.

In order to fully assess the scope of this new obligation under public procurement law, it is helpful to recall the comprehensive opinion of

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<sup>157</sup> See Treumer, S. (2007) "Towards an Obligation to Terminate Contracts Concluded in Breach of the E.C. Public Procurement Rules – the End of the Status of Concluded Public Contracts as Sacred Cows", *Public Procurement Law Review*, Issue 6.

<sup>158</sup> Joined Cases C-20/01 and 28/01 *Commission v Germany*, fn. 41 and Case C-503/04 *Commission v Germany*, fn. 41.

<sup>159</sup> Case C-126/03 *Commission of the European Communities v Federal Republic of Germany* [2004] ECR I-11197.

<sup>160</sup> LG München, Urteil v. 20.12.2004 – Az: 33 O 1645/05

<sup>161</sup> See for example Williams, R. (2003) "Remedying a Breach of Community law: the Judgment in Joined Cases C-20/01 and C-28/01, *Commission v Germany*", *Public Procurement Law Review*, Issue 5. Arrowsmith, S. (2005) *The Law of Public and Utilities Procurement*, Second edition, London, Sweet & Maxwell.

<sup>162</sup> Treumer, S. (2007) "Towards an Obligation", fn. 157, p. 371. Treumer observes that the possibility of terminating a contract has existed in French legal tradition for more than 100 years, but that it has clearly been more of an exception than a rule.

<sup>163</sup> Joined Cases C-20/01 and 28/01 *Commission v Germany*, fn. 41 and Case C-503/04 *Commission v Germany*, fn. 41.

Advocate General Trstenjak, who finds the obligation to terminate the contract by going through three simple steps.<sup>164</sup> First, she states that it is clear from the case law of the Court that all the effects of an infringement must be exhausted in order for the infringement to come to an end and that this cannot be accomplished if the contract is allowed to continue. Second, she holds that the Member States may not rely on the rights of the contracting party, such as the protection of legitimate expectations and *pacta sunt servanda*, in order to avoid their obligation to terminate the contract. Thirdly, she finds that in light of the principle of effectiveness and in order for public procurement rules to have a deterrent effect and to fully protect the interests of third parties, it is necessary to end the contract and re-open the public procurement procedure.<sup>165</sup>

As we have seen, the Court follows the reasoning of the Advocate General, establishing an obligation to terminate the contract. What remains to be seen is whether such an obligation is now the main rule for all breaches of public procurement rules.

### 3.2.3 Only established breach or any relevant breach?

Some have interpreted the *Commission v Germany* judgments as imposing the obligation to terminate a contract only where there has been a previous Article 226 EC procedure establishing a breach of Community law. They argue that this obligation cannot be invoked directly before the national court, if such a procedure has not taken place.<sup>166</sup> However, such an interpretation would seriously undermine both the effectiveness of Community law and the possibility for the individual to make use of this newly established obligation. It should be remembered that the individual has no say in determining whether the Commission actually initiates proceedings against a Member State.<sup>167</sup> To make an obligation under Community law conditional on a preceding Commission action would thus lead to different levels of protection, depending on whether the applicant has successfully lobbied its case before the Commission. This would of course be foreign to the principles of legal certainty and equality before the law. The availability of the Article 226 EC procedure should never be used as an excuse for the national court not to give full force and effect to Community law and ensure effective judicial protection of individual's rights. What is more, there should not be two different sets of Community obligations depending on whether the applicant tries to indirectly invoke its Community

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<sup>164</sup> Opinion of AG Trstenjak delivered on 28 Mar. 2007 in Case C-503/04 *Commission v Germany*, fn. 41.

<sup>165</sup> *Ibid.*, para. 65-79.

<sup>166</sup> This seems to be the view of some lawfirms, advising that it is necessary that the Commission first establishes a breach. See, for example, [http://www.ashurst.com/doc.aspx?id\\_Content=3134](http://www.ashurst.com/doc.aspx?id_Content=3134) or [http://www.altius.be/html/newsletters/newsletter01\\_art01.asp](http://www.altius.be/html/newsletters/newsletter01_art01.asp)

<sup>167</sup> Case 247/87 *Star Fruit Company SA v Commission of the European Communities* [1989] ECR 00291.

rights through Article 226 EC procedure or directly before the national court.

For this reason I believe that, it should be sufficient that a national court or review body has established a “relevant breach” of Community rules on public procurement and that this decision has reached status of *res judicata*. In my opinion, this should provide a sufficient basis for a plea before the national court to have the concluded contract terminated. The word “relevant breach” is used, since it is my opinion that not all breaches of public procurement rules should lead to the termination of the concluded contract. The *Commission v Germany* cases deal with illegal direct award, which is the most serious breach of Community law in the field of public procurement.<sup>168</sup> As it has been made clear in the previous chapters, it is nearly impossible to obtain damages in such situations, and therefore competitors would be left entirely without protection if the contracts were not terminated so that a proper public procurement process may take place.<sup>169</sup> As we saw in *Alcatel*, the court did not hesitate to order the “disapplication” of Article 2(6) to ensure that effective remedies were made available to competitors by allowing the award decision to be effectively challenged.<sup>170</sup> It is submitted that the same rationale lies behind the judgments in *Commission v Germany*. As the Court is faced with a scenario where competitors risk being left without recourse if the contract is not terminated, it once again orders the “disapplication” of Article 2(6) and breaks the sanctity of concluded contracts for the benefit of effective remedies.

### **3.2.4 Only long-term contract or any illegal contract?**

In light of the above, it seems that the termination of the contract is mandatory where a national court or a review body has established an illegal direct award, as the effects of the infringement cannot be exhausted unless the contract is terminated. However, the Court does take into account the fact that the contract is concluded for a long term, in order to establish the obligation to terminate the contract.<sup>171</sup> Does this mean that the obligation to terminate only exists in case of long running contracts?

In my view, it does not. Instead, one should see the reference to the fact that the contract is concluded for a long term as a way for the Court to further strengthen its argument. As some have argued, there is a problem with terminating already completed contracts, since such a termination is

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<sup>168</sup> Case C-26/03 *Stadt Halle*, fn. 46, para. 37.

<sup>169</sup> See Section 2.2.3 and Treumer, S. (2006) “The Discretionary Powers of Contracting Entities – Towards a Flexible Approach in the Recent Case Law of the Court of Justice”, *Public Procurement Law Review*, Issue 3.

<sup>170</sup> Case C-81/98 *Alcatel*, fn. 38, para. 38.

<sup>171</sup> Case C-503/04 *Commission v Germany*, fn. 41, para. 29.



presumably irrelevant.<sup>172</sup> However, by reminding the Member State of the potential magnitude of the infringement, the Court emphasises that there is much to be gained by termination. It also stresses that the contract is far from completed and that termination is still relevant. Having said this, it should be added that it is for national law to determine the character of the termination. Accordingly, in some systems a contract can be terminated with a retroactive effect, cancelling all contractual obligations (*ex tunc*), whereas in other national systems it is only allowed to cancel those obligations which still have to be performed (*ex nunc*).<sup>173</sup>

It is my belief that the obligation of termination is not dependent on the duration of the contract as long as there is some part of the contract that can still be terminated under national law. Instead, this obligation is mandatory whenever a contract is illegally directly awarded and can only be deviated from for reasons of overriding public interest.<sup>174</sup> In fact, one could view the Court's reference to the length of the contract as a way of pre-empting the possibility for contracting authorities to rely on such justifications. As we have seen in previous chapters, the public procurement directives are based on the four freedoms and the principles of non-discrimination. The Court has accepted derogations from these principles where they are justified by overriding reasons of public interest.<sup>175</sup> It is submitted that the same justification grounds should apply to the obligation to terminate contracts. This view is also supported by the amended Remedies Directive, which only allows derogation from ineffectiveness where there is an overriding public interest.<sup>176</sup> One could even speculate that the Court had the proposal for the amended Remedies Directive in mind when it decided on the obligation to terminate. As argued by some authors, it is not entirely uncommon for the Court to use proposed directives as a lever in interpreting primary law in an extensive manner.<sup>177</sup>

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<sup>172</sup> Arrowsmith, S. (2005) *The Law of Public and Utilities Procurement*, fn. 161, p. 1457.

<sup>173</sup> French law for instance allow public contracts to be declared null and void even after their completion. See for instance the Judgment of the Conseil d'Etat in *Institut de recherché pour le développement* of 10 Dec. 2003 concerning delivery of a vessel.

<sup>174</sup> See Section 2.3.2.

<sup>175</sup> Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 00649, Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECR I-04921, Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-04165, Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-01141, Joined Cases C-369/96 and C-376/96 *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL and Bernard Leloup, Serge Leloup and Sofrage SARL* [1999] ECR I-08453.

<sup>176</sup> New Article 2d(3) of Directive 89/665/EEC.

<sup>177</sup> Treumer, S., Werlauff, E. (2003) "The Leverage Principle: Secondary Community Law as a Lever for the Development of Primary Community Law", *European Law Review*, Vol. 28, No. 1, p. 124.

### 3.2.5 Only illegal direct award or also race to signature?

A further issue to be resolved is whether the obligation to terminate contracts also expands to situations not involving illegal direct award. It has been suggested that it does. Treumer seems to include all breaches, which have or are likely to have influenced the outcome of the competition for the award of the public contract as breaches, which might potentially lead to the termination of the contract.<sup>178</sup> However, the obligation to terminate a contract is, in his view, dependent on a number of circumstances such as the seriousness of the breach, the amounts at stake and the degree to which the internal market was affected.<sup>179</sup> If this test is applied to situations of race to signature, the following conclusions can be drawn.

Regarding the seriousness of the breach, it is submitted that race to signature is in many ways akin to illegal direct award. Both are infringements that allow the contracting authority to entirely avoid or effectively minimise the possibility of review of the public procurement procedure. Both rely on the sanctity of concluded contracts to avoid public law obligations and neither can be effectively remedied unless the concluded contract is terminated. Thus, race to signature is every bit as serious a breach as illegal direct award and it would be strange not to impose the same obligation for both of them. This conclusion is also supported by the amended Remedies Directive, which prescribes the same remedy of ineffectiveness for both infringements.<sup>180</sup>

Concerning the amounts at stake and the degree to which the internal market is affected, it is my view that these aspects have already been taken into account through the thresholds laid down in the substantive directives.<sup>181</sup> The thresholds were originally set in order to exclude contracts not adversely affecting the internal market to such a degree that they needed to be specifically regulated.<sup>182</sup> Essentially, the same rationale can be found in the substantive procurement directive, which makes a clear division between A and B services, where B contracts are pre-assumed to have less of an adverse affect on the internal market than A contracts and consequently a higher threshold applies.<sup>183</sup> To require of the national court to make an assessment of the adverse effects on the internal market of a particular contract, would, in my opinion, lead to arbitrary and unequal results throughout the Union and have harmful effects on the foreseeability and legal certainty of public procurement rules.

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<sup>178</sup> Treumer, S. (2007) "Towards an Obligation", fn. 157, p. 378.

<sup>179</sup> *Ibid.*, p. 378-381.

<sup>180</sup> New Articles 2a and 2d of Directive 89/665/EEC.

<sup>181</sup> Article 7 of Directive 2004/18/EC.

<sup>182</sup> Recital 2 of the Preamble to Directive 2004/18/EC.

<sup>183</sup> The terms A and B services are used to describe services, listed in Annex II A ("A services") and Annex II B ("B services"). For difference in thresholds compare Articles 7(a) and 7(b) of Directive 2004/18/EC.

In sum, it is my opinion that the *Commission v Germany* judgments should be interpreted as laying down an obligation on national authorities to terminate contracts concluded as a result of race to signature or illegal direct award, where so established by a national court or review body, if the value of such contracts reach the thresholds laid down in the substantive directives. Any further assessment of the value, the duration of the contract and the degree to which the internal market was affected can only be taken into account when assessing whether this obligation is to be derogated from due to an overriding reasons of public interest.

# 4 Analysis of general principles of Community law

A general principle of Community law is a principle, which transcends specific areas of Community law and underlies the Community legal system as a whole.<sup>184</sup> For this reason, no review of an area of Community law would be complete, unless it included an assessment of what such general principles require when applied to a specific field. In the following, I will examine the central case law of the principles of effectiveness and effective judicial protection, which are of great importance when it comes to enforcement of Community law and the protection of individual's rights.

## 4.1 Principle of effectiveness

### 4.1.1 Definition and distinction

The principle of effectiveness, which is founded on the principle of loyalty, is recognised by the Court as a general principle of Community law.<sup>185</sup> The principle of effectiveness essentially demands that Community law is effectively enforced, implemented and complied with at all levels both in the Community and in its Member States.<sup>186</sup> In this capacity, it guarantees that the rights of individuals stemming from Community law are effectively enforceable and provides an integral tool in ensuring the proper and coherent functioning of the Community legal order.<sup>187</sup>

The principle of effectiveness is, unlike other general principles of Community law, not based on the common traditions of the Member States, but derived from the distinct characteristics of Community law, primacy and direct effect. However, given the decentralised nature of the Community legal order it constitutes an essential tool for the enforcement of all other general principles of Community law.<sup>188</sup>

As the principle of effectiveness has developed in case law, it has become apparent that there are two different standards of protection required by this

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<sup>184</sup> Tridimas, T. (2006) *The General Principles of EU Law*, Second Edition, New York, Oxford University Press, p. 1.

<sup>185</sup> See for example Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur*, fn. 68, para. 29 and the Opinion of AG Léger delivered on 20 June 1995 in Case C-5/94 *The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd.* [1996] ECR I-02553.

<sup>186</sup> Accetto, M., Zleptnig, S. (2005) "The Principle of Effectiveness: Rethinking its Role in Community Law", *European Public Law*, Vol. 11, Issue 3, p. 375 ff.

<sup>187</sup> *Ibid.*, p. 376.

<sup>188</sup> Tridimas, T. (2006) *The General Principles of EU Law*, fn. 184, p. 418 ff.

principle.<sup>189</sup> First, there is the principle of effectiveness in the broader sense, which was laid down in *Simmenthal* requiring the Member States to do all in their power, at any level of their internal legal order, to ensure the “full force and effect” of Community law.<sup>190</sup> Second, there is effectiveness in the narrow sense, as laid down by the famous *Rewe*-line of case law, which requires the Member States to ensure enforcement of Community law so that national rules do not render the exercise of Community rights “virtually impossible or excessively difficult”.<sup>191</sup>

Arguably, the *Simmenthal* effectiveness offers a more stringent standard of protection than the *Rewe* effectiveness. In the following, these two lines of case law will be examined in order to determine which standard should be applied in the field of public procurement. Furthermore, it will be analysed what are the requirements of such a standard, when confronted with illegal direct award and race to signature. I will start by examining the *Rewe*-line of reasoning.

## 4.1.2 The *Rewe*-requirements

Since the judgments of *Rewe* and *Comet* came out in 1976, the “*Rewe* formula” has been referred to by the Court on numerous occasions.<sup>192</sup> As developed, it states that in the absence of any relevant Community rules, it is for the national legal order of each Member State to lay down the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under Community law, provided that they are not less favourable than those governing similar domestic situations and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order. Accordingly, it refers both to the principle of procedural autonomy and to the limitations of this autonomy, namely the requirements of equality and effectiveness. Taking these one by one, I start by examining the principle of procedural autonomy.

### 4.1.2.1 National procedural autonomy or competence

National procedural autonomy is based on the concept of a decentralised enforcement of Community law.<sup>193</sup> Since Community law, as a general rule,

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<sup>189</sup> See on this division Jans, J. H. et al (2007) *Europeanisation of Public Law*, fn. 18, p. 54 ff, Pachnou, D. (2000) “Enforcement of the EC Procurement Rules: The Standards Required of National Review Systems under EC Law in the Context of the Principle of Effectiveness”, *Public Procurement Law Review*, Issue 2, p. 56 ff.

<sup>190</sup> Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 00629, para. 22.

<sup>191</sup> Case 33/76 *Rewe-Zentralfinanz*, fn. 18, para. 5. Case 45/76 *Comet BV v Produktschap voor Siergewassen* [1976] ECR 02043, para. 13, 16.

<sup>192</sup> See Case 33/76 *Rewe-Zentralfinanz*, fn. 18, Case 45/76 *Comet*, fn. 191, Case C-312/93 *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* [1995] ECR I-04599, Joined Cases C-430/93 and C-431/93 *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-04705.

<sup>193</sup> Tridimas, T. (2006) *The General Principles of EU Law*, fn. 184, p. 418.

does not provide specific rules on enforcement, the organisation of national authorities and the procedural rules they apply, remain an essential competence of the Member States.<sup>194</sup> To reach full effectiveness of Community law, Member States need to “exercise their procedural autonomy in a manner which is compatible with Community law”.<sup>195</sup> However, while procedural autonomy remains the rule, the requirements of Community law impose exceptions to this rule.<sup>196</sup> Such a view point is an expression of respect for the national procedural systems’ strong cultural and historical tradition as well as a realisation of the fact that national courts are often in a better position to determine whether the national systems enforce Community rights in an effective and equal manner.<sup>197</sup>

However, the idea of Member States having procedural autonomy has been strongly criticised in doctrine. Former ECJ judge Kakouris has held that national procedural law should be considered as a tool for the complete effectiveness of Community law, and that for this reason there can be no balancing between the interest of procedural autonomy and Community rules.<sup>198</sup> Similarly, it has been held that the primacy of substantive Community law “spills over” on national procedural law creating a “European procedural primacy”.<sup>199</sup> In fact, former Advocate General Van Gerven has abandoned the term “procedural autonomy” entirely and instead speaks of “procedural competence”, reminding the reader that the national system only enjoys procedural authority “so long as no Community rules have been enacted and direct Community competence is absent”.<sup>200</sup>

#### 4.1.2.2 The requirement of equivalence

The requirement of equivalence or non-discrimination, states that claims based on Community law must be subject to rules, which are not less favourable than those governing similar claims under national law. Assessing which claims are to be considered as similar is, according to case law, in principle left to the national court.<sup>201</sup> To determine whether a provision complies with the principle of equivalence, the national court should assess the provision’s function in the procedure as a whole, as well as its operation and any special features before the various national

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<sup>194</sup> Accetto, M., Zleptnig, S. (2005) “The Principle of Effectiveness”, fn. 186, p. 395.

<sup>195</sup> See Kakouris, C. N. (1997) “Do the Member States Possess Judicial Procedural “Autonomy”?”, *Common Market Law Review*, Vol. 34, p. 1395, for his definition of procedural autonomy in the traditional sense.

<sup>196</sup> Accetto, M., Zleptnig, S. (2005) “The Principle of Effectiveness”, fn. 186, p. 396.

<sup>197</sup> Opinion of AG Léger delivered 8 Apr. 2003 in the Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239, para. 98.

<sup>198</sup> Kakouris, C. N. (1997) “Do the Member States Possess Judicial Procedural “Autonomy”?”, fn. 195, p. 1406-1408.

<sup>199</sup> Delicostopoulos, J.S. (2003) “Towards European Procedural Primacy in National Legal Systems”, *European Law Journal*, Vol. 9, Issue 5, p. 609.

<sup>200</sup> Van Gerven, W. (2000) “Of Rights, Remedies and Procedures”, *Common Market Law Review*, Vol. 37, p. 502.

<sup>201</sup> see Case C-326/96 *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd* [1998] ECR I-07835, para. 39-41, Case C-261/95 *Rosalba Palmisani v Istituto nazionale della previdenza sociale (INPS)* [1997] ECR I-04025, para. 33.

courts.<sup>202</sup> The national court must furthermore consider “the purpose and essential characteristics” of allegedly similar actions in order to determine whether they really comply with the principle of equality.<sup>203</sup> Arguably, the case law of the Court on the requirement of equivalence leaves a wide margin of discretion to the national court as to what can be regarded as an equivalent claim.<sup>204</sup>

#### 4.1.2.3 The requirement of effectiveness

The requirement of effectiveness or minimum protection demands that national rules do not make the exercise of rights conferred by Community law virtually impossible or excessively difficult.<sup>205</sup> The Court has traditionally interpreted this requirement as not imposing any positive obligation and therefore not leading to the creation of any new remedies, other than those already laid down by the national system.<sup>206</sup>

Moreover, it is important to note that the requirement of effectiveness takes precedence over the requirement of equality, so that a Member State cannot excuse an ineffective system for the protection of Community rights claiming that it is equally ineffective for strictly internal situations. Nonetheless, the mere fact that a provision is deemed to be effective does not make it unnecessary to apply the requirement of equivalence.<sup>207</sup> Arguably, the assessment of whether a national rule makes it excessively difficult or virtually impossible to exercise Community rights has, in some instances, been made in light of the specific circumstances of the case. For example, actions of an authority have been taken into account when assessing the effectiveness of a national provision in a specific situation, an issue that might be of importance in relation to public procurement as well.<sup>208</sup>

#### 4.1.3 Should the *Rewe*-requirements apply to public procurement?

So which standard of effectiveness should be applied in public procurement – the narrow, traditional and more lenient *Rewe*-requirements or the broader, progressive and more stringent standard of “full force and effect” developed in *Simmenthal*? Generally, it is not easy to draw any conclusions since the

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<sup>202</sup> Case C-326/96 *Levez*, fn. 201, para. 44.

<sup>203</sup> *Ibid.*, para. 43. Further on this assessment see Case C-78/98 *Shirley Preston and Othes v Wolverhampton Healthcare NHS Trust and Others and Dorothy Fletcher and Others v Midland Bank plc* [2000] ECR I-03201.

<sup>204</sup> Jans, J. H. et al (2007) *Europeanisation of Public Law*, fn. 18, p. 44-48.

<sup>205</sup> Case 33/76 *Rewe-Zentralfinanz*, fn. 18, para. 5.

<sup>206</sup> Case 158/80 *Rewe-Handelsgesellschaft Nord mbH et Rewe-Markt Steffen v Hauptzollamt Kiel* [1981] ECR 01805 (Butter-buying cruises), para. 6.

<sup>207</sup> Case 199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 03595. See also Jans, J. H. et al (2007) *Europeanisation of Public Law*, fn. 18, p. 43-44.

<sup>208</sup> Case C-208/90 *Theresa Emmott v Minister for Social Welfare and Attorney General* [1991] ECR I-04269. This will be further discussed below in Section 5.1.1.

Court has been known to mix-and-match the requirements of both lines.<sup>209</sup> Thus, the dilemma of which standard of effectiveness should be applied in which situation has had scholars intrigued for quite a number of years.<sup>210</sup> However, there can be no doubt as to which standard applies to public procurement remedies.

At the offset, it might seem that the *Rewe*-line should be applied, since we are dealing with the area of enforcement of substantive procurement rules. According to the *lex specialis* principle it would, in such situations, be appropriate to apply case law that specifically deals with enforcement rather than the *Simmenthal* line, which arguably lays down a more general principle of effectiveness. However, it is quite clear, in my view, that public procurement does not fit the mould for application of the *Rewe*- line. In fact, it falls short of its very first requirement:

“in the absence of Community rules”.<sup>211</sup>

There are indeed rules on enforcement in public procurement. The Remedies Directives were adopted to ensure real effectiveness of remedies in this field, thus bringing this area under the exclusive competence of Community law. Since the *Rewe*-line is conditional upon the lack of Community legislation, it can no longer be applied and the procedural autonomy, which runs as an undercurrent to all the requirements of the *Rewe*-formula, is exhausted.

I agree with Van Gerven that it is generally more appropriate to speak of “procedural competence” since Member State’s authority in the procedural field is always subject to the supremacy of general principles of Community law. However, I do not believe that it is fully appropriate to speak of “procedural competence” in fields of procedural law where a Community act is in force. Since Van Gerven’s terminology is based on the assumption that there is no Community legislation regulating the enforcement, it can be misleading to use such a terminology where there indeed is a directive in force. Instead, I suggest the use of the term “procedural discretion” to describe the competence left to the Member States in such situations. This term implicitly reminds that we are essentially dealing with a question of Community requirements on implementation rather than enforcement in

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<sup>209</sup> See for instance Case C-224/ *Gerhard Köbler*, fn. 197. In para. 27, 28 the Court refers to Article 10 EC and the principle of loyalty, which is generally associated with the full effect of Community law and a *Simmenthal* type of reasoning, while at the same time puts great emphasis on national law in para. 65-67. For comment on this crossbred nature of the *Köbler* case see Groussot, X., Minssen, T. (2007) “Res Judicata in the Court of Justice Case-Law: Balancing Legal Certainty with Legality?” *European Constitutional Law Review*, Issue 3, p. 400 ff. See also Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* [2007] ECR I-02271, para. 30-35, 69, where the Court refers to both the *Rewe*-line and the *Simmenthal*-line in the same case.

<sup>210</sup> Van Gerven, W. (2000) “Of Rights, Remedies and Procedures”, fn. 200, Tridimas, T. (2006) *The General Principles of EU Law*, fn. 184, Jans, J. H. et al (2007) *Europeanisation of Public Law*, fn. 18.

<sup>211</sup> Case 33/76 *Rewe-Zentralfinanz*, fn. 18, para. 5.



such fields.<sup>212</sup> What would be contained in such a procedural discretion is the form and method of implementing the Remedies Directive. In the field of public procurement covered by the Remedies Directive, there has been an expression of such procedural discretion only with regard to assigning the body responsible for reviewing the legality of public procurement procedures.<sup>213</sup>

If the *Rewe*-line was applied in the field of public procurement, it would mean that national courts should offer the same level of protection under the Remedies Directive as if there were no directive in force. Such an outcome is of course unacceptable since it would leave the Community act regulating remedies pointless. The Remedies Directive was adopted to ensure coherence of remedies in the field of public procurement. Therefore, it would be highly inappropriate to adopt the *Rewe* requirement of equivalence to public procurement remedies. As a consequence of the presumed procedural autonomy or competence in the field of enforcement, the level of protection under this requirement is constantly measured against what protection is offered for national law. It is not difficult to see how the application of this principle would lead to different results in different Member States. As ironic as it may seem, the application of the requirement of equality may lead to an increased incoherence and inequality in the field of public procurement.

Having ruled out the application of *Rewe*, it is my view that Community rules on public procurement remedies must, like all other rules enshrined in directives, be applied by the Member States at all levels so as to ensure their full force and effect, as required by the *Simmenthal* judgment. The precise obligations stemming from this broader concept of effectiveness will now be discussed.

#### **4.1.4 The full force and effect of Community law**

The best way to determine the content of the obligation to ensure full force and effect is to examine the case law that uses this broader concept of effectiveness. Unfortunately, this is easier said than done. As mentioned before, the Court has been known to mix the requirements of *Rewe* with the concept of supremacy and full force and effect from *Simmenthal*. This has, in my view, been done to sharpen the *Rewe* requirements of effectiveness where there is no Community legislation on enforcement, but where the Court nonetheless wanted to ensure proper protection of Community

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<sup>212</sup> For further debate on the discretion left to the Member States in field where a directive is in force, see Prechal, S. (2005) *Directives in EC Law*, fn. 132, p. 43, 66, 247-250.

<sup>213</sup> Case C-54/96 *Dorsch Consult*, fn. 116, Case C-76/97 *Walter Tögel v Niederösterreichische Gebietskrankenkasse* [1998] ECR I-05357, Case C-111/97 *EvoBus Austria GmbH v Niederösterreichische Verkehrsorganisations GmbH (Növog)* [1998] ECR I-05411, Case C-258/97 *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Landeskrankenanstalten-Betriebsgesellschaft* [1999] ECR I-01405.

rights.<sup>214</sup> However, for the purposes of public procurement, it is important to omit the case law relying on national procedural autonomy, since it was made clear that no such autonomy exist in this field. I have for this reason, limited my examination to cases referring strictly to the full effectiveness of Community law.

#### 4.1.4.1 *Simmenthal*

In the seminal *Simmenthal* judgment, the Court referred for the first time to the full effectiveness of community law.<sup>215</sup> The case concerned the repayment of some fees levied on the import of beef and veal, which had been established as contrary to community law by the Court in a previous ruling.<sup>216</sup> The referring national court asked the ECJ whether it should set aside the national legislation imposing the fees on its own accord or if it should abide by Italian law and refer the case to the Italian constitutional court, which had the power to declare a law unconstitutional.

The Court answered by stating that the national court must apply Community law in its entirety and protect the rights of individuals stemming therefrom. Accordingly, the national court was obliged to set aside any provision, which was in conflict with Community law.<sup>217</sup> Consequently, the Court held that any rule of national law that hinders the national court from setting aside a provision, which might prevent Community law from having full force and effect, is contrary to the very essence of Community law and must be disregarded.<sup>218</sup>

#### 4.1.4.2 *Factortame*

The *Simmenthal* judgment was confirmed and further developed by *Factortame* given in 1990.<sup>219</sup> The case before the national court concerned a British legislative act adopted to combat so called quota-hopping for fishing-vessels. The new law demanded all fishing vessels to be re-registered and show a strong connection to the United Kingdom. *Factortame*, who owned 95 fishing vessels not fulfilling this criterion, challenged this new law for incompatibility with Community law and asked for interim relief. However, national law did not allow interim relief against the Crown. The national court seized of the dispute referred to the ECJ

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<sup>214</sup> Case C-453/00 *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren* [2004] ECR I-00837, Case C-443/03 *Götz Leffler v Berlin Chemie AG* [2005] ECR I-09611, Case C-432/05 *Unibet*, fn. 209, Joined Cases C-10/97 to C-22/97 *Ministero delle Finanze v IN.CO.GE.'90 Srl, Idelgard Srl, Iris'90 Srl, Camed Srl, Pomezia Progetti Appalti Srl (PPA), Edilcam Srl, A. Cecchini & C. Srl, EMO Srl, Emoda Srl, Sappesi Srl, Ing. Luigi Martini Srl, Giacomo Srl and Mafar Srl* [1998] ECR I-06307.

<sup>215</sup> Case 106/77 *Simmenthal*, fn. 190, para. 23.

<sup>216</sup> Case 35/76 *Simmenthal SpA v Ministero delle Finanze italiano* [1976] ECR 01871.

<sup>217</sup> Case 106/77 *Simmenthal*, fn. 190, para. 21.

<sup>218</sup> *Ibid.*, para. 22-24.

<sup>219</sup> Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-02433.

asking whether Community law required it to disapply the national rule preventing it from granting interim relief.

The Court started by referring to the *Simmenthal* judgment, stating that directly applicable rules of Community law must be fully and uniformly applied in all Member States from the day of their entry into force.<sup>220</sup> It repeated that rules of national law hindering the setting aside of national provisions that prevent Community law from having full force and effect, impair the effectiveness of Community law.<sup>221</sup> Relying on this judgment, the Court found that the same should apply to provisions hindering the injunction of interim relief to ensure the full effectiveness of rights claimed under Community law.<sup>222</sup>

#### 4.1.4.3 Consequences of the case law

The *Simmenthal* judgment has been read as imposing two negative obligations on the Member States. One obligation is imposed on the legislator, precluding the adoption of national legislative measures that would be incompatible with Community law. The other is an obligation imposed on the national court to set aside domestic legislation, which conflicts with Community law. This obligation applies to national legislation adopted both prior and subsequent to the Community rule and evidently applies to all judiciary levels.<sup>223</sup> Both of these obligations were derived from the principle of effectiveness in its broader sense.

Apart from the negative obligation of setting aside incompatible national legislation, the Court seems to impose on national courts also a positive obligation.<sup>224</sup> In this sense, it has been argued that *Factortame* marks a departure from the Court's previous statement that no new remedies will have to be created for the protection of Community law.<sup>225</sup> Since there was no previous possibility of interim relief against the Crown under British law and such a remedy was required by the Court in order to comply with the judgment, it does in fact seem that the Court imposes a positive obligation to create such a remedy. However, I do not consider this as a departure from previous case law. It only further proves that we are indeed dealing with two separate lines of case law. Although it might be uncertain whether the *Rewe* requirement of effectiveness imposes positive obligations on the Member State, there can be no doubt that the *Simmenthal* line of case law does. If the national court has to resort to the creation of new remedies, in order to ensure effectiveness of Community law, it is obliged to do so. It seems that such an obligation is also silently implied in Article 10 EC, which requires

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<sup>220</sup> *Ibid.*, para. 18.

<sup>221</sup> *Ibid.*, para. 20.

<sup>222</sup> *Ibid.*, para. 21.

<sup>223</sup> Groussot, X., Minssen, T. (2007) "Res Judicata in the Court of Justice Case-Law", fn. 209, p. 391, 392.

<sup>224</sup> Jans, J. H. et al (2007) *Europeanisation of Public Law*, fn. 18, p. 52.

<sup>225</sup> Case 158/80 *Rewe* (Butter-buying cruises), fn. 206, para. 6.

the Member States to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty.

## 4.2 Effective judicial protection

### 4.2.1 Definition and distinction

In the Community context, effective judicial protection consists of the right to access the court and the right to obtain effective judicial review.<sup>226</sup> In other words, it implies that individuals should be able to enforce all rights conferred on them by Community law, before the national courts or the Court of Justice.<sup>227</sup> The doctrine and the Court itself often refer to this as the right to judicial control or judicial review, which I consider as being analogous to effective judicial protection as defined above.

Effective judicial protection has been recognised by the Court as a general principle of Community law, stemming from the constitutional traditions of the Member States.<sup>228</sup> What is more, it is evident from the case law that this principle constitutes a fundamental right.<sup>229</sup> The right to effective judicial protection is namely enshrined in the ECHR,<sup>230</sup> which has long been a source of inspiration for the Court and is of special significance when it comes to fundamental rights.<sup>231</sup> Articles 6 and 13 of the ECHR, providing the basis for this right, guarantee the access to justice, the right to a fair hearing and the right to an effective remedy for violation of rights and freedoms set forth in the ECHR.

However, the right to effective judicial protection as interpreted and applied by the Court seems to be more extensive than the one guaranteed in the ECHR, especially as regards to the provision of effective remedies for infringements of Community law.<sup>232</sup> Consequently, Article 47 of the Charter,<sup>233</sup> which has codified and reaffirmed the fundamental right to effective judicial protection in the Union, contains a broader and more

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<sup>226</sup> Tridimas, T. (2006) *The General Principles of EU Law*, fn. 184, p. 443.

<sup>227</sup> Jans, J. H. et al (2007) *Europeanisation of Public Law*, fn. 18, p. 49.

<sup>228</sup> Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 01651, para. 18.

<sup>229</sup> Groussot, X. (2006) *General Principles of Community Law*, Groningen, Europa Law, p. 236.

<sup>230</sup> Council of Europe, The European Convention on Human Rights, Rome, 4 Nov. 1950 [hereinafter the ECHR].

<sup>231</sup> Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991] ECR I-02925, para. 41.

<sup>232</sup> Groussot, X. (2006) *General principles of Community Law*, fn. 229, p. 238.

<sup>233</sup> Charter of Fundamental Rights of the European Union, proclaimed on 7 Dec. 2000 in Nice, OJ C 364, 18 Dec. 2000 [hereinafter the Charter].

explicit guarantee of a remedy for wrongs done.<sup>234</sup> It provides that everyone, whose rights and freedoms guaranteed by EU law are violated, have the right to an effective remedy.<sup>235</sup> This clearly marks that effective judicial protection and the right to effective remedy apply to all rights and obligations deriving from the Treaty, extending also to decisions taken by national authorities, which are purely administrative in nature.<sup>236</sup> Furthermore, the right to a fair and public hearing within a reasonable time, the right to defence and representation, and the availability of legal aid are guaranteed under the Charter.<sup>237</sup> Although the Charter is not a binding document, its importance has been increasing and after initial reluctance,<sup>238</sup> the Court is now regularly referring to it in cases that concern fundamental rights. Reference to the Charter is also commonly made in secondary Community legislation. Interestingly enough, the Preamble to the amended Remedies Directive explicitly refers to Article 47 of the Charter and effective judicial protection, which unequivocally marks the importance of this fundamental right in the area of public procurement remedies.

Although it is true that the principle of effectiveness is in close affinity to effective judicial protection, and that the latter is generally regarded as the application<sup>239</sup> or further elaboration of the former,<sup>240</sup> the two principles should be clearly distinguished. One of the main differences lies in the fact that effective judicial protection is, as mentioned before, not only a general principle of Community law but also a fundamental right. As such, it provides a basic protection for individuals and prevents the authorities exercising public functions from abusing their powers.<sup>241</sup> In this capacity, the right to effective judicial protection can be considered as an intrinsic component of the “rule of law”<sup>242</sup> and thus of crucial importance in any legal system, not only in Community law. In other words, effective judicial protection is a general principle of law that exists independently of the Community legal system. On the other hand, the principle of effectiveness,

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<sup>234</sup> Shelton., D. (2004) “Remedies and the Charter of Fundamental Rights of the European Union”, in: Peers, S., Ward, A., *The European Union charter of fundamental rights*, Oxford, Hart, p. 355.

<sup>235</sup> Article 47(1) of the Charter, corresponding to Article 13 of the ECHR, but is broader.

<sup>236</sup> Dougan, M. (2004) *National remedies before the Court of Justice: issues of harmonisation and differentiation*, Oxford, Hart, p. 5.

<sup>237</sup> Articles 47(2) of the Charter, corresponding to Article 6(1) of ECHR, and 47(3) of the Charter, reflecting jurisprudence of the ECtHR.

<sup>238</sup> The Charter has been embraced by many Community institutions, including the European Parliament, the Commission, the European Ombudsman and the CFI. It was frequently mentioned by Advocates General, but the ECJ itself first referred to the Charter in the Case C-540/03 *European Parliament v Council of the European Union* [2006] ECR I-05769. Interestingly, this case was decided shortly after it became clear that the Constitutional Treaty, which was supposed to integrate the Charter and make it legally binding, would not come into force.

<sup>239</sup> Tridimas, T. (2006) *The General Principles of EU Law*, fn. 184, p. 291, 292.

<sup>240</sup> Jans, J. H. et al (2007) *Europeanisation of Public Law*, fn. 18, p. 51.

<sup>241</sup> Schwartz, J. (2002) “Judicial Review in EC Law: Some Reflections on the Origins and the Actual Legal Situation”, *The International and Comparative Law Quarterly*, Vol. 51, No. 1, p. 17.

<sup>242</sup> Lenaerts, K. (2007) “The Rule of Law and the Coherence of the Judicial System of the European Union”, *Common Market Law Review*, Vol. 44, p. 1626.

which derives from Article 10 EC, is a typical Community-developed principle that is inherent to and dependent on the way the Community functions. Its existence and operation is closely connected to the fact that implementation, administration and enforcement of Community law are decentralised. Therefore, the principle of effectiveness, which in essence ensures the proper functioning of the Community, seems to be of much greater concern and importance in EC law, than in domestic legal contexts, where all these functions are centralised.<sup>243</sup>

Nevertheless, the two principles cannot be entirely separated. They are closely intertwined and overlapping, particularly with regard to the availability of effective remedies, which seems to be inherent to both. On one hand, the fundamental right to effective judicial protection, codified in Article 47 of the Charter, entitles the individual to an effective remedy for any breach of rights and freedoms guaranteed by Union law. On the other hand, the principle of effectiveness, stemming from Article 10 EC, creates a corresponding obligation on the Member States to provide remedies, sufficient to ensure effective legal protection in the fields covered by Union law – an obligation explicitly imposed on the Member States by Article 19(1) of the forthcoming Lisbon Treaty<sup>244</sup>. Thus, it can be held that when it comes to effective remedies, the principles are two sides of the same coin.

## 4.2.2 Requirements of effective judicial protection developed in case law

Through the prohibition of denial of justice, the Court early recognised the need for effective judicial protection in Community law.<sup>245</sup> Although the Court has declared that the right to effective judicial protection is a fundamental right and one of the general principles of Community law,<sup>246</sup> it initially gave little guidance as to the specific contents of that right. As the case law in this area gradually developed, it brought various implications for national procedural law. Through its jurisprudence, the Court shaped the requirement to provide effective judicial control for the protection of Community rights, demanding that effective remedies are available and that decisions adversely affecting Community rights are reasoned.<sup>247</sup> However, the Court was rather cautious when it dealt with the scope of judicial review exercised by the national courts in cases involving Community law.<sup>248</sup> In

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<sup>243</sup> Accetto, M., Zleptnig, S. (2005) “The Principle of Effectiveness”, fn. 186, p. 379, 382.

<sup>244</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ C 306, 17 Dec. 2007.

<sup>245</sup> Joined Cases 7/56, 3/57 to 7/57 *Dineke Algera, Giacomo Cicconardi, Simone Couturaud, Ignazio Genuardi, Félicie Steichen v Common Assembly of the European Coal and Steel Community* [1957] ECR 00039.

<sup>246</sup> Case 222/84 *Johnston*, fn. 228, para. 18.

<sup>247</sup> Case 222/84 *Johnston*, fn. 228, para. 18, Case C-185/97 *Belinda Jane Coote v Granada Hospitality Ltd* [1998] ECR I-05199, Case C-432/05 *Unibet*, fn. 209, Case 222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others* [1987] ECR 04097.

<sup>248</sup> Case C-120/97 *Upjohn Ltd v The Licensing Authority established by the Medicines Act 1968 and Others* [1999] ECR I-00223, Joined Cases C-65/95 and C-111/95 *The Queen v*

addition, it did not demand the national court to expand its jurisdiction in order to comply with the requirement to supply an effective remedy.<sup>249</sup> However, the Court did require that national rules on *locus standi* would not undermine the right to effective judicial protection,<sup>250</sup> albeit showing restraint when this fundamental right was invoked by an individual to obtain a legal standing to challenge a Community measure under Article 230(4) EC.<sup>251</sup>

It is obvious that the case law, relating to effective judicial protection is broad, having an impact on various areas of national procedural law. Since it is not the purposes of this thesis to provide a coherent overview of the case law on effective judicial protection, the focus will lie on the cases connected to remedies, which will be briefly presented in the following section.

#### 4.2.2.1 *Johnston*

The leading case in this area is the *Johnston* case,<sup>252</sup> in which the Court analysed the requirements of effective judicial protection. The case concerned the UK legislation, which permitted derogations from the principle of equal treatment between men and women in relation to acts, intended to protect national security or public safety. The legislation provided that a certificate issued by the national authorities should constitute conclusive evidence that the act in question complied with the terms of such derogations. In the proceedings before the national tribunal, such a certificate was produced in relation to the decision to refuse the renewal of Mrs Johnston's employment contract.

In answering the question put forward by the national court, the ECJ referred to Article 6 of the Equal Treatment Directive,<sup>253</sup> which requires that Member States introduce in their national legislation all the necessary measures to enable the individuals to pursue their claim by judicial process. The Court stated that the requirement of effective judicial protection stipulated in that provision reflects a general principle and a fundamental

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*Secretary of State for the Home Department, ex parte Mann Singh Shingara and Abbas Radiom* [1997] ECR I-03343. For further comment on these cases see Ward, A. (2000) *Judicial Review and the Rights of Private Parties in EC Law*, New York, Oxford University Press, p. 74-76.

<sup>249</sup> Case C-54/96 *Dorsch Consult*, fn. 213, Case C-76/97 *Tögel*, fn. 213, Case C-111/97 *EvoBus*, fn. 213, Case C-258/97 *Hospital Ingenieure*, fn. 213. For further comment on these cases see Ward, A. (2000) *Judicial Review*, fn. 248, p. 76, 77.

<sup>250</sup> Joined Cases C-87/90, C-88/90 and C-89/90 *A. Verholen and others v Sociale Verzekeringsbank Amsterdam* [1991] ECR I-03757, Case C-13/01 *Safalero Srl v Prefetto di Genova* [2003] ECR I-08679.

<sup>251</sup> Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-06677, Case C-263/02 P *Commission of the European Communities v Jégo-Quéré & Cie SA* [2004] ECR I-03425.

<sup>252</sup> Case 222/84 *Johnston*, fn. 228.

<sup>253</sup> Council Directive 76/207/EEC of 9 Feb. 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39, 14 Feb. 1976.

right.<sup>254</sup> It continued by laying down an obligation on the Member State to ensure the availability of effective judicial control of national legislation, intended to give effect to the rights enshrined in the Directive.<sup>255</sup> However, the Court went even further. It held that, by virtue of Article 6 of the Directive, interpreted in the light of the general principle of effective judicial protection, all persons have the right to obtain an effective remedy in a competent court against measures, which they consider to be contrary to the principle of equal treatment laid down in said Directive.<sup>256</sup> Consequently, the Court ruled that a provision, which requires a certificate to be treated as conclusive evidence allows the national authorities to deprive an individual of judicial protection. It therefore concluded that such a provision is contrary to the principle of effective judicial protection laid down in Article 6 of the Directive.<sup>257</sup>

#### **4.2.2.2 Heylens**

*Heylens*<sup>258</sup> confirmed that the right to an effective judicial remedy is a general one, extending beyond sex discrimination.<sup>259</sup> The Court was asked to consider whether Article 39 EC on the free of movement of workers could be violated by a decision of a national authority, rejecting an employment application without giving reasons and providing a specific legal remedy.

The Court held that since free access to employment is a fundamental Community right, the existence of a judicial remedy against any decision of a national authority refusing that right is essential in order to secure effective judicial protection.<sup>260</sup> It then went on and defined the right to effective judicial protection in the light of the duty to give reasons.<sup>261</sup> It held that this right presupposes that the national authority justifies decisions, which adversely affect Community rights, to enable the individual to defend his right under the best possible conditions.<sup>262</sup>

#### **4.2.2.3 Coote**

The importance of providing judicial protection of Community rights and effective remedies against their violation as articulated by the Court in *Johnston*, has been stressed in subsequent cases. In *Coote*,<sup>263</sup> which also concerned discrimination on the ground of sex, the Court was asked whether the principle of effective judicial protection must extend to retaliatory measures adopted by an employer in reaction to an equal treatment claim.

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<sup>254</sup> Case 222/84 *Johnston*, fn. 228, para. 18.

<sup>255</sup> *Ibid.*, para. 19. This obligation clearly stems from the principle of effectiveness of Community law and Article 10 EC.

<sup>256</sup> *Ibid.*, para. 19.

<sup>257</sup> *Ibid.*, para. 20.

<sup>258</sup> Case 222/86 *Heylens*, fn. 247.

<sup>259</sup> Craig, P., de Burca, G. (2007) *EU law*, fn. 112, p. 310.

<sup>260</sup> Case 222/86 *Heylens*, fn. 247, para. 14.

<sup>261</sup> Groussot (2006) *General principles of Community Law*, fn. 229, p. 237.

<sup>262</sup> Case 222/86 *Heylens*, fn. 247, para. 15.

<sup>263</sup> Case C-185/97 *Coote*, fn. 247.



The Court stated that the principle of effective judicial protection, enshrined in Article 6 of the Equal Treatment Directive, would be deprived of an essential part of its effectiveness if the protection did not cover the employer's retaliatory measures. It emphasised that the fear of such measures against which no legal remedy is available, might deter workers who consider themselves victims of discrimination, from pursuing their claims. This would, in the Court's opinion, seriously jeopardise implementation of the aim pursued by the Directive.<sup>264</sup>

#### **4.2.2.4 *Unibet***

A more recent ruling regarding the application of the right to effective judicial protection in the field of remedies is the *Unibet* judgment.<sup>265</sup> Although the case concerned the possibility to challenge national law that allegedly breaches Community law, the judgment has important implications for effective judicial protection of individual's Community rights. The dispute evolved when Unibet wanted to promote an internet betting service in Sweden, which was prohibited by the Swedish law on lotteries. Unibet considered that such a prohibition infringed Article 49 EC and sought in a separate action a declaration that the Swedish law on lotteries was contrary to Community law. As the Swedish law did not provide for a self-standing application for a declaration that a statute was inconsistent with a higher-ranking rule of law, the application was dismissed. On the appeal to the Swedish Supreme Court, a reference was made to the ECJ, asking whether the principle of effective judicial protection required that there be a separate self-standing action or whether it was adequate that the infringing national law can be challenged indirectly.

The Court started by emphasising the importance of effective judicial protection as a general principle of Community law and a fundamental right<sup>266</sup> and reminded that Article 10 EC obliges the Member States to ensure judicial protection of individual's Community rights.<sup>267</sup> However, it pointed out that Member States are not, in principle, required to create new remedies to ensure observance of Community law, unless it was apparent from the overall scheme of the national system that no legal remedy existed which made it possible to ensure, even indirectly, respect for individual's Community rights.<sup>268</sup> After scrutinising the Swedish legislation, the Court concluded that the principle of effective judicial protection did not require Member States to provide for a self-standing action for examination of compatibility with Community law, provided that other effective remedies make it possible for such a question to be determined as a preliminary issue.<sup>269</sup>

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<sup>264</sup> *Ibid.*, para. 24.

<sup>265</sup> Case C-432/05 *Unibet*, fn. 209.

<sup>266</sup> *Ibid.*, para. 37, with an explicit reference to Article 47 of the Charter.

<sup>267</sup> *Ibid.*, para. 38.

<sup>268</sup> *Ibid.*, para. 40, 41.

<sup>269</sup> *Ibid.*, para. 65.

#### 4.2.2.5 Consequences of the case law

Based on the above case law there seem to be two possible consequences of a failure to provide an effective remedy to the individual – setting aside the conflicting national legislation and the creation of new remedies. Interestingly, they correspond to those identified as a consequence of flanking the principle of effectiveness of Community law.

The landmark case of *Johnston* and the subsequent case law showed that Community law is able to provide individuals not only with rights but also with effective remedies that allow them to protect the rights derived from Community law. On the basis of the Court's reasoning it seems that, as a general rule, any provision of Community or national law, which enables the exclusion of a recourse to the courts in circumstances where the rights of the individual are adversely affected, will be set aside as unconstitutional.<sup>270</sup> In other words, when the competent court finds that the effective protection of an individual right is in some way inhibited by certain rules, such domestic legislation must be set aside as incompatible with the binding requirements of Community law. Although all of these cases involved the exercise of a fundamental Treaty right (e.g. equal treatment and free movement of persons), there seems to be no reason why the same approach should not apply to any right protected by Community law.<sup>271</sup> This includes the rights enshrined in the substantive public procurement directives.

The recent *Unibet* case revealed that a possible consequence stemming from the need to ensure effective judicial protection is the creation of new remedies. Although Sweden was not required to do so, the Court explicitly recognised that Community law might sometimes require the creation of new remedies.<sup>272</sup> In particular, this seems to be the case where there is no other effective remedy available for the protection of Community rights. Furthermore, given that the underlying rationale for such a decision is the overriding consideration of effective judicial protection of individual's Community rights, I see no reason why the requirement of creating new remedies would not extend to any area of EC law, where there is no effective remedy available, including the area of public procurement.

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<sup>270</sup> Tridimas, T. (2006) *The General Principles of EU Law*, fn. 184, p. 444.

<sup>271</sup> Dougan, M. (2004) *National remedies before the Court of Justice*, fn. 236, p. 9, 13.

<sup>272</sup> Arnall, A. (2007) "Case C-432/05, Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern, judgment of the Grand Chamber of 13 March 2007", *Common Market Law Review*, Vol. 44, p. 1773.

## 4.3 Effects of the new directives

### 4.3.1 The place of directives in Community law

Directives are one of the instruments used for developing Community policy, when the institution adopting them aims to harmonise national laws within a certain area or to introduce a complex legal change.<sup>273</sup> According to Article 249 EC, a directive is binding as to the result to be achieved, but leaves to the national authorities the choice of form and methods of implementation. The directives enter into force on a day specified in the directive or, in the absence of any such date, the twentieth day following its publication in the Official Journal.<sup>274</sup> Thus, they produce legal effects for a Member State from the date of their publication.<sup>275</sup> Yet, the Member States are allowed a certain period, varying from a few months to several years, to adopt implementing measures that transpose the directives into the national legal order. The dissociation of the entry into force of a directive and the entry into force of the implementing measures necessary raises the question of the effects of the directive produced during this interval of time.<sup>276</sup> This issue, which is indeed very important when trying to determine the current effects of the amended Remedies Directive, will now be addressed through the analysis of relevant case law.

### 4.3.2 Effects of new directives in case law

Regarding the direct effect of newly adopted directives, the Court's case law clearly indicates that a directive can only have such an effect once the time limit for its implementation has expired.<sup>277</sup> This follows from the *Ratti* judgment,<sup>278</sup> which firmly established that the expiry of the implementation period is one of the essential conditions for invoking direct effect.

A more intriguing question is, however, whether a directive can have an anticipatory indirect effect, i.e. whether there is an obligation of harmonious or conform interpretation of national law even before the deadline for implementation of the directive has expired.<sup>279</sup> A number of Advocates General has argued that the obligation of harmonious interpretation should apply before the expiry of the time limit for implementation,<sup>280</sup> but recently

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<sup>273</sup> Craig, P., de Burca, G. (2007) *EU law*, fn. 112, p. 85.

<sup>274</sup> Article 254 EC.

<sup>275</sup> Also confirmed in the Case C-212/04 *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos* (ELOG) [2006] ECR I-06057, para. 118.

<sup>276</sup> Prechal, S. (2005) *Directives in EC Law*, fn. 132, p. 18, 19.

<sup>277</sup> Craig, P., de Burca, G. (2007) *EU law*, fn. 112, p. 291.

<sup>278</sup> Case 148/78 *Criminal proceedings against Tullio Ratti* [1979] ECR 01629.

<sup>279</sup> Klamert, M. (2006) "Judicial Implementation of Directives and Anticipatory Indirect Effect", *Common Market Law Review*, Vol. 43, p. 1252.

<sup>280</sup> Opinion of AG Mischo delivered on 17 Mar. 1987 in the Case 80/86 *Criminal proceedings against Kolpinghuis Nijmegen BV* [1987] ECR 03969, para. 32, Opinion of AG Jacobs delivered on 25 June 1992 in the Case C-156/91 *Hansa Fleisch Ernst Mundt*

the Court conclusively decided on this issue. In *Adeneler* it held that the general obligation owed by national courts to interpret domestic law in conformity with directives exists only once the period for their transposition has expired.<sup>281</sup>

Nevertheless, the Court reminded that directives produce legal effects for Member States and for all national authorities already from the date of their publication.<sup>282</sup> From the fact that directives have a binding effect from the time they enter into force and prior to the expiry of the implementation deadline, the Court derived certain obligations for the Member States.<sup>283</sup> First, Member States are, during the period prescribed for transposition, under a negative obligation to refrain from taking any measures liable to seriously compromise the result prescribed by the new directive.<sup>284</sup> Secondly, Member States seem to be under no positive obligation to disapply conflicting national law before the expiry of the time limit for implementation.<sup>285</sup> However, it stems from the *Mangold* judgment that in certain circumstances, national courts will be obliged to set aside national legislation conflicting with the newly adopted directive, even though the implementation period has not yet expired.<sup>286</sup>

Mr Mangold, then aged 56, concluded a fixed-term employment contract with his employer Mr Helm in 2003. The parties referred to Paragraph 14(3) of the Act on Part Time and Fixed Term Employment, which explicitly authorised the conclusion of fixed-term employment contracts without an objective justification once the worker reached the age of 52. In these circumstances, a question was referred to the Court asking whether Directive 2000/78/EC,<sup>287</sup> of which the time limit for implementation had not yet expired, must be interpreted as precluding such a provision. The ECJ analysed the German legislation and concluded that it cannot be considered as justified under Article 6(1) of said Directive.<sup>288</sup> Interestingly, the ECJ did not feel precluded from assessing the substance of the Directive and its effects on national law, despite the fact that the period for implementation had not yet run out.<sup>289</sup> The foremost reason for this seemed to be the

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*GmbH & Co. KG v Landrat des Kreises Schleswig-Flensburg* [1992] ECR I-05567, para. 23, Opinion of AG Van Gerven delivered on 12 July 1990 in the Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-04135, para. 9; Opinion of AG Tizziano delivered on 30 June 2005 in the Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-09981, para. 117-120.

<sup>281</sup> Case C-212/04 *Adeneler*, fn. 275, para. 115.

<sup>282</sup> *Ibid.*, para. 119.

<sup>283</sup> Prechal, S. (2005) *Directives in EC Law*, fn. 132, p. 20.

<sup>284</sup> Case C-129/96 *Inter-Environnement Wallonie ASBL v Région wallonne* [1997] ECR I-07411, para. 45.

<sup>285</sup> Case C-156/91 *Hansa Fleisch*, fn. 280, para. 20, Case C-157/02 *Rieser Internationale Transporte GmbH v Autobahnen- und Schnellstraßen-Finanzierungs- AG (Asfinag)* [2004] ECR I-01477, para. 47.

<sup>286</sup> Case C-144/04 *Mangold*, fn. 280, para. 76-78.

<sup>287</sup> Council Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2 Dec. 2000.

<sup>288</sup> Case C-144/04 *Mangold*, fn. 280, para. 65.

<sup>289</sup> *Ibid.*, para. 66.

underlying principle of non-discrimination on grounds of age, which the Court found as common to the constitutional traditions of the Member States and enshrined in various international instruments.<sup>290</sup> It therefore concluded that non-discrimination on grounds of age constitutes a general principle, which should be applied to measures falling within the scope of Community law irrespective of the expiry of the transposition period.<sup>291</sup> Moreover, the Court held that in such circumstances it is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination, setting aside any provision of national law, which may conflict with Community law, even where the period prescribed for transposition has not yet expired.<sup>292</sup>

### 4.3.3 Consequences of the case law

The Court's judgment in *Mangold* is unique and not entirely undisputed. It has been heavily criticised as entailing an improper form of judicial activism, mainly by giving an unimplemented directive a horizontal direct effect.<sup>293</sup> Nevertheless, it bears some important implications for Community law, including public procurement, as it opens the possibility of invoking general principles in contractual relationships.<sup>294</sup>

Above all, the Court made it clear that even directives, for which the implementation period has not yet expired, may have certain effects on national legislation. What is more, if a non-implemented directive can be regarded merely as a specific enunciation of a general principle of Community law, such as non-discrimination or effective judicial protection, its effects may impose an obligation on the national court to set aside any national provision conflicting with the non-implemented directive.<sup>295</sup> This is not at all surprising, but rather a natural consequence of the fact that the observance of general principles, whose application is universal and timeless, cannot be made conditional upon the expiry of the implementation period.<sup>296</sup> Thus, one has to agree with Jans, who perceives the *Mangold* judgment as a simple example of a hierarchy of norms, in which a superior general principle of Community law may render conflicting national legislation non-applicable.<sup>297</sup>

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<sup>290</sup> Ibid., para. 74, 75.

<sup>291</sup> Ibid., para. 76.

<sup>292</sup> Ibid., para. 78.

<sup>293</sup> Editorial Comments (2006) "Horizontal Direct Effect – a Law of Diminishing Coherence", *Common Market Law Review*, Vol. 43.

<sup>294</sup> Jans, J.H. (2007) "The effect in national legal systems of the prohibition of discrimination on grounds of age as a general principle of Community law", *Legal Issues of Economic Integration*, Vol. 3, No. 1, p. 53-66. Available at: <http://ssrn.com/abstract=960349> (26 May 2008).

<sup>295</sup> Case C-144/04 *Mangold*, fn. 280, para. 77.

<sup>296</sup> Ibid., para. 76.

<sup>297</sup> Jans, J.H. (2007) "The effect in national legal systems", fn. 297.

# 5 Application of general principles and concluding remarks

The above analysis revealed the general obligations and consequences under the principles of effectiveness and effective judicial protection. In this concluding chapter, I will attempt to apply those standards to the field of remedies in public procurement in order to establish whether these principles are fulfilled and if the inefficiencies of the current remedies legislation can be overcome by such application.

## 5.1 Are the principles of effectiveness and effective judicial protection satisfied?

### 5.1.1 Applying effectiveness

After having established that the standard of full force and effect is to be applied to public procurement, it will now be assessed what this standard entails and which public procurement rules are to be rendered “fully effective”.<sup>298</sup> Since the Remedies Directive is put in place to ensure effective compliance with the substantive directives, it is both the obligation to provide effective remedies as expressed in the Remedies Directive and the principles of transparency, equality and non-discrimination as articulated in the substantive directives that should be ensured full force and effect.<sup>299</sup> If one paraphrases the requirements of *Simmenthal*, it is clear that the national court must apply both the substantive and the Remedies Directive in their entirety and protect the rights of an individual to have public contracts awarded in a transparent, open and non-discriminatory manner.<sup>300</sup>

As has been shown in the previous chapters on the problematic nature of illegal direct award and race to signature, it is necessary to effectively combat these infringements if the above rights are not to be rendered nebulous.<sup>301</sup> It is also apparent from the case law following *Alcatel* that the correct way to implement the Remedies Directive is to impose a standstill period. In my view, it is only if the Member States combine such an implementation with the obligation laid down in the *Commission v Germany* judgments to terminate a contract, that the level of protection required by *Simmenthal* will be achieved.

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<sup>298</sup> See Section 4.1.3 and 4.1.4.

<sup>299</sup> Article 1(1) of Directive 89/665/EEC and Article 2 of Directive 2004/18/EC.

<sup>300</sup> Application of Case 106/77 *Simmenthal*, fn. 190.

<sup>301</sup> See Section 2.2.1. and 2.2.2.

Such an implementation of the Remedies Directive would dispatch of any lasting detrimental effects of illegal direct award and race to signature. In the case of illegal direct award, the contract would in accordance with the *Commission v Germany* judgments be terminated upon challenge. With regard to race to signature, the standstill period would ensure that aggrieved bidders have a real possibility to challenge the award decision they consider unjust and if this period were not respected, the concluded contract would consequently be terminated. If the contracting authorities knew that these infringements would lead to a mandatory termination of the contract, there would be no incentive to commit such breaches, since it would only lead to them having to re-open the award procedure, whereby the tenderers' right to transparency and non-discrimination would be fully and effectively ensured.

In addition, it should be noted that even if there were no Remedies Directive in public procurement, there would still be strong grounds for imposition of a standstill period and the termination of contracts under the *Rewe*-line of case law. Arguably, illegal direct award and race to signature render it virtually impossible or excessively difficult for the aggrieved tender to exercise his right to transparency and non-discrimination. Even more so, if one considers the controversial *Emmott* ruling where the Court ordered the disapplication of certain time limits for appeal against an authority decision deemed to be contrary to Community law.<sup>302</sup> In this case, the authorities had acted in a way, which severely limited the possibilities for the applicant to obtain review. As the judgment has been interpreted in doctrine<sup>303</sup> and in subsequent case law,<sup>304</sup> the rather stringent standard of effectiveness adopted by the Court can be explained by these specific circumstances.

If this is true, it can similarly be argued that a stricter standard should be applied as regards to both illegal direct award and race to signature. In illegal direct award, it is the contracting authority's disregard of public procurement procedure that causes the ineffectiveness of remedies. The lack of transparency created by the contracting authority makes it unusually and excessively difficult for the aggrieved tenderer to prove an injury, a direct causal link and his potential to win the contract in an action for damages. Given that the conduct of the authority renders damages virtually impossible to obtain, the more stringent *Emmott* ruling can be applied in the case of illegal direct award. The same rationale can be used, perhaps even more convincingly, for applying the *Emmott* ruling to situations of race to signature. Since race to signature is often used consciously by the contracting authority to avoid litigation, while effective pre-contractual remedies are still available, it bears striking resemblance to the situation in

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<sup>302</sup> Case C-208/90 *Emmott*, fn. 208.

<sup>303</sup> Jans, J. H. et al (2007) *Europeanisation of Public Law*, fn. 18, p. 45, 296-301. Tridimas, T. (2006) *The General Principles of EU Law*, fn. 184, p. 420-434, Craig, P., de Burca, G. (2007) *EU law*, fn. 112, p. 314 .

<sup>304</sup> Case C-338/91 *H. Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen* [1993] ECR I-05475, Case C-188/95 *Fantask A/S e.a. v Industriministeriet (Erhvervministeriet)* [1997] ECR I-06783, C-231/96 *Edilizia Industriale Siderurgica Srl (Edis) v Ministero delle Finanze* [1998] ECR I-04951.

*Emmott* where the authority discouraged the applicant from seeking review while there was still time to do so.

### 5.1.2 Applying effective judicial protection

As previously established, effective judicial protection is not only a general principle, but also a fundamental right, ensuring an effective remedy to every individual whose rights guaranteed by Community law are violated.<sup>305</sup> Since this concept constitutes an intrinsic component of the “rule of law”,<sup>306</sup> it is inherent to all fields of law, including public procurement. In fact, it is often emphasised that public contracts, which due to their low value fall outside the Remedies Directive, are nevertheless subject to the requirements stemming from the principle of effective judicial protection.<sup>307</sup> However, it should be borne in mind that this general principle also applies to public contracts falling within the scope of the Remedies Directive and that the remedies enshrined in it must fulfil the requirements of effective judicial protection. This fact also transpires from the Preamble to the amended Remedies Directive, which makes an explicit reference to effective judicial protection and emphasises the importance of ensuring full respect for the right to an effective remedy.<sup>308</sup>

The question is, however, whether the public procurement remedies actually meet the requirements of effective judicial protection as developed by the Court. It is submitted that they do not, especially in the event of illegal direct award and race to signature. If the demands of the established case law are applied to public procurement, it is clear that all aggrieved bidders should have the right to obtain an effective remedy against measures, which they consider to be contrary to the principles laid down in substantive directives, that is to say the principles of openness, transparency and equality.<sup>309</sup> Yet, it has been shown that in cases of illegal direct award and race to signature, damages are the only remedy available to disappointed bidders, although they are ineffective and extremely difficult to obtain.<sup>310</sup> The burden of proof is, for example, placed on the aggrieved bidder, who is required to show that there was a breach of public procurement, a direct causal link between the breach and the injury and that the contract would have been awarded to him, had it not been for the breach.<sup>311</sup> Furthermore, it should be noted that in practice, any financial award is limited to the reimbursement of costs incurred in the bidding process. That is by no means compatible with the Court’s case law, which established that limiting the right to compensation to purely nominal amounts, such as the

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<sup>305</sup> Case 222/84 *Johnston*, fn. 228, para. 18. See also Articles 6 and 13 of the ECHR and Article 47 of the Charter.

<sup>306</sup> Lenaerts, K. (2007) “The Rule of Law”, fn. 242, p. 1626.

<sup>307</sup> European Commission, *Impact Assessment Report*, fn. 24, p. 5.

<sup>308</sup> Recital 36 of the Preamble to Directive 2007/66/EC.

<sup>309</sup> Application of Case 222/84 *Johnston*, fn. 228.

<sup>310</sup> See Section 2.2.3.

<sup>311</sup> Leffler, H. (2003) “Damages Liability”, fn. 62, p. 166, 167.



reimbursement of expenses incurred in the application process, would not satisfy the requirements of an effective transposition of the directive.<sup>312</sup> In any event, as emphasised by the Court of First Instance, a claim for damages cannot adequately protect the interests of the individual, since it does not lead to the removal of the illegal measure. Thus, such an action cannot be regarded as guaranteeing affected persons the right to an effective remedy.<sup>313</sup>

In the light of the above, it is obvious that no effective remedy exists for combating the most serious breaches of public procurement. Thus, the purpose of the Remedies Directive and, perhaps even more importantly, of the whole substantive public procurement law is severely undermined. Being aware of the situation, the aggrieved bidders, deprived of their right to compete for a public contract in a transparent, open and non-discriminatory way, are deterred from pursuing their claims. Contracting authorities, on the other hand, perceive such breaches as a flexible, unremedied type of award and often consciously opt for it instead of conducting a formal procurement procedure. In such circumstances, it is fair to conclude that the lack of effective public procurement remedies seriously encroaches upon the implementation of the fundamental aims of Community public procurement law.<sup>314</sup>

## 5.2 Setting aside Community legislation

As shown, the principle of effectiveness, when applied to public procurement, demands that the substantive and remedies directives have full force and effect, in order to ensure the rights of a tenderer to have public contracts awarded in a transparent, open and non-discriminatory manner. Moreover, the principle of effective judicial protection requires that all aggrieved bidders have the right to obtain an effective remedy against measures, which they consider to be contrary to the principles laid down in the substantive directives. It is clear from the above that this level of protection is commonly not achieved in case of illegal direct award and race to signature. In accordance with established case law, such disregard of general principles of effectiveness and effective judicial protection brings about an obligation on the national court to set aside any legislation hindering the achievement of aims of the public procurement directives<sup>315</sup> and, if necessary, create new remedies for their fulfilment.<sup>316</sup>

The obligation to set aside is further supported by the judgment in *Mangold*, where the ECJ held that the national court must disapply national legislation

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<sup>312</sup> Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 01891, para. 24.

<sup>313</sup> Case T-177/01 *Jégo-Quéré & Cie SA v Commission of the European Communities* [2002] ECR II-02365, para. 46, 47.

<sup>314</sup> Application of Case C-185/97 *Coote*, fn. 247.

<sup>315</sup> Case 106/77 *Simmenthal*, fn. 190, Case 222/84 *Johnston*, fn. 228.

<sup>316</sup> Case C-213/89 *Factortame*, fn. 219, Case C-432/05 *Unibet*, fn. 209.

conflicting with a directive, articulating a general principle, even where the period prescribed for transposition has not yet expired. The amended Remedies Directive 2007/66/EC is most certainly an enunciation of the general principle of effective judicial protection.<sup>317</sup> Arguably, this principle, which is also a fundamental right, has much stronger foundation in the constitutional traditions common to the Member States, than the principle of non-discrimination on grounds of age, which was in question in the *Mangold* case. Consequently, there is no reason why the national court would not be under an obligation to set aside national law, contrary to the amended Remedies Directive.

What remains to be seen is which specific provisions of the national public procurement legislation need to be set aside by a national court, seized with a dispute regarding illegal direct award and race to signature. In my view, the legislation to be set aside is legislation implementing Article 2(6) of Directive 89/665/EEC. As we have seen, it is this provision that creates an unconditional sanctity and irreversibility of contracts, even if they are concluded following illegal direct award or race to signature. In such cases, full force and effect of substantive directives and effective remedies after the conclusion of the contract can only be ensured by diapplying national legislation based on Article 2(6), thereby enabling the removal of any illegal award decision and allowing a new, transparent, open and non-discriminatory public procurement process to take place.

It should be noted, that this conclusion is not precluded by the fact that national legislation is based on a Community directive. As held by Advocate General Trstenjak in *Commission v Germany*, a provision of secondary legislation such as Article 2(6) cannot, in any way, alter the application of obligations under primary law.<sup>318</sup> Furthermore, the Court has been known to allow general principles of Community law, such as the principle of effective judicial protection, to take precedence over provisions of secondary law. In the context of such decisions, the Court also refers to the obligation to ensure the full effectiveness of Community law as an obligation, which can override hindering provisions of secondary law.<sup>319</sup> Moreover, the Court held in *Baumbast* that directives must not amount to a disproportionate interference with the individual's rights. It emphasised that although directives may lay down limitations to the exercise of individual's rights, they must be applied in compliance with general principles of

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<sup>317</sup> See Recital 36 of the Preamble to the Directive 2007/66/EC.

<sup>318</sup> Opinion of AG Trstenjak delivered on 28 Mar. 2007 in Case C-503/04 *Commission v Germany*, fn. 41, para.29.

<sup>319</sup> Case C-226/99 *Siples Srl, in liquidation v Ministero delle Finanze and Servizio della Riscossione dei Tributi - Concessione Provincia di Genova - San Paolo Riscossioni Genova SpA* [2001] ECR I-00277, para. 19, 20, referring to the Courts judgment in the Case C-213/89 *Factortame*, fn. 219 and Article 10 EC. See also Case C-1/99 *Kofisa Italia Srl v Ministero delle Finanze, Servizio della Riscossione dei Tributi - Concessione Provincia di Genova - San Paolo Riscossioni Genova SpA* [2001] ECR I-00207, para. 47-49 for identical wording.

Community law.<sup>320</sup> In any event, it is clear from *Mangold* that a directive, which is merely an enunciation of a general principle, cannot be implemented in a way, which defeats the purpose of the higher-ranking principle.

## 5.3 Filling the gaps and enhancing efficiency of remedies

We have firmly established that national legislation, implementing Article 2(6) of Directive 89/665/EEC is the source of inefficiency of remedies in cases concerning illegal direct award or race to signature. The principles of effectiveness and effective judicial protection and the *Mangold* judgment all point towards setting aside such legislation. However, after the legislation has been set aside, national court will have to show some creativity in order to fill gap arising therefrom. General principles requiring that full force and effect must be given to Community procurement legislation and that there must be effective remedies available to combat illegal direct award and race to signature, do not give much guidance as to the achievement of these goals. Therefore, I will now propose a number of different paths that the national court may choose to pursue in order to achieve the full effectiveness of Community law and ensure effective judicial protection for the disappointed tenderer.

### 5.3.1 Correct application of Directive 89/665/EEC in light of case law

Our first suggestion is that the national court, seized with a dispute regarding illegal direct award or race to signature, tries to resolve the situation by applying directly effective provisions of the Remedies Directive, coupled with the solutions suggested in the case law of the Court. In solving this question, I begin by examining whether Articles 1(1) and 2(1) of the Remedies Directive are capable of being directly effective at all. I will then ascertain whether these provisions can produce direct effect as to confer a right on the individual to have a possibility to challenge the award decision after the contract has been concluded and have illegally concluded contracts terminated.

There are a number of cases where Articles 1(1) and 2(1) have been deemed directly effective. One of them is the *Koppensteiner* judgment,<sup>321</sup> where a question was raised concerning direct effect of a previously established obligation to have the decision to withdraw an invitation to tender open to

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<sup>320</sup> Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-07091, para. 91-96.

<sup>321</sup> Case C-15/04 *Koppensteiner GmbH v Bundesimmobiliengesellschaft mbH* [2005] ECR I-04855.

review.<sup>322</sup> The Court found that where national legislation precludes examination and the setting aside of decisions to withdraw an invitation to tender, the applicant can rely directly on Articles 1(1) and 2(1) to obtain effective review.<sup>323</sup> This clear admission of direct effect has also been confirmed by the *Lämmerzahl* judgment.<sup>324</sup>

Although *Koppensteiner* concerned a decision to withdraw an invitation to tender, there is no reason why direct effect of Articles 1(1) and 2(1) should not be extended to an award decision, such as the one in *Alcatel*. However, the ambiguous nature of the Court's judgment on direct effect in this case, could be interpreted as ruling out direct effect of the abovementioned Articles. We, however, disagree with such an interpretation. Although the national court asked whether Article 2(1) can be directly relied upon to have an award decision set aside even after the conclusion of the contract, the Court never dealt with the question of direct effect.

The first and perhaps most obvious reason is that the concept as such is not mentioned anywhere in the judgment.<sup>325</sup> The Court never addresses the requirements of preciseness and clarity, nor does it comment on the issue of discretion left to the national authorities, which might under some circumstances hinder the application of direct effect. Instead, the Court rules out the possibility for review bodies to hear applications under Article 2(1) where there is no award decision which might be set aside.<sup>326</sup> This answer is, however, completely irrelevant in the circumstances of the case, since there was indeed an award decision, only it was not transparent.<sup>327</sup> Claiming that the award decision does not exist simply because it was not taken in a transparent manner, would also contradict the later *Stadt Halle* case, where the Court held that a decision not to initiate an award procedure is the first decision amenable to review.<sup>328</sup> It is hard to imagine how such a passive act is considered open to review, while the disguised award decision in *Alcatel* is deemed nonexistent. In any event, I believe that the *Alcatel* judgment should be read together with Opinion of Advocate General Micho, who holds that the Member States' obligations stemming from Article 2(1) are clearly determined, requiring that unsuccessful tenderers are able to initiate proceedings to have the award decision set aside. He further considers that this obligation gives rise to rights for the individual and that Member States' discretion was exhausted upon implementation.<sup>329</sup> He does, however, find that recourse to the concept of direct effect might be unnecessary, since the national provision are, in fact, capable of being applied as to comply with

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<sup>322</sup> The obligation to have the decision to withdraw an invitation to tender open to review was established in the Case C-92/00 *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Stadt Wien* [2002] ECR I-05553, para 55.

<sup>323</sup> Case C-15/04 *Koppensteiner*, fn. 321, para. 36-39.

<sup>324</sup> Case C-214/06 *Lämmerzahl GmbH v Freie Hansestadt Bremen* [2007] n.y.r., para. 63.

<sup>325</sup> Pachnou, D. (2003) *The effectiveness of bidder remedies*, fn. 60, p. 91.

<sup>326</sup> Case C-81/98 *Alcatel*, fn. 38, para. 50.

<sup>327</sup> Pachnou, D. (2003) *The effectiveness of bidder remedies*, fn. 60, p. 91.

<sup>328</sup> Case C-26/03 *Stadt Halle*, fn. 46, para. 33.

<sup>329</sup> Opinion of Advocate General Mischo delivered on 10 June 1999 in the Case C-81/98 *Alcatel*, fn. 38, para. 84-92.

the requirements of the Remedies Directive.<sup>330</sup> This possibility, however, should by no means be interpreted as precluding direct effect of Article 2(1) when aggrieved tenderer wishes to challenge an award decision after the conclusion of the contract.

It is clear from the above that Articles 1(1) and 2(1) have direct effect in different contexts, from which individuals derive a right of a rapid and effective review, including the right to have an award decision set aside. As we have learned from the first part of the *Alcatel* judgment, Member States are under obligation to provide possibility to exercise the above right. One way of ensuring this obligation is through implementation of a standstill period. However, where the standstill period has not been respected or where a contract has been concluded following an illegal direct award, the directly effective right does not cease to exist. On the contrary, the individual continues to enjoy the right to effectively challenge the award decision even after the contract has been concluded. In order for this right to become fully operational and effective, the national court needs to compensate for the failure of the national legislator and the contracting authorities. Guidance for this can be found in the *Commission v Germany* judgments, which demand the termination of illegal contracts in order to protect individuals' right and ensure respect of Community law. There are good reasons why this judgment is to be applied, not only in case of illegal direct award, but also when a standstill period is not respected. In my view, the national court's decision to allow the individual to challenge the award decision and have it set aside, must have certain effects on the concluded contract. Unless a contract is terminated as a consequence of setting aside the award decision, there will be little incentive for the contracting authority to re-open the public procurement procedure. Thus, it is only by terminating the contract and forcing the contracting authority to start anew, that the individual's rights to a transparent, open and non-discriminatory award process can be ensured.

At the end of the day, one is compelled to conclude that the directly effective Articles 1(1) and 2(1) confer on the individual not only a right to challenge the award decision even after the contract has been concluded, but also a right to have illegally concluded contracts terminated.

### **5.3.2 Using the amended Remedies Directive 2007/66/EC as a guidance**

The second manner in which the national court can fill the gaps created by the setting aside of national legislation is to apply the solutions proposed in the amended Remedies Directive. This proposition might sound controversial and doubts may be raised whether such a solution does not

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<sup>330</sup> *Ibid.*, para. 96-99.

render the provisions of a directive, which is yet to be implemented, directly effective.<sup>331</sup> Arguably, this is not the case here for the following reasons.

Firstly, it must be emphasised that the two main innovations of the amended Remedies Directive providing disappointed bidders with an effective remedy against illegally awarded contracts are not at all new. It is clear from the prior analysis of the case law that the obligation to introduce a standstill period has existed since 1999, when the *Alcatel* case was decided.<sup>332</sup> The fact that following the *Alcatel* judgment many Member States have introduced a standstill period in their public procurement legislation,<sup>333</sup> makes it clear that they perceived it as a binding Community obligation. Disrespect of such an obligation can naturally result in a Commission action under Article 226 EC, a scenario seen in the *Commission v Austria* case<sup>334</sup> and the recent *Commission v Spain* judgment.<sup>335</sup> Furthermore, the Court's ruling in the *Commission v Germany* judgments demonstrates that the termination of a contract concluded on the basis of illegal direct award is the only way for the Member States to comply with their obligations under Community public procurement law. Thus, it is obvious that the mandatory standstill period and ineffectiveness of illegal contracts are well-established Community obligations, which are merely codified in the amended Remedies Directive and that there is nothing preventing these obligations from being applicable already today.

Secondly, national court can use the amended Remedies Directive as guidance on how the Remedies Directive 89/665/EEC is to be used in order to ensure full effectiveness of Community public procurement law and effective judicial protection of individual's rights. There is nothing preventing the national court from using directives, yet to be implemented, as interpretative tools. In fact, this seems to be in line with established case law following the *Inter-Environnement Wallonie* case,<sup>336</sup> where the Court held that during the period prescribed for transposition of a directive Member States must refrain from taking any measures liable to seriously compromise the result prescribed by the new directive. This is a clear example of using a directive for which the implementation period has not yet expired as guidance when applying existing rules. What is more, such an interpretative technique is not uncommon to Community law and has been used even by the Court itself on several occasions.<sup>337</sup>

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<sup>331</sup> As clear from Case 148/78 *Ratti*, fn.278, such a solution would be not we compatible with the existing direct effect doctrine, which requires a failure on the Member State to implement the directive in the prescribed time.

<sup>332</sup> See Section 3.1.

<sup>333</sup> European Commission, *Impact Assessment Report*, fn. 24, p. 10.

<sup>334</sup> Case C-212/02 *Commission v Austria*, fn. 55, where it was declared that Austria had failed to fulfil its obligations for not implementing the *Alcatel* judgment.

<sup>335</sup> Case C-444/06 *Commission of the European Communities v Kingdom of Spain* [2008] n.y.r., where Spain was held liable for failing to provide for a mandatory standstill period between the award of the contract and its conclusion.

<sup>336</sup> Case C-129/96 *Inter-Environnement Wallonie*, fn. 284.

<sup>337</sup> C-101/94 *Commission of the European Communities v Italian Republic* [1996] ECR I-02691, C-222/95 *Société civile immobilière Parodi v Banque H. Albert de Bary et Cie* [1997] ECR I-03899, C-222/97 *Manfred Trummer and Peter Mayer* [1999] ECR I-01661,

In closing, it is proposed that the national court seized of a dispute concerning illegal direct award or race to signature avails itself of the ready-to-use solutions of the amended Remedies Directive. By using this new legislative piece as a guideline, the national courts can be assured that full force and effect of public procurement directives and effective judicial protection of individual's rights are respected, while ensuring that their judicial practice is in tune with the future of public procurement remedies.

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## **OPINIONS OF ADVOCATES GENERAL**

Opinion of Advocate General Mischo delivered on 10 June 1999 in the Case C-81/98 *Alcatel Austria AG and Others, Siemens AG Österreich and Sag-Schrack Anlagentechnik AG v Bundesministerium für Wissenschaft und Verkehr* [1999] ECR I-07671

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