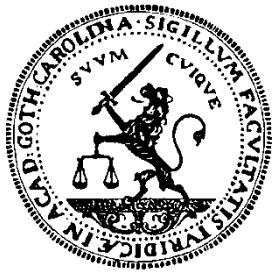

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Remedies Directive in Need of Remediation?

- An Analysis of the Public Procurement Remedies Directive

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Contents

Summary

This thesis pertains to analyse the public procurement Remedies Directive in the light of other EU law. The areas and legal instruments that will be presented and compared with the Remedies Directive are the Public Procurement Directive, fundamental rights and domestic public law. After the introduction section, relevant parts of the Public Procurement Directive, the Charter of Fundamental Rights, and different aspects of domestic public law will, in that order, be scrutinized and put into relation with the Remedies Directive. Subsequently, the findings in the previous sections will be analysed in a general analysis section where shortcomings of the Remedies Directive are identified and conclusions are made. Lastly, the conclusions will be discussed in a final discussion where personal opinions and observation are shared and presented.

The findings of this thesis demonstrate that the Remedies Directive is in need of legislative reform. This conclusion mainly originates from recent case law, the entry into force of the CFR as primary EU law and the fact that certain parts of the Remedies Directive have not been reviewed since its introduction in 1989. The most severe shortcomings in this regard is the potential application discrepancy between the Remedies Directive and the Public Procurement Directive emanating out of the judgement in the *Falk Pharma* case. However, the Remedies Directive is mainly well aligned with the fundamental rights enshrined in the CFR, whereas it needs some changes in order to clarify its interplay with domestic public law and ensure consistent judicial protection for all procurement decisions.

Sammanfattning

Syftet med denna uppsats är att utvärdera Rättsmedelsdirektivet inom offentlig upphandling i ljuset av annan EU-rätt. De rättsområden och rättskällor som har analyserats i förhållande till Rättsmedelsdirektivet är Upphandlingsdirektivet, grundläggande rättigheter samt nationell offentlig rätt. Efter introduktionen kommer relevanta delar av Upphandlingsdirektivet, Europeiska Unionens Rättighetsstadga och olika aspekter avseende nationell offentlig rätt att belysas och jämföras med Rättsmedelsdirektivet. Vidare har det som framkommit i föregående delar av uppsatsen analyserats i ett övergripande analyssegment där Rättsmedelsdirektivets tillkortakommanden identifieras. Uppsatsens frågeställningar har också besvarats i detta segment. Slutligen har slutsatserna diskuterats och personliga åsikter och observationer presenterats.

De resonemang som förts och de slutsatser som dragits i denna uppsats visar att Rättsmedelsdirektivet är i behov av legislativ revidering. Detta konstaterande härrör i första hand från ny praxis från EU-domstolen, att Rättighetsstadgan har blivit primärrätt och faktumet att vissa delar av Rättsmedelsdirektivet inte har ändrats sedan dess tillkomst 1989. Det mest alarmerande tillkortakommandet som har identifierats är den potentiella diskrepansen vad avser tillämpningsområde mellan Rättsmedelsdirektivet och Upphandlingsdirektivet som är ett resultat av domskälen i *Falk Pharma*-fallet. Hursomhelst är Rättsmedelsdirektivet i stora drag väl förenligt med de rättigheter som garanteras i Rättighetsstadgan. Däremot kommer det att behövas några förändringar för att klargöra dess samspel med nationell offentlig rätt och säkerställa att alla upphandlingsbeslut omfattas av samma rättsliga skydd.

Preface

During my five years of legal studies, I have read endless pages, written multiple essays, acquired useful knowledge and gained fascinating insights. However, all things must come to an end and this thesis gets to represent the pinnacle of my academic career. Hopefully it can live up to all the expectations that this entails, even though public procurement might not be the most arousing subject matter.

I would like to thank my family who have always given me unconditional support and encouraged my pursuit of higher education. Also, I would like to address a special thanks to my supervisor, Jörgen Hettne, for providing valuable input whenever I was in need of consultation. Lastly, I would like to thank all my friends at the faculty of law who have made my time as a student at Lund University very memorable.

Magnus Ståhl
Lund, August 2017

Abbreviations

CFR	Charter of Fundamental Rights of the European Union
ECJ/ The Court	The European Court of Justice
EU	European Union
OJ	Official Journal of the European Union
Public Procurement Directive	Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC
Remedies Directive	Council Directive 89/665/EEC of 21 December 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
TEU	The Treaty on the European Union
TFEU	The Treaty on the Functioning of the European Union

1. Introduction

1.1 Legal Context and Background

The aim of EU public procurement law is to create a common market where public contracts are awarded by using an anti-discriminatory and transparent procedure. Approximately, the total annual value of public procurement contracts concerning works, supplies and services amounts to two trillion euros.[1] The EU public procurement regulatory framework consists of directives that pertain to ensure that public funds are used as efficiently as possible. Studies have shown that compliance with the EU procurement rules results in an overall cost decrease of six billion euros a year.[2]

In order to safeguard the different interests that a public procurement procedure implicates, a directive consisting of procedural provisions and remedies was issued in 1989.[3] Initially, the Remedies Directive was lacking in many regards and it has subsequently been amended several times since it appeared in its original form.[4] The most substantial amendments were made in 2007.[5] In general, the intention behind the changes was to implement two new remedies and to prevent illegal procurement practices.[6] In 2014, a new

[1] Bovis, Christopher H, *EU Public Procurement Law,* Second Edition, Edward Elgar Publishing Limited, Cheltenham, 2012, p. 2.
[2] Commission Staff Working Paper, Evaluation Report*, Impact and Effectiveness of EU Public Procurement Legislation,* Part 1, Brussels, 2011, p. 147
[3] Council Directive 89/665/EEC of 21 December 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 [1989] OJ L 395/33.
[4] Matei, Emanuela, 'The Remedies Directive in public procurement' in *Research Handbook on EU Public Procurement Law,* Bovis, Christopher (ed), Edward Elgar Publishing Limited, Cheltenham, 2016, p. 352.
[5] Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 Amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] OJ L 335/31.
[6] European Commission Final Study Executive Summary, *Economic efficiency and legal effectiveness of review and remedies procedures for public contracts,* MARKT/2013/072/C*,* written by Europe Economics and Milieu, 2015, p.9ff.

public procurement directive entailed further necessary amendments to the Remedies Directive in order to achieve coherence between the directives.[7]

As has already been implied, the Remedies Directive pertains to provide concrete remedies and a procedural framework for administrating public procurement decisions that have been appealed due to an alleged infringement of the substantive public procurement rules by a contracting authority. The provisions in the Remedies Directive only establish a minimum standard for legal review and need to be transposed into national law by the EU Member States.[8] This inevitably results in procedural differences between the domestic laws at the Member State level that potentially could cause issues from an internal market perspective. Another possible consequence of the quite wide margin of discretion granted by the Remedies Directive is conflicts of precedence contra procedural autonomy that emanate from incoherence between different levels of public legislation. This typically happens when a national administrative provision allegedly infringes, or at least affect primary or secondary EU law.

A lot has happened in the legal field of public procurement since the Remedies Directive was introduced back in 1989. New kinds of procurement contracts have been incorporated and the ECJ has delivered many judgements and, thus, affected the public procurement regime through adjudication. In addition, the Charter of Fundamental Rights of the European Union (CFR) has become primary EU law by the entry into force of the Lisbon Treaty in 2009 and, consequently, now has the same legal status as the TEU and TFEU.[9] This means that the CFR will affect all areas where Member States are implementing EU law, including the transposition of the directives. CFR provisions that directly provide administrative or

[7] See Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L 94/1, Article 46.
[8] Treumer, Steen, 'Enforcement of the EU Public Procurement Rules: The State of Law and Current Issues' in *Enforcement of the EU Public Procurement Rules*, Volume 3, Treumer, Steen; Lichère, François (eds), DJØF Publishing, Copenhagen, 2011, p. 28.
[9] Craig, Paul; de Búrca, Gráinne, *EU Law – Text, Cases and Materials,* Sixth Edition, Oxford University Press, Oxford, 2015, p. 394.

judicial rights will undeniably be of relevance as far as the Remedies Directive is concerned. With all this in mind, it is reasonable to assume that some conceivable deficiencies of the Remedies Directive might have been overlooked.

In January of 2017, the Commission published a report[10] on different aspects of the Remedies Directive. The assessment concerned *inter alia* effectiveness and consistency with other EU policies. The Commission concluded that the Remedies Directive is general completely aligned with primary EU law and general principles concerning fundamental rights. Further, the Commission also contended that the Remedies Directive is generally coherent with the recent public procurement reforms.[11] It was, however, deduced that some aspects were in need of clarification, especially the interplay with certain contract mechanisms introduced by the 2014 Public Procurement Directive[12] such as decisions of automatic contract suspension.[13] Lastly, the Commission remarks that the few problems that could be identified are rooted in national legislation or practices beyond the direct reach of the Remedies Directive.[14] The findings of the report can hardly be interpreted in any other way than that the Commission does not intend to prioritize a regulatory review of the Remedies Directive in the near future.

1.2 Purpose and Research Questions

This thesis pertains to analyse the Remedies Directive through an EU law perspective, particularly in the light of relatively recent ECJ case law, publications from the Commission and the 2014 substantive public

[10] Commission Staff Working Document, *Evaluation of the Modifications Introduced by Directive 2007/66/EC to Directives 89/665/EEC and 92/13/EEC Concerning the European Framework for Remedies in the Area of Public Procurement/REFIT Evaluation,* COM(2017) 28 final, Brussels, 24.1.2017.
[11] Ibid., p. 55.
[12] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65.
[13] Commission Staff Working Document, COM(2017) 28 final, op.cit., p. 45f.
[14] Ibid., p. 59.

procurement reform. Thus, the research will solely be focused on how well the Remedies Directive correlates and interacts with other legal sources, both with EU law and domestic Member State legislation. The objective is also to discuss concrete solutions in instances where a potential irregularity or problem is identified. For the sake of clarity, the research questions of this thesis can be summarized as follows:

- Does the Remedies Directive have any regulatory shortcomings in the light of the legal interplay with other EU and/or national law and if so; how can they be rectified?

It should also be emphasized that the aim of this thesis is not to discredit or disprove the conclusions made by the Commission in its report[15], but rather to conduct an independent and objective analysis. However, the findings of the Commission and the conclusions made in this thesis will be compared in the discussion segment.

1.3 Delimitations and Methodology

First of all, this thesis is not intended to be exhaustive in the sense that it pertains to highlight all legal aspects where the Remedies Directive might be lacking. Overall, the assessment and analysis will focus on the legal relationship between the Remedies Directive and three other legal instruments and areas. Those are the 2014 Public Procurement Directive, the CFR and domestic judicial and administrative legislation that apply to the public procurement process at the national level.

Secondly, the Remedies Directive that will be analysed is the one that applies to the public sector. The counterpart for the utilities sector[16] and its

[15] Commission Staff Working Document, COM(2017) 28 final, op.cit.
[16] Council Directive 92/13/EEC of 25 February 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, 23.3.1992).

corresponding public procurement directive[17] do not fall within the ambit of this thesis. It should be kept in mind, though, that it is more than likely that some arguments, reasoning and conclusions may be somewhat applicable to the utilities sector as well, considering the similarities between the different public procurement and remedies directives.

The scientific approach and research analysis are characterized by a normative legal methodology. Selected doctrine, case law as well as both primary and secondary EU law have been presented and accounted for whenever deemed to be pertinent.

1.4 Disposition

In the first section of this thesis, the legal context and background will be provided and outlined. Further, the purpose of the thesis is established and research questions are formulated. Delimitations are identified and the methodology is described. Lastly, the thesis will be put in a broader scientific context by accounting for some previous research that has been done on the subject.

In the second section of the thesis, the Remedies Directive will be introduced. The regulatory structure, the scope of application and the different remedies will be accounted for. The third section will go over the Public Procurement Directive, highlighting relevant provisions and case law. Section four explains the relationship between the Remedies Directive and the CFR. In the fifth section, the different levels of administrative public procurement law will be scrutinized and put into relation with the Remedies Directive. The sixth section will comprise of an extensive analysis. Conclusions will be made and the research questions will be

[17] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors (OJ L 94, 28.3.2014).

answered. In the seventh and last section, personal observations and opinions will be presented and discussed.

1.5 Previous Research

There are quite a few publications and articles that partially overlap the subject matter of this thesis.[18] To my knowledge though, there is not any research that specifically and extensively focuses on the Remedies Directive in the light of those three general areas that this thesis is limited to. I would also argue that recent case law from the ECJ has changed certain conditions concerning the legal assessment of the Remedies Directive and its interplay with other legislation. In addition, the Commission report[19] from earlier this year adds another dimension as far as evaluation and comparison go.

[18] Cf. Simovart, Mari Ann, *Old remedies for new violations? The deficit of remedies for enforcing public contract modification rules*, Upphandlingsrättslig Tidskrift, 2015 nr 1, p. 33 and Semple, Abby; Andrecka, Marta, *Classification, Conflicts of Interest and Change of Contractor: A Critical Look at the Public Sector Procurement Directive*, European Procurement & Public Private Partnership Law Review, 2012, Vol. 10, No. 3, p. 171.
[19] Commission Staff Working Document, COM(2017) 28 final, op.cit.

2. The Remedies Directive

2.1 Scope of Application

According to the first paragraph in its first article, the Remedies Directive applies to *contracts "referred to in Directive 2014/24/EU of the European Parliament and of the Council"*[20]. Contract, as a legal concept is not expressly defined in the Remedies Directive. Instead, the scope of application is depending on how "contracts" are defined in the Public Procurement Directive. However according to the third paragraph of Article 1(1), contracts within the meaning of the directive include *inter alia* framework agreements and dynamic purchasing systems. Thus, the provisions in the Remedies Directive aim to guarantee a minimum level of protection for tenderers participating in the award of contracts falling within the scope of the Public Procurement Directive. The fourth paragraph of Article 1(1) prescribes that:

"*Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2014/24/EU or Directive 2014/23/EU, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive,* ***on the grounds that such decisions have infringed*** *Union law in the field of public procurement or national rules transposing that law."* (Emphasis added)

Since the Remedies Directive only stipulates minimum levels of protection regarding effective review, the Member States have quite a significant margin of discretion while implementing its provisions. Except for the mandatory requirements specified in Article 2 to 2f, the Member States are free to set up their own administrative and judicial rules for the public

[20] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65, in this thesis referred to as "the Public Procurement Directive".

procurement procedure in the national legislation. Member States have different administrative and judicial systems and might, as a result thereof, face different legal challenges while implementing EU law. In order to ensure an effective implementation and give national legislators the possibility to adapt the transposition in accordance with the domestic legal system, certain discretion is granted. This discretion is sometimes referred to as procedural autonomy.[21]

2.2 Procedural Provisions

As regards the availability of remedies, Article 1(3) of the Remedies Directive establishes that any person that have or had an interest in obtaining a public contract and risks being harmed, or already has been harmed, by an alleged infringement shall have access to detailed review procedures. According to Article 2(1), Member States must ensure that possibilities exist to take interim measures, set aside unlawful decisions and to award damages to persons harmed by an infringement.

A contracting authority must wait at least 10 calendar days from the award decision until it conclude the contract. This standstill period is regulated in Article 2a(2). Its purpose is to ensure that potential aggrieved tenderers will have enough time to challenge public procurement decisions. In *Commission v Spain*[22], the ECJ ruled that the option of bringing proceeding for the annulment of an already concluded contract does not compensate for not allowing tenderers to challenge the award decision before the conclusion of the contract.[23] In another case[24], also concerning standstill, the ECJ decided that national provisions allowing the contacting authority to conclude the contract even though formal aggrieved tenders had formally

[21] Kristjánsdóttir, Margrét Vala, `Good Administration as a Fundamental Right´ in *Icelandic Review of Politics & Administration,* Vol. 9 No. 1, Institute of Public Administration and Politics 2013, p. 245.
[22] Case C-444/06, Commission of the European Communities v Kingdom of Spain, EU:C:2008:190.
[23] Ibid., para. 45.
[24] Case C-327/08, Commission of the European Communities v Republic of the France, EU:C:2009:371.

submitted claims of appeal were in breach of Article 2a(2) of the Remedies Directive.[25] The Court also went on to deduce that it, under certain circumstances is acceptable to reduce the 10 days delay in case of urgency, given that the tenderers still have reasonable time to take legal action.[26]

Article 2a(2) also prescribes that the communication of the award decision shall be accompanied with a summary of relevant reasons. Irish legislation that only granted the concerned tenderers basic information, such as the name of the successful tenderer, in the first communication following the award decision was deemed to be incompatible with the Remedies Directive.[27] The ECJ argued that such legislation deprived the tenderers of the right to effective interim measures.[28] In its somewhat earlier case law, the ECJ decided that a tenderer has the right to challenge public procurement decisions even though the tenderer, mistakenly, had been unlawfully invited to the second stage of the procedure.[29] The contracting authority contended that, since the tenderer should already have been excluded had no mistake been made, no harm could be done to the tenderer by the exclusion decision in the second stage.[30] However, the ECJ established that the refusal to allow the tenderer to challenge the decision was contrary to the Remedies Directive. The Court explained that the right to challenge decisions is extensive and that:

"Article 1(3) … does not permit a tenderer to be refused access to the review procedures laid down by the directive to contest the lawfulness of the decision of the contracting authority not to consider his bid … on the ground that his bid should have been eliminated at the outset … for other reasons and that therefore he neither has been nor risks being harmed by the unlawfulness which he alleges. In the review procedure thus open to the

[25] Ibid., para. 60.
[26] Ibid para. 44
[27] Case C-455/08, Commission of the European Communities v Republic of Ireland, EU:C:2009:809.
[28] Ibid., paras. 31-34.
[29] Case C-249/01, Werner Hackermüller v Bundesimmobiliengesellschaft mbH and Wiener Entwicklungsgesellschaft mbH für den Donauraum AG, EU:C:2003:359.
[30] Ibid., para. 14.

tenderer, he must be allowed to challenge the ground of exclusion ... he alleges to be unlawful."[31]

Lastly, as concerns the possibility for Member States to regulate time limits for submitting applications challenging a public procurement decision in the domestic legislation, the ECJ concluded that the Remedies Directive does not preclude such possibilities. The national time limits can, however, not be such as to render it virtually impossible or excessively difficult for tenderers to challenge decisions taken by the contracting authority.[32] It was subsequently decided in the *Uniplex*[33] case that it is incumbent on the Member States to construe time limits that are sufficiently precise and foreseeable in order to fulfil the requirement of rapidity inferred upon them by Article 1(1) of the Remedies Directive.[34]

2.3 Remedies

The different remedies described in the Remedies Directive can broadly be divided into two groups: procedure specific remedies and damages.[35] The damage compensation is a generic remedy that is available for all aggrieved tenderers that have allegedly been harmed by an unlawful public procurement decision. The obligation for Member States to ensure that the reviewing body of first instance has the power to award damages is regulated in Article 2(1)(c).

Procedure specific remedies are not generic in nature. Instead, they always relate to the contract at hand. Interim measures, regulated in Article 2(1)(a), do not necessarily need to have a suspensive effect on the contract to which they relate according to Article 2(4). Such an interim measure can, for

[31] Ibid., para. 29.
[32] Case 241/06, Lämmerzahl GmbH v Freie Hansestadt Bremen, EU:C:2007:597, paras. 50-52.
[33] Case C-406/08, Uniplex (UK) Ltd v NHS Business Services Authority, EU:C:2010:45.
[34] Ibid., para. 39.
[35] Treumer op. cit., p. 28f.

example be the setting aside of an unlawful decision and retracting the entire public procurement procedure to the relevant phase preceding the infringing decision. Ineffectiveness is a relatively new remedy that was introduced by the amending directive of 2007.[36] Member States must ensure that a contract is rendered ineffective by a review body in case of the occurrence of any of the circumstances listed in Article 2d(1). The consequences of a contract being declared ineffective shall be described in national law according to Article 2d(2). Member States may provide for national review bodies to impose alternative remedies instead of ineffectiveness, after having assessed all relevant aspects. These alternative remedies are either the imposition of a fine on the contracting authority or shortening the duration of the contract in accordance with Article 2(e). It should be noted that there is no given hierarchy between the different remedies and that the national legislators are granted a wide margin of discretion to regulate the criteria alluding to the interim measures.[37]

In a case[38] emanating out of the Netherlands, the ECJ had to assess the Dutch review procedure following a claim for interim measures and damages from an unsuccessful tenderer. At the time, the Netherlands had not implemented the parts of the Remedies Directive into national law, taking the view that the law in place already met the requirements of the directive. In the judicial system of the Netherlands, damage claims as a result of public contracts were treated as a matter of private law. Thus, the civil courts had jurisdiction over the claims while an administrative court had jurisdiction over the substantive public procurement decision.[39] The Court decided that the Remedies Directive does not preclude such a system, even though the two different courts could theoretically make different interpretations of EU law and cause internal divergence.[40] The general

[36] Directive 2007/66/EC op. cit.
[37] Treumer op. cit., p. 30.
[38] Case C-568/08, Combinatie Spijker Infrabouw-De Jonge Konstruktie, Van Spijker Infrabouw BV, De Jonge Konstruktie BV v Provincie Drenthe, EU:C:2010:751.
[39] Ibid., paras. 10-11.
[40] Ibid., paras. 74-80.

requirements for state liability in relation to individuals were reiterated in regards to EU public procurement law.[41]

In yet another case[42], the question arose whether damage compensation in the Remedies Directive could be made dependant on a requirement of culpability on the part of the contracting authority. The ECJ concluded that national rules imposing such a requirement is incompatible with the Remedies Directive because the provisions therein is based on a presumption of fault due an infringement. Thus, the contracting authority cannot escape liability by blaming the infringement on the actions of individuals.[43]

[41] Ibid., para 92.
[42] Case C-314/09, Stadt Graz v Strabag AG, Teerag-Asdag AG, Bauunternehmung Granit GesmbH, EU:C:2010:56.
[43] Ibid., para. 45.

3. The Public Procurement Directive

3.1 Scope of Application

The Public Procurement directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts. In order to fall within the ambit of the directive, the total value of the contract must exceed the thresholds described in Article 4. The very concept of procurement within the meaning of the Public Procurement Directive is defined in Article 1(2). It states:

"Procurement within the meaning of this Directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose."

According to Article 2(1)(5), public contracts are defined as "*contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services*".

These concepts and definitions were subjected to the scrutiny of the ECJ in the somewhat recent and controversial *Falk Pharma*[44] case. The dispute leading up to the case consisted of different opinions regarding the concept of a public contract. The procurement procedure at hand was as such that the contracting authority intended to conclude contracts with all tenders that were able to fulfil the requirements in the descriptive procurement documents. This procedure, in the view of the contracting authority, did not

[44] Case C-410/14, Dr. Falk Pharma GmbH v DAK-Gesundheit, EU:C:2016:399.

pertain to conclude public contracts within the meaning of the Public Procurement Directive and did not, as a result, implicate the application of substantive EU public procurement law. The only interested tenderer disagreed with this assessment and brought proceeding before a German administrative court, seeking a declaration that the procedure used by the contracting authority indeed was compatible with the public procurement law.[45] The German court stayed the proceedings and referred a question for preliminary question to the ECJ, essentially asking whether concept of public contract applied in a procedure where the contracting authority did not select one or more exclusive economic operators.[46]

Historically, the concept of contract has been defined extensively in order to ensure the effectiveness of public procurement rules.[47] However, in *Falk Pharma,* the Court went on to establish that it is "*apparent that the choice of a tender and, thus, of a successful tenderer, is intrinsically linked to the regulation of public contracts by that directive and, consequently, to the concept of 'public contract' within the meaning of Article 1(2) of that directive"*.[48] It should be noted that the Court made its judgement on the basis of the older public procurement directive[49] that has subsequently been repealed. The definition of public contract did, however, remain unchanged by the introduction of the 2014 Public Procurement Directive.[50] In addition, the ECJ used the Public Procurement Directive analogously while defining the concept of procurement even though it could not be applied to the circumstances of the case *ratione temporis.*[51]

The most controversial extrapolation of ECJ, following its reasoning in the *Falk Pharma case,* concerned the implications of defining public contracts

[45] Ibid., paras. 16-19.
[46] Ibid., para. 31.
[47] Case C-15/04, Koppensteiner GmbH v Bundesimmobiliengesellschaft mbH, EU:C:2005:345, para. 29.
[48] Case C-410/14, Falk Pharma op. cit., para. 38.
[49] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004 L 134, p. 114.
[50] Cf. Article 1(2)(a) of Directive 2004/18/EC and Article 2(1)(5) of Directive 2014/24.
[51] Case C-410/14, Falk Pharma op. cit., paras. 25, 40.

by the existence of an exclusive choice. Since this conclusion undoubtedly will have effects on the scope of application of the Public Procurement Directive and constitute an important basis for discussion later on in this thesis, it will be quoted in its entirety.

"Consequently, where a public entity seeks to conclude supply contracts with all the economic operators wishing to supply the goods concerned in accordance with the conditions specified by that entity, the fact that the contracting authority does not designate an economic operator to whom ***contractual exclusivity*** *is to be awarded means that there is no need to control, through the detailed rules of Directive 2004/18, the action of that contracting authority so as to prevent it from awarding a contract in favour of national operators."*[52]

These lines of reasoning can only be interpreted as narrowing the extensive definition of contracts that had previously been applied in the case law. Furthermore, it introduces a problematic requirement entailing the making of exclusive choices that could possible disrupt the relationship between the Public Procurement Directive.

3.2 Central Substantive Provisions

Beyond the scope of application, there are some additional rules in the Public Procurement Directive that are of interest for the sake of analysing the interplay with the Remedies Directive. Those provisions will be briefly presented in this section.

Contract notices are a central part of a public procurement procedure. According to Article 49, contract notices shall be used as a means to call for competition in respect of all procedures. The content of the descriptive document in the notice is regulated in Annex V part C, including *inter alia*

[52] Ibid., para. 37 emphasis added.

nature of service or provision of goods, conditions for participating and timeframe for delivery. Article 18(1) stipulates general principle of public procurement that contracting authorities need to take in consideration in their dealings with economic operators. These principles consist of anti-discrimination, transparency and proportionality.

Framework agreement and dynamic purchasing systems are regulated in Article 33 and 34 respectively. The two procurement mechanisms are similar in the sense that they both typically include more than one tenderer that meet the minimum requirements in the descriptive documents. The tenderer or tenderers that are awarded the contract are not selected until a later stage of the procedure. The main difference between them is that dynamic purchasing systems are open for any tenderer that qualifies during the validity of the system whereas framework agreements are exclusive to one or more successful tenderers that are subsequently awarded contracts during a given time period.[53]

Rules concerning the exclusion of tenderers can be found in Article 57 of the Public Procurement Directive. There are both mandatory and optional grounds for exclusion. The mandatory grounds, such as economic criminality and the use of child labour, are described in Article 57(1) whereas the optional ones, such as bankruptcy and risk of distorting competition, are listed in Article 57(4). In the *Michaniki*[54] case, the question arose whether the exclusion grounds in the substantive EU public procurement law were exhaustive. The ECJ ruled that the list in the applicable public procurement directive exhaustively described the objective considerations of professional quality that are capable of justifying the exclusion of a contractor from participation in a public works contract. Member States can, however additional exclusive grounds whose aim is to

[53] Cf. Article 33(1) and 34(1) of Directive 2014/24.
[54] Case C-213/07, Michaniki AE v Ethniko Simvoulio Radiotileorasis, EU:C:2008:731.

safeguard the probity of the procedure as long as such measures are deemed to be proportionate.[55]

A new possibility that was incorporated in the Public Procurement was the modification of concluded contracts without the need for a new procedure.[56] The conditions for using this possibility can be found in Article 72. A contracting authority also has the option to terminate public contracts, depending on the national law, in accordance with what is prescribed in Article 73.

[55] Ibid., para. 49.
[56] Simovart op. cit., p. 33.

4. Fundamental rights

4.1 Scope of Application

Article 51 determines the general scope of application of the fundamental rights in the CFR. According to Article 51(1), the charter provisions are addressed to the institutions and bodies of the Union and to Member States, only when they are implementing Union law. In *Siragusa*[57], it was established that in order to assess whether the concept of "implementing Union law" is fulfilled with regards to national law, the court must examine the nature of the legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law.[58] In another case, the ECJ stipulated that the charter provisions could not, by themselves, trigger their own application.[59]

The ECJ confirmed some of its previous case law in the *Åkerberg Fransson*[60] case in which it declared that the applicability of fundamental rights guaranteed by the EU legal order is warranted in all situations governed by Union law, but not outside such situations.[61] Subsequently, the Court went on to deduce the impossibility of situations covered by EU law that does not invoke the applicability of EU fundamental rights.[62] In the more recent *Hernández*[63] case, a very important and clarifying conclusion was made regarding the relationship between the CFR and legal areas where the EU has passed legislation. The ECJ declared that:

[57] Case C-206/13, Cruciano Siragusa v Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo, EU:C:2014:126.
[58] Ibid., para. 25.
[59] Case C-265/13, Emiliano Torralbo Marcos v Korota SA and Fondo de Garantía Salarial, EU:C:2014:187, para. 30.
[60] Case C-617/10, Åklagaren v Hans Åkerberg Fransson, EU:C:2013:105.
[61] Ibid., para. 19.
[62] Ibid., para. 21.
[63] Case C-198/13, Víctor Manuel Julian Hernández and others v Reino de España and others, EU:C:2014:2055.

"*The mere fact that a national measure comes within an area in which the European Union has powers cannot bring it within the scope of EU law, and, therefore, cannot render the Charter applicable."*[64]

A purely internal situation was considered to exist in the *Romeo*[65] case. The Italian authorities submitted a question for preliminary ruling concerning the possibility to deviate from fundamental principles, especially the right to good administration enshrined in Article 41 CFR, while interpreting national law.[66] The ECJ answered this question by pointing out that the Italian legislator hardly had intended to subject purely internal situations to Article 41 CFR. Instead the intent was to invoke the applicability of the more specific Italian administrative rules governing the situation at hand.[67] Therefore, the ECJ explained the referred questions inadmissible due to lack of relevance.[68]

However, in two other cases that are similar in the sense that they both concerned situations to which no primary or secondary EU law was directly applicable, *Venturini*[69] and *Enterprise Focused Solutions*[70], the reasoning of the court was somewhat different. It was held that, even though a public procurement contract falls outside the scope of the substantive EU public procurement rules due to not reaching the relevant threshold, general principles such as anti-discrimination and transparency apply.[71] Similarly, those principles apply when there is a potential cross-border interest that EU primary law aims to protect.[72]

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[64] Ibid., para. 36.
[65] Case C-313/12, Giuseppa Romeo v Regione Siciliana, EU:C:2013:718.
[66] Ibid., para. 18.
[67] Ibid., para. 35
[68] Ibid., paras. 41-42.
[69] Joined Cases C-159/12 to C-161/12, Alessandra Venturini and others v ASL Varese and others, EU:C:2013:791.
[70] Case C-248/14, SC Enterprise Focused Solutions SRL v Spitalul Județean de Urgență Alba Iulia, ECLI:EU:C:2015:228.
[71] Ibid., para. 16.
[72] Cases C-159/12 to C-161/12, Venturini op. cit., para. 25.

4.2 The Right to Good Administration

According to Article 41(1) CFR, every person has the right to have affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. Article 41(2) states that the right to good administration includes the right of every person to be heard, before any individual measure, which would affect him or her adversely, is taken. Every person also have the right to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy. Furthermore, the right to good administration imposes an obligation for administrative bodies to give reasons for their decisions.

The case law of the ECJ and the principles developed therein have had a significant impact on the principles surrounding EU fundament rights in general,[73] and perhaps Article 41 in particular considering that the right to good administration cannot be found in any other international legal instrument conferring rights unto private citizens.[74]

It should be noted that the application of Article 41 is limited to "*the institutions and bodies of the Union*". Seemingly, the only reasonable interpretation of this demarcation is that Article 41 cannot be directly applied to administrative and judicial procedures conducted by domestic authorities and courts. The ECJ has assessed this issue and pointed out that Article 41 is indeed not addressed to the bodies of the Member States, although the Court did not elaborate on what effect this has with regards to the scope of application of the right to good administration.[75] In another case,[76] the ECJ ruled on the right to be heard before adverse individual measures are taken. The Court established that the right to be heard, as enshrined in Article 41, is a fundamental principle of EU law of general

[73] Fortsakis, Theodore, Principles Governing Good Administration in *European Public Law*, Volume 11(2), Kluwer Law International, 2005, p. 208.
[74] Kristjánsdóttir op. cit., p. 240.
[75] Case- C-482/10, Teresa Cicala v Regione Siciliana, EU:C:2011:868, para. 28.
[76] Case C-277/11, M. M. v Minister for Justice, Equality and Law Reform and others, EU:C:2012:744.

application.[77] Yet again, the demarcation was not explained or mentioned. However, in the propositional judgement, the Advocate General relied on the right to be heard as an established principle of EU law and, thus, implicitly rejecting a direct applicability of Article 41.[78]

4.3 The Right to an Effective Remedy

The right to an effective remedy and to a fair trial is enshrined in Article 47 CFR. According to this article, "*everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy*". Thus, in order for Article 47 to apply, the rights or freedoms that have allegedly been violated must be rights or freedoms that are guaranteed by applicable EU law.[79] The concepts of "rights and freedoms" are to be broadly interpreted. For example, the ECJ has indicated that decisions that affects the applicant adversely is generally capable of falling with the scope of Article 47.[80] It should also be added that the right to an effective remedy implicates a right to be provided with sufficient information in order to be able to prepare an effective defence against sanctions decided by Member State authorities.[81]

In the *Orizzonte Salute*[82] case, the ECJ held that the provisions in the Remedies Directive must be interpreted in the light of the fundamental rights guaranteed by the CFR, particularly the right to an effective remedy before a court or tribunal, provided for in Article 47.[83] The right to an

[77] Ibid., paras. 82-84.
[78] Opinion of Advocate General Bot delivered on 26 April 2012, C-277/11, M.M. op. cit., EU:C:2012:253, paras. 32-33.
[79] Case C-370/12, Thomas Pringle v Government of Ireland, EU:C:2012:756, paras. 178–179.
[80] Case C-334/12 RX-II, Oscar Orlando Arango Jaramillo and other v European Investment Bank, EU:C:2013:134, paras. 44-45.
[81] Case C-300/11, ZZ v Secretary of State for the Home Department, EU:C:2013:363, para. 65,
[82] Case C-61/14, Orizzonte Salute v Azienda Pubblica di Servizi alla persona San Valentino and others, EU:C:2015:655.
[83] Ibid., para. 49.

effective remedy also includes the right to be heard. This is something that Article 47 has in common with Article 41(2).[84]

The ECJ determined in *Fastweb*[85] that the Remedies Directive is designed to strengthen already existing arrangements for ensuring the effective application of the EU rules on the award of public contracts.[86] Consequently, the Court could not find any conflict between the Remedies Directive and the right to an effective remedy.[87] Conversely, as regards the interplay between the right to an effective remedy and the Remedies Directive, it can be added that the Commission has noted that the Remedies Directive is fully in line with the objective of Article 47 CFR.[88]

[84] Case C-166/13, Sophie Mukarubega v Préfet de police, EU:C:2014:2336, para. 43.
[85] Case C-19/13, Ministero dell'Interno v Fastweb SpA, EU:C:2014:2194.
[86] Ibid., para. 59.
[87] Ibid., paras. 55-65.
[88] 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, Brussels, 4.5.2006, COM(2006) 195 final, p. 3.

5. Domestic Public Law

5.1 Introduction

The administrative systems vary between the Member States. Each country tends to develop its own practises and precedence in case law regarding how administrative decisions are taken and how the judicial review of these decisions is to be conducted. In addition, the principle of procedural autonomy gives the Member State a certain degree of discretion while implementing EU law.[89] This discretion enables the possibility to coordinate EU legislation with pre-existing national legislation. It should be kept in mind, though, that the Member States have a general obligation to remove any obstacles in the domestic law that can endanger the effectiveness of Union law according to Article 4(3) TEU. National courts consequently have, provided that it is possible, to interpret existing national legislation in conformity with obligations that the Union imposes on its Member States through primary or secondary EU law. This general obligation is sometimes referred to as the principle of sincere cooperation.[90]

Considering that EU public procurement law constitutes an extensive regulatory framework that significantly limits the capacities of the Member State authorities to act as public purchasers, the domestic courts have to ignore incompatible national administrative or judicial legislation.[91] In cases where domestic public law affects public procurement procedures governed by EU law without being directly incompatible, the courts shall make an interpretation that is compliant with the aims of the substantive EU rules.[92] This can sometimes be complicated since public procurement law often has to exist within a larger administrative framework characterized by national regulatory tradition and established legal practises. These difficulties can

[89] Kristjánsdóttir op. cit., p. 245.
[90] Graells, Albert Sanchez, Assessing Public Administration's Intention in EU Economic Law: Chasing Ghosts or Dressing Windows*?*, in K A Armstrong (ed), *Cambridge Yearbook of European Legal Studies,* Cambridge 2016, p. 13.
[91] Ibid., p. 3.
[92] Ibid., p. 17.

seldom be solved by applying principles of EU supremacy because the problems do not derive from a direct conflict, but rather from juxtaposition between different layers of public law. As concerns the Remedies Directive, this can result in inconsistency of judicial protection. Below, two cases where the ECJ was confronted with this kind of issue will be presented.

5.2 Case Law

In *Pizzo*,[93] the ECJ had to assess whether a general administrative Italian provision, prescribing an obligation to pay mandatory fees in order to participate in the public procurement procedure at hand in the case. Complicating thing further, the mandatory fees were not expressly mentioned in the law. Instead, the obligation to pay such fees was derived from established case law by the Italian administrative law.[94] As a result of having failed to pay the fees in time, a tenderer was excluded from the procedure. The question referred to the Court for preliminary ruling concerned the issue whether the imposition of such obligations was compatible with the substantive EU public procurement law. In this context, it is also relevant to point of that the requirement to pay the fees was not expressly described in the procurement document.[95]

The ECJ subsequently explained that the principles of transparency and equal treatment, which permeate all public procurement procedures, entail that the substantive and procedural premises concerning the participating of the procedure must be clearly defined in advance.[96] The Court also pointed out a potential anti-competitive risk by allowing requirements that arise from the interpretation of national law and the practise of domestic authorities to have an exclusive effect on tenderers without being detailed in the procurement descriptive documents. This would have a particularly disadvantageous effect on tenderers established in other Member States

[93] Case C-27/15, Pippo Pizzo v CRGT Srl, EU:C:2016:404.
[94] Ibid., para. 17.
[95] Ibid., para. 20.
[96] Ibid., para. 37.

since they probably do not have the same amount of knowledge about the relevant law as domestic tenders, the Court reasoned.[97] Thus, the ECJ concluded that the exclusion of the tenderer was contrary to the principles of EU public procurement law, ruling that *"the principle of equal treatment and the obligation of transparency must be interpreted as precluding an economic operator from being excluded from a procedure for the award of a public contract as a result of that economic operator's non-compliance with an obligation which does* ***not expressly arise from the documents*** *relating to that procedure or out of the national law in force, but from an interpretation of that law".*[98]

In the recent *Taxi Service*[99] case, the ECJ had to assess whether a decision not to exclude a tenderer was contrary to EU public procurement law. The situation was, in that regard, opposite compared to the circumstances in *Pizzo.* The dispute in the main proceedings was a consequence of a Dutch contracting authority choosing not to exclude a successful tenderer who was guilty of grave professional misconduct, even though that tenderer definitely should have been excluded according to the descriptive documents. This decision was based on a general rule in the Dutch administrative public law, stating that an assessment in accordance with the principle of proportionality must be conducted before a tenderer is, indeed, excluded from the public procurement procedure. The contracting authority found that it would be disproportionate to exclude the tenderer, a decision that was appealed by the tenderer in second place.[100] The Dutch court stayed the proceedings and asked the ECJ whether the fact that the descriptive documents clearly prescribed that a tenderer who has been guilty of grave professional conduct must be excluded, was significant in the sense that it precludes the contracting authority from conducting a proportionality assessment before potentially excluding the tenderer.[101]

[97] Ibid., para. 46.
[98] Ibid., para. 51, emphasis added.
[99] Case 171/15, Connexxion Taxi Services BV v Staat der Nederlanden and others, EU:C:2016:948.
[100] Ibid., paras. 13-23.
[101] Ibid., para. 26.

Yet again, the ECJ identified an anti-competitive aspect of allowing domestic administrative rules to take precedence over the conditions that are determined and detailed in the descriptive document. Since domestic tenderers probably are aware of the general administrative rule entailing that authorities have to conduct a proportionality test pre-exclusion, they might be tempted to submit a tender and try to partake in the procedure despite the fact that they are guilty of an exclusion ground that must lead to exclusion according to the descriptive documents. Tenderers established in other Member States will, under the same circumstances, most likely refrain from participating assuming that they will be excluded regardless of the merits of their offer.[102] The Court ultimately contended that the decision not to exclude was incompatible with the principles of EU public procurement law. The ECJ concluded that, according to the obligation of transparency, it is precluded "*to award a public contract to a tenderer which has been guilty of grave professional misconduct on the ground that the exclusion of that tenderer from the award procedure would be contrary to the principle of proportionality,* [when]*,* ***according to the tender conditions*** *of that contract, a tenderer which has been guilty of grave professional misconduct must necessarily be excluded, without consideration of the proportionality of that sanction".*[103]

[102] Ibid., 41-42.
[103] Ibid., para. 44, emphasis added.

6. Analysis and Conclusions

6.1 The Public Procurement Directive

The potential application discrepancy between the Remedies Directive and the Public Procurement Directive is mainly stemming out of the judgement in the *Falk Pharma* case and the definition of contract and public procurement in the light of Article 1(1) of the Remedies Directive and Article 1(2) of the Public Procurement Directive. Since the Remedies Directive only applies to contracts referred to in the Public Procurement Directive, it can be concluded that a contract falling outside the definition of "public contract" within the meaning of the Public Procurement Directive is excluded from review in the light of the Remedies Directive. This conclusion constitutes a fundamental premise in the following analysis.

In *Falk Pharma,* the ECJ established that it is "*apparent that the choice of a tender and, thus, of a successful tenderer, is intrinsically linked to the regulation of public contracts by that directive and, consequently, to the concept of 'public contract'*".[104] The Court subsequently went on to stipulate that a procurement scheme, such as the one at hand in the case, where the contracting authority intended to enter into agreement with all tenderers can deliver in accordance with the predetermined conditions, did not constitute a public contract within the meaning of the Public Procurement Directive. The absence of an exclusive choice by the contracting authority was crucial in the reasoning of the ECJ and, thus, for the outcome of the case.

The *Falk Pharma* case raises many questions concerning the interplay between the Remedies Directive and the Public Procurement Directive with regards to applicability. The ECJ effectively narrowed the definition of public contracts and consequently of public procurement as a legal concept. By using the same logic and reasoning as the Court did in *Falk Pharma,*

[104] See section 3.1.

public procurement decisions made by contracting authorities that do not consist of, or is intended to lead up to, an exclusive choice of a tenderer are exempt from reviewability in accordance with the Remedies Directive.

The exclusivity requirement established by the ECJ results in uncertain scope of application of the Remedies Directive with regards to some public procurement decisions. For example decisions concerning the setting up of framework agreements with more than one supplier where the contracting authority does not, at least initially, choose an exclusive tenderer. This disparity is extra unfortunate due to the fact that framework agreements are expressly mentioned in the first article of the Remedies Directive. By using the same logic as the Court did in *Falk Pharma,* the decision to set up a framework agreement would be excluded from review because of lack of an exclusive choice of a tenderer. This would, for the same reason, also apply to dynamic purchasing systems. Inevitably, this constitutes a potential legal discrepancy between the Remedies Directive and the substantive public procurement law whose effectiveness it aims to ensure.

Similarly, the *Falk Pharma* case also creates complications concerning the recently introduced possibility for contracting authorities to modify contracts during their term without starting a new public procurement procedure. The decision to award the initial contract has already been subjected to review in accordance with the provisions in the Remedies Directive. When the contracting authority subsequently modifies the contract, no new exclusive choice is made. Then, by applying the reasoning in the *Falk Pharma* case and the exclusive choice criteria stipulated therein, the decision to change the content of the procurement agreement would not constitute an establishment of a public contract. This will in turn result in the modification decision falling outside the scope of the Remedies Directive. The logic that permeates these lines of reasoning is based on the premise that the modified contract is completely separate from the original public procurement procedure.

Analogous arguments can be adduced with regards to decisions to terminate an existing contract. The conditions for discretionary termination are clearly listed in Article 73 of the Public Procurement Directive. Just as in the case of modification, the exclusive choice has already been made and the procedure leading up to it has already been subjected to review within the ambit of the Remedies Directive. A decision entailing the termination of an existing contract does not comprise a new exclusive choice. Thus, it can reasonably be argued that it falls outside the scope of the Remedies Directive using the principles developed through the *Falk Pharma* case.

The central idea appears to be that the very concept of public procurement is intrinsically and inherently linked with making exclusive choices. If no such choice is made, there is no need to subject public procurement decisions to review. This makes sense from a strict public procurement perspective, especially from the view of the tenderers, since the equity of the procedure cannot really be questioned until the contracting authority chooses a tender while rejecting others. However, it fails to take any other aspects into account.

In summary, it can be concluded that there are some uncertainties regarding the applicability of the Remedies Directive concerning some public procurement decisions. The definitions of public contract and public procurement that were introduced by the Public Procurement Directive are the root to the discrepancy. These issues will remain until the ECJ changes its precedence or legislative actions are taken.

6.2 Fundamental Rights

The entry into force of the CFR as primary EU law has created some questions of constitutional nature regarding the Remedies Directive and its interplay with fundamental rights. Overall, there are mainly two rights in the CFR that are relevant for the provisions in the Remedies Directive; namely

the right to good administration and the right to an effective remedy, enshrined in Article 41 and 47 respectively.

In summary, two different questions arise from the relationship between the Remedies Directive and the CFR. The first question concerns compatibility and the second involves possible implications of a general CFR application to public procurement review at the Member State level. One of these questions is considerably more complicated than the other.

As far as complicity goes, there are no conflicts between the Remedies Directive and the CFR. On the contrary, the provisions of the Directive are well aligned with the fundamental rights and principles in the CFR. It was deduced by the ECJ in the *Orizzonte Salute* case that the provisions in the Remedies Directive must be interpreted in the light of the fundamental rights in the Charter, especially the right to an effective remedy in case of an alleged violation of EU law. A similar ruling was made in *Fastweb,* where the Court decided that no conflict could be found between the Remedies Directive and the fundamental right to an effective remedy. In addition, the Commission declared in its proposal that preceded the 2007 amendments of the Remedies Directive that the intended changes were fully in line with Article 47 CFR and general principles such as transparency and proportionality.[105]

There are some issues concerning scope of application surrounding the wording and interpretation of Article 41 CFR. However, the ECJ has established that the right to good administration constitutes a general principle of EU law. For the sake of this thesis, it suffices to conclude that the different rights that can be derived from the concept of good administration create legal standards for the Remedies Directive whether or not Article 41 CFR is applicable to judicial review conducted by Member State authorities and courts. Moreover, in the case of EU public procurement law, there is seemingly no meaningful distinction to be made

[105] See section 4.3.

between good administration as enshrined in the CFR and good administration as a general principle of EU law developed by the ECJ through case law, even though it is unclear whether the general principle has identical implications compared to Article 41. Since Article 41 CFR can be regarded as a codification of said general principle, it will hereunder be referenced when the right to good administration is discussed, even though it seems clear that its semantic demarcation precludes a direct application to judicial and administrative review at the Member State level.

The rights that are encompassed by the CFR apply to the Member States whenever they are implementing Union law. This is apparent from the wording of Article 51(1) CFR. In *Siragusa,* the ECJ established that, when domestic rules are concerned, it has to *inter alia* be ascertained whether that legislation is intended to implement a provision of EU law or if there are specific rules of EU law on the matter capable of affecting it. As far as domestic legislation transposing EU public procurement rules are concerned, the rights in the CFR are structurally implicated because the purpose of the transposition is to create a harmonized public procurement system. Thus, all requirements derived from Article 51(1), clarified by subsequent case law, are fulfilled when Member States are implementing provisions in the Remedies Directive. It can thereby be deduced that the rights in the CFR apply to such Member State rules, regardless of whether they are judicial or administrative in nature.

A specific issue of application arises in relation to domestic rules that are internal in the sense that they are not designed to transpose EU law. It could reasonably be assumed that national public procurement legislation that falls outside the scope of the substantive EU public procurement law would not typically infer CFR applicability. Case law, like the *Romeo* case, appears to support such an assumption. The ECJ argued that since the national legislator did not appear to have intended purely internal situations to be subjected to Article 41 of the CFR, the right to good administration could not have an impact on the domestic administrative rules in that regard. This

line of reasoning makes sense considering the general limitations to CFR application enshrined in Article 51and the conclusions made in recent case law, such as the *Hernández* case.

There are a few cases that point in a different direction, such as *Venturini* and *Enterprise Focused Solutions*. A purely internal situation can arguably never exist in public procurement situations that invoke a risk for affecting cross-border interests. Such situations generally falls within the ambit of fundamental rights derived from primary EU law since adherent effect on cross-border activity is generally incompatible with the TEU and undesirable from an EU perspective. However, there is nothing in the case law that suggests an overall application of the CFR public procurement procedures that fall outside the scope of the Remedies Directive, even though some provisions in the TEU and the general principle of anti-discrimination always apply. Thus, it appears reasonable to assume that CFR application is directly dependant on the Remedies Directive being applicable. The application of the two legal instruments overlaps.

Lastly, it can be concluded that the CFR is structurally concerned in public procurement review when the Remedies Directive is applicable. Moreover, the Remedies Directive is already well aligned with the relevant provisions in the CFR. A clarification regarding the details around the application of the right to good administration in Article 41 CFR and its interplay with the Remedies Directive would be preferable though.

6.3 Domestic Public Law

Just like all other EU directives, the Remedies Directive has to be transposed into domestic legislation in the Member States. Public procurement law oftentimes has to coexist with general, domestic administrative and judicial rules. The reason behind this relationship is that the transposed public procurement legislation seldom is totally separate from other types of public law at the Member State level. Thus, it has to find

its place within a larger administrative framework and interact with other kinds of rules and practises. The main issue at hand, as concerns the Remedies Directive and the EU substantive public procurement rules whose effectiveness it aims to safeguard, is not really that of conflicting provisions but rather of ensuring the same degree of judicial protection and legal certainty regardless of which layer of public law that is applied. In order to analyse this in detail, a distinction needs to be made between domestic public procurement rules that directly implements EU law, domestic public procurement rules that exist independently of EU law and domestic administrative or judicial rules or practises that are not public procurement law *per se* but somehow affect or has the potential to affect public procurement procedures.

According to the fourth paragraph of Article 1(1) of the Remedies Directive, "*Member States shall take the measures necessary to ensure that . . . decisions taken by the contracting authorities may be reviewed effectively . . . on the grounds that such decisions have infringed Union law in the field of public procurement or national rules transposing that law.*[106] The phrasing of this provision gives rise to quite a few issues. In the case of domestic rules directly implementing EU law, there is not really that much to mention. A claim based on such rules will always be claims consisting of infringement of Union law or national rules transposing that law. In the case of rules that are not transposing EU law, it becomes more complicated.

The most logical interpretation of Article 1(1) is that claims that are being submitted for review need to be founded on non-compliance or breach of EU law, or national rules transposing such law, in order for the obligation of ensuring effective review to apply along with other rights that the Remedies Directive provides. Consequently, if a claim of a tenderer solely is based on the allegedly incorrect interpretation or application of a domestic rule, that is not aimed to transpose EU law, other procedural and judicial rules than those in Articles 2-2f of the Remedies Directive could be applied for the

[106] See section 2.1.

review of that claim. Then, theoretically this would mean that different review systems could be used at the Member State level depending on which rules the claimant decides to base the claim on and more importantly on which basis the claimant chooses to enunciate the legal arguments. The main difference between domestic public procurement rules and domestic administrative rules ought to be that it typically will be more difficult to claim infringement in the light of Article 1(1) when the latter set of rules are applied. In addition, the more general administrative rules are probably more obscure in the eyes of the tenderers and harder to overview pre-contentiously. Needless to say, this will vary from case to case.

A very peculiar legal situation will arise if domestic public law that is obviously completely compatible with EU law affects a public procurement procedure concerning a contract covered by the Public Procurement Directive and, thus, the Remedies Directive. Even though the Remedies Directive in a situation like this will apply *per se,* the wording of the fourth paragraph of Article 1(1) will preclude the application of its most important provisions, namely those stipulating how the review should be conducted. It should be added that the claimant probably could invoke full applicability of the Remedies Directive by simply claiming infringement, however unfounded such a claim might be.

In both the *Pizzo* case and the *Taxi Service* case, questions were raised concerning the relationship between the Remedies Directive, substantive EU public procurement law and domestic public law as regards the exclusion of tenderers. The reasoning of the ECJ in these two cases is strikingly similar. The Court emphasized on the fact that the content of the domestic law was not included in the tender conditions in the descriptive public procurement document. In *Pizzo,* it was established that it would be contrary to the principles of transparency and anti-discrimination to let the interpretation of national legislation notably change the initial tender conditions that are expressly detailed in the procurement contract since this would be particularly disadvantageous to tenderers established in other Member

States. Such tenderers would likely not be as familiar with national law and administrative practise as domestic tenderers. Similarly, in *Taxi Services,* the ECJ explained that a contracting authority is precluded to apply the principle of proportionality to the exclusion of a tenderer, even though this possibility exists according to the national public procurement law, if a tenderer must be excluded according to the tender conditions.

The outcomes in the two cases are practical from a legal certainty perspective in the sense that it gives the conditions in the tender conditions in the descriptive document precedence over the established interpretation of domestic administrative law. It does, however, give rise to more complex issues such as subsidiarity and national procedural autonomy. A strict application of the reasoning of the Court would implicate an obligation for the contracting authority to include all relevant national legislation as well as its associated interpretation and case law in order to ensure the application of these rules to the public procurement procedure.

Overall, it can be concluded that the relationship with domestic public law could use a clarification. Article 1(1) of the Remedies Directive creates uncertainties in some instances concerning which substantive rules that should be applied to public procurement decisions based on domestic public law. The ECJ also appears to have bypassed some of these legal issues by potentially overrating the importance of the tender conditions in relation to national rules.

7. Discussion

7.1 The Public Procurement Directive

The application uncertainties between the Remedies Directive and the Public Procurement Directive primarily derive from the controversial judgement in the *Falk Pharma* case. A mistake that I think the ECJ made in its reasoning is that it relied too much on the strict definition of procurement, while failing to see the bigger picture. This mistake will likely, as has been previously argued in this thesis, result in a significant number of different public procurement decisions falling outside the scope of the Public Procurement Directive, and consequently the Remedies Directive. A conclusion entailing that, *inter alia,* decisions to set of dynamic purchasing systems or modifications of contracts do not need to be subjected to administrative review was hardly the intent of the legislator. In my opinion, there is an obvious absurdity in that the very definition of public procurement can exclude some public procurement decisions, which are described and specified in the Public Procurement Directive, from administrative reviewability.

It can also be argued that the Court failed to take other important aspects into account. For example, one of the overriding purposes of EU public procurement legislation is to facilitate cross-border competition by removing obstacles that are discriminatory in nature. By separating some public procurement decisions from the concept of public contract, the ECJ opened up for risks of increased protectionism since it is possible that the procedure contains award criteria that favours domestic tenderers, even though the procedure *per se* is open for everyone and the contracting authority intends to conclude contracts with all tenderers fulfilling the minimum requirements in the descriptive documents. An aggrieved tenderer that is being falling victim for indirect discrimination in a procurement procedure, such as the one in *Falk Pharma,* will be deprived of the protection granted by the substantive rules in the Public Procurement

Directive as well as the access to review within the ambit of the Remedies Directive. This fact alone might deter tenderers from participating in such procurement procedures. Undoubtedly, this will have anti-competition effects that I think the ECJ as least should have addressed in its legal reasoning.

Lastly, I can only hope that the judgement in *Falk Pharma,* will be overruled and replaced with precedence implicating a more lenient attitude towards the wording of Article 1(2) of the Public Procurement Directive and the definition of public contract. Alternatively, a reform of the concept of public procurement could be made in order to fix the issues detailed above. Such a reform should preferably amount to focus on the concept of choosing and, instead, put emphasis on acquisition alone.

7.2 Fundamental Rights

As a general point of discussion, it should be noted that Article 41 and 47 in the CFR overlap. The right to good administration and the right to an effective remedy have quite a few things in common. An example of this overlap is the right to be heard which is considered to be an essential part of a fair trial. As we have seen, this right is more detailed in Article 41 but is nonetheless within the scope of Article 47. The close connection between the procedural administration and judicial effectiveness and fairness cannot be ignored. Since both rights apply to the Remedies Directive, the overlap will not have an impact on the relationship between the Remedies Directive and the CFR.

An interesting question is how to balance the right to good administration with the rapid administrability and effectiveness of the review procedure. Essentially, the question also alludes to finding a balance between the interests of the contracting authority and the tenders respectively, speed and practicality contra legal certainty and procedural rights. The right to be

heard before any adverse measure is taken can entail considerable delay, especially since the contracting authority needs to give the tenderer sufficient time to submit its point of view and meticulously motivate its response to every appeal. It could be argued that, since the CFR is primary EU law, that it is redundant to address its implication in the Remedies Directive. However, it is very important to explain how the general provisions in the CFR concretely interact with other procedural rules. Therefore, I think it would be extremely preferable to include a detailed clarification in the Remedies Directive regarding what procedural obligations contracting authorities and domestic courts have in view of the right to good administration. For example, the right to access the file is not even mentioned in the Remedies Directive as of now.

Another interesting question is how extensive and intense the judicial review needs to be in order to be fully compatible with the right to an effective remedy and a fair trial enshrined in Article 47 CFR. In a public procurement procedure, there a several kinds of decisions or assessments made by the contracting authority that an aggrieved tenderer might want to appeal. Obviously, most decisions are made on the basis of national public procurement legislation transposing EU law or other domestic public law. Appealing such decisions to a court of first instance for judicial review should, typically, not be problematic since they can be derived form specific circumstances or facts surrounding the procedure at hand and how this, according to the contracting authority relates to the descriptive procurement document and the applicable law.

However, it becomes more difficult when there are disagreements regarding the substantive meaning of award criteria that involves elements of arbitrary assessment. Overall, discretion exerted by contracting authorities in the selection of tenders is generally undesirable considering that the descriptive documents should be sufficiently precise in order for all parties to predict how different factors and merits will be evaluated. A certain degree of discretion is probably impossible to avoid though. The question, then, is

how a court is to assess appeals where aggrieved tenderers are of another opinion than the contracting authority concerning relative parameters. In my view, these kinds of issues will always and inevitably arise due to different interpretations of the descriptive documents in the contract notice, especially in more complex procurement procedure where both the relative merits and the award criteria are more complicated to overview. There is undoubtedly nothing that indicates that the probity of the procedure will be improved by replacing the discretion of a contracting authority with the arbitrariness of a court. In this context, it should also be pointed out that the authority probably is better suited to assess relative merits since it has a close connection to the practical purpose that the merits aims to fulfil. Therefore, it is probably not a good idea for the court of first instance to second-guess the assessment of authorities in this regard, provided that it is compatible with the applicable law. The judicial public procurement review imposed on the Member States by the Remedies Directive and Article 47 CFR does not, in my opinion, go beyond assessing the legality of the decisions and providing sufficient reasons for the assessment.

The exclusion of tenderers entails additional problems with regards to the intensity of the judicial review and the right to good administration. Considering that the mandatory and optional exclusion grounds might be very different in nature, varying from criminal behaviour to the potential distortion of competition, it is reasonable to assume that different standards of judicial protection should apply. Exclusion decisions can be dependant on other legislation and its interpretation such as criminal law, insolvency law and competition law. Typically, different requirements regarding burden of proof and evidentiary evaluation are applied in these different areas of law. I think that this somehow should be reflected in the Remedies Directive. For example, requiring further obligations to provide reasons when a contracting authority intends to exclude a tenderer due to alleged involvement in criminal activity could achieve this aim.

7.3 Domestic Public Law

It has previously in this thesis been argued that the phrasing of the fourth paragraph of Article 1(1) opens up for some interpretations with peculiar results.[107] This argumentation is based on the fact that the concept of *having infringed* indicates that an aggrieved tenderer somehow must form the appeal as a claim of non-compliance or incompatibility with EU public procurement law in order for the procedural provisions of the Remedies Directive to apply, alongside the judicial protection that they entail. If this assumption is true, then it is possible for Member States to instate different judicial procedures depending on how the appellant phrases the legal argumentation, even though it would assumedly be administratively impractical to do so. The judicial protection could potentially depend on whether the aggrieved tenderer claims non-compliance with EU law or only an incorrect application of purely domestic public law. This was most likely not an intended result. The legislator might have overlooked the possibility of domestic public law being able to affect the public procurement procedure without, for that sake, infringing on EU law or national law transposing such law. Reasonably, this can potentially have anti-competitive effects if it deters foreign tenderers from participating in public procurement procedures because they are uncertain of which rights they have in the case of a legal conflict with the contracting authority.

Personally, I do not see the point of including such a limitation to the applicability of the procedural provisions in the Remedies Directive. Simply by skipping the part that starts with "*on the grounds that such decisions have infringed*" could solve the problems mentioned above.

The ECJ might have found its own solution to these issues of applicability and judicial protection though. Considering the judgements in *Pizzo* and *Taxi Services*, domestic administrative rules and practises must be described in the contract conditions in order for the contracting authority and the

[107] See section 6.3.

tenderers to be able to rely on such law or practises. The reasoning used by the ECJ in these two cases effectively renders domestic public law useless with regards to public procurement. If the domestic public law is in conflict with EU law, it cannot apply for obvious reasons. If it is in conflict with EU law and included in the descriptive procurement documents, it cannot apply for the same obvious reasons. Lastly if it is compatible with EU law but not included in the descriptive document, it cannot be applied since this would infringe on the obligation of transparency. It can only have meaning if it is compatible and included in the descriptive document. From this, I deduce that the ECJ has deprived domestic public law of its legal independence by strictly giving precedence to the contract conditions.

I have to admit that the reasoning of the Court makes perfect sense from a pure EU public procurement perspective. By giving such a great importance to the descriptive documents, the ECJ has managed to ensure equal judicial protection for claims based on purely domestic law since such a claim would be futile unless it has support in the contract conditions. However, the conclusions by the ECJ raise difficult concerns about the balance between conformity and subsidiarity as well as between Union consistency and Member State sovereignty. These questions fall outside the scope of this thesis though.

7.4 Concluding Remarks

I believe that this thesis has demonstrated that there are shortcomings in the Remedies Directive that are in need of legislative reform or general clarifications. In view of these deductions, I think it is extremely disappointing that the Commission,[108] despite having identified some shortcomings on its own, seems generally uninterested in initiating any actions leading to a legal overview of the provisions in the Remedies Directive. Most likely, it lies in the nature of the Commission to assume a

[108] See section 1.1.

pragmatic attitude rather than indulging in theoretical reasoning. Nevertheless, I hope that the Commission will reconsider its priorities sometime in the near future.

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