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

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Abstract

The enforcement of EC procurement law relies heavily on legal action brought by aggrieved bidders for public contracts before the national courts. National remedies for bidders have been harmonised by two EC directives. The study considers the extent to which a system of bidder remedies is an effective mechanism for enforcing the procurement rules, through text-based research of the public sector procurement remedies and an empirical study in the construction sector, based on interviews with bidders, awarding authorities and procurement lawyers, in two Member States, Greece and the United Kingdom.

The findings of the research indicate that remedies are not in principle incapable of assisting enforcement but that the use that is made of them and their capacity to enforce the law depend on their features, in terms, particularly, of legal costs as well as of the likelihood of a case being won at trial.

Before this project was undertaken, there was no empirical research work on procurement remedies. It is hoped that this study will interest everyone involved in contracts awards (namely, firms, public bodies and lawyers) as well as scholars of EC law studying the national enforcement of EC rules, either in the area of procurement or in other areas regulated by EC law. It is also hoped that the findings of the study will be of some use to policy and law makers, at European and national level.

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Chapter 1

Introduction

This study is concerned with the enforcement[1] of EC procurement law. It seeks to contribute to an understanding of this subject by considering the extent to which a system of legal remedies for aggrieved bidders[2] is an effective and appropriate mechanism for enforcing the rules. This is investigated through text-based research of the public sector procurement remedies and an empirical study of the use of remedies by bidders in the public works sector in two Member States –Greece, in which there is extensive use of the available remedies, and the United Kingdom, where remedies are rarely invoked.

1 The EC procurement rules: the EC Treaty and procurement directives

Public procurement refers to the purchase of goods and services by public bodies from the private market[3].

From the point of view of EC law, procuring goods and services is an economic activity covered by the EC Treaty. The Treaty articles, requiring Member States to refrain from discriminating on grounds on nationality against citizens of other Member States (article 12 (ex 6) EC) and to remove obstacles to the free movement of goods (article28 (ex 30) EC) and services (article 43 (ex 52) EC) and to the freedom of

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[1] "Enforcement" refers to the process of compelling observance of the EC legislation: "enforcement means that through control and the eventual application (or threat thereof) of … sanctions, a situation may be attained where generally applicable rules are observed", Veldkamp "The Shifting Boundaries of European and National Enforcement: Three Case Studies", in Vervaele (ed.), *Compliance and Enforcement of European Community Law,* (1999), p.247. See also on this Prechal, *Directives in European Community Law* (1995), pp.5-6.

[2] The terms "supplier", "tenderer", "bidder", "contractor" are all used alternatively in the study and they refer to any person who participates or is prevented from participating in an award procedure and who has an interest in challenging it. The personal pronoun "he" will be used, independently of their real life gender or legal form (natural or legal person). The term "firm" will also be used alternatively when the person is a commercial company.

[3] See for example, Arrowsmith, *The Law of Public and Utilities Procurement* (1996)*,;* Bovis, *EC Public Procurement Law* (1997); Fernández-Martín, *The EC Public Procurement Rules: a Critical Analysis*

establishment (article 49 (ex 59) EC) in the European Union, are applicable[4]. These obligations, as applied in procurement, forbid national awarding authorities[5] to exclude or discriminate against bidders or products from other Member States in their national contract award procedures[6]. Any form of discrimination, direct or indirect, is caught under the prohibition and is disallowed.

The Treaty articles were perceived as inadequate by themselves to ensure the equal treatment of bidders from all Member States, mainly because, unless transparent procedures were put in place and Community-wide standards were imposed, awarding authorities would be able to conceal discriminatory procurement practices easily and national standards would create barriers for foreign bids[7]. Starting in 1971[8], the Community sought to resolve these problems by adopting a series of directives, replacing or amending each other, which regulate and harmonise procurement award procedures in the Member States for contracts, the value of which exceeds a financial threshold set by the directives. The Community thereby aims to establish transparent and easy to monitor award procedures, where bidders from all Member States have equal access and participate without discrimination, in conditions of fair competition. At the time this study was completed, public contracts awards are regulated by six EC directives, which fall into two groups. The first group comprises the so-called "public sector" directives, which

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(1996); Trepte, *Public Procurement in the EC* (1993); Weiss, *Public Procurement in European Community Law* (1993).

[4] See, in particular, Arrowsmith, *The Law…, op. cit.* footnote 3, chapter 4; Fernández-Martín, *The EC…, op. cit.*, footnote 3, chapter 1.

[5] The terms "purchaser", "awarding" or "contracting" "authority" or "body" or "entity" are used alternatively in the study and they refer to any body, the purchasing activity of which is covered by the EC law. On the coverage of the EC procurement directives see Arrowsmith, *The Law…, op. cit.* footnote 3, chapters 5 and 10.

[6] Arrowsmith, "An Overview of EC Policy on Public Procurement: Current Position and Future Prospects" (1992) P.P.L.R. p.30.

[7] Arrowsmith, "The Way forward or the Wrong Turning? An Assessment of European Community Policy in the Light of the Commission's Green Paper" (1997) 3 European Public Law, p.389 at p.391.

[8] With Council Directive 71/305, OJ [1971] L185/1, which regulated public works awards.

coordinate awards for public works[9], public supplies[10] and public services[11] contracts. These directives were amended by one directive[12] to be brought into line with the World Trade Organisation Agreement on Government Procurement (GPA). The second group comprises one directive regulating awards in the utilities sectors of water, energy, transport and telecommunications[13] and one directive amending it to bring it into line with the GPA[14].

The relationship between the rules in the Treaty articles and in the directives is the following. First of all, the Treaty articles apply on a supplementary basis to contracts falling under the directives, for matters not provided for in the directives. Secondly, the Treaty articles are the only EC rules that apply to contracts that are not governed by the directives, for example, contracts below the thresholds[15].

2 Enforcement of the EC procurement rules

Mechanisms to enforce EC law, including procedures to ensure compliance or punish instances of non-compliance, exist at two levels. First, procedures to enforce EC law are provided at a centralised European level and their operation is mainly entrusted to the European Commission[16]. Secondly, enforcement of EC law is entrusted to national authorities and, in particular, national review bodies, which monitor observance of the Community rules in the Member State where they operate. The second, decentralised, level of enforcement is the most important one. In a vast

[9] Council Directive 93/37, OJ [1993] L199/54.
[10] Council Directive 93/36, OJ [1993] L199/1.
[11] Council Directive 92/50, OJ [1992] L209/1).
[12] Council Directive 97/52 OJ [1997] L328/1, based on Council Decision 94/800/EC, OJ [1994] L336/1.
[13] Council Directive 93/38, OJ [1993] L199/84.
[14] Council Directive 98/4, OJ [1998] L101/1, based on Council Decision 94/800/EC, OJ [1994] L336/1.
[15] European Commission, *Guide to the Community rules on public works contracts* (1997) p.1.
[16] Direct action before the European Court of Justice is open to individuals, under Article 230 (ex 173) EC, only against decisions of the EC institutions addressed to them or concerning them directly and individually. This option is not available for breaches of EC law in national procurement procedures.

and heterogeneous area such as the Community, where there are no central enforcement EC institutions or agencies (with the exception of the Commission's general monitoring powers and specific enforcement powers that the Commission has been attributed in limited areas, such as competition[17]), effective control of compliance with EC law may only be achieved, if delegated to the Member States and review bodies therein[18]. Decentralised enforcement of EC law relies on the effectiveness of national remedies as well as on the willingness of individuals to seek protection of their rights under EC law before the competent national bodies[19].

In public procurement, decentralised enforcement was thought to be of such importance to the success of EC policy in the area that the Community sought to ensure its existence and quality, by adopting two directives, one concerning enforcement of EC law in the context of contract awards falling under the public sector directives[20], which we will call the Remedies Directive or Directive 89/665, and one concerning enforcement in the context of awards falling under the utilities directives[21], which we will call the Utilities Remedies Directive or Directive 92/13. These Directives provide for specific national remedies and lay down minimum conditions of form and procedure thereof. As we will see, legislative intervention on the part of the Community in the area of national procedural rules is rare. The adoption of the two Remedies Directives was based precisely on the aforementioned understanding that the participation of individuals in enforcement is vital to ensure compliance with EC law.

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[17] EEC Council Regulation 17/62, first Regulation implementing Articles 85 and 86 of the Treaty, JO [1962] p.204.

[18] Fernández-Martín, *The EC .., op. cit.,* footnote 3, pp.179-180.

[19] C-26/62 *Van Gend en Loos v Nederlanse Administratie der Belastinden* [1963] E.C.R. 1 at 13: "the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 EEC to the diligence of the Commission and the Member States".

[20] Directive 89/665 "on the co-ordination of the laws, regulations and administrative procedures relating to the application of review procedures to the award of public supply and public works contracts" OJ [1989] L395/33. Article 41 of Directive 92/50 on public procurement of services extended the scope of directive 89/665 to contracts falling under it.

[21] Directive 92/13 "co-ordinating the laws, regulations and administrative provisions relating to the application of Community law on the procurement procedures of entities operating in the water, energy,

The Directives provide for three specific remedies, namely interim measures, the set aside of decisions taken unlawfully and the compensation of persons injured by infringements. The Utilities Remedies Directive gives Member States the option, instead of interim measures and the set aside of unlawful decisions, to provide for the payment of a sum (such as a fine), when a breach occurs. This Directive also provides for two further compliance mechanisms, which do not exist in the public sector, attestation and conciliation. These mechanisms depart from the classic conception of remedies, because they do not involve action before review bodies, they are optional for the parties involved and they do not concern or do not necessarily lead to the solution of a dispute or can lead to a decision that is not legally binding.

The Commission put forward suggestions to improve enforcement of EC procurement law in a Green Paper and a Communication that it has issued on procurement[22]. The suggestions concerned complementary methods of problem solving. One of them was put in place on the initiative of Denmark, acting in consultation with the Commission. It was a pilot project on co-operation between national authorities appointed for that purpose with the objective to monitor compliance of contracting entities with the procurement rules, examine cases of cross-border procurement problems and, if possible, promote an informal solution of the dispute. Other enforcement suggestions, like the grant of investigation powers to the Commission[23] and the adoption of sanctions to penalise breaches of the procurement rules[24], fell through, mainly due to Member State opposition.

3 Scope, aims and structure of the study

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transport and telecommunications sectors" OJ [1992] L76/14. It was adopted three years after the directive on public sector remedies.

[22] Commission Green Paper, *Public Procurement in the European Union: Exploring the Way Forward* COM(96) 583 final; Commission Communication, *Public Procurement in the European Union,* COM(98) 143 final.

[23] Commission Green Paper, *op cit*., footnote 22, p.16; Commission Communication, *op. cit.,* footnote 22, p.12.

As explained at the start of this chapter, the aim of this study is to contribute to an understanding of the enforcement of EC procurement law through text-based research of the public sector bidder remedies and an empirical study of their practical use.

To this end, the study first outlines centralised enforcement of EC procurement law (in chapter 2). The study then examines the EC rules and principles concerning national procurement remedies and, in particular, Directive 89/665 (in chapter 3). The role and usefulness of enforcement mechanisms other than remedies are briefly discussed and assessed (in chapter 4), because they form part of the overall context of enforcement in procurement, in which bidders decide whether to use remedies, and thus may affect their use. Some of these mechanisms could constitute alternative options for bidders, replacing the use of remedies. Though remedies in the utilities sector are not examined in this study, attestation and conciliation are briefly looked at, as there have been suggestions of their extension in the public sector[25]. The proposals that fell through are also briefly looked at, as they define the limits of EC intervention in the area of procurement enforcement.

The study then analyses the features of remedies to enforce the public sector rules in the UK (England and Wales) and Greece, in chapters 5 and 6 respectively.

Prior to this study there were no data on the practical aspects of the use of remedies, such as legal costs or out-of-court use of remedies, or, more importantly, on bidders' participation and their willingness to use remedies, which, as we have seen, is crucial for the success of decentralised enforcement. Such data are, however, important in order to assess the role of remedies, since they concern their features or effects and, above all, whether they are likely to be used and of use in enforcement. For this reason, empirical research was undertaken to collect this information on the basis of interviews with the persons concerned by remedies, namely bidders, awarding authorities and legal advisers

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[24] Commission Green Paper, *op cit*., footnote 22, p.15.
[25] *Ibid.* p.26.

to both of them. The research was centred on factors that influence bidders' use of remedies and explores practice in the field. The area of procurement activity that the empirical research covers is construction. The methodology of the empirical research is explained in chapter 7 and the empirical findings laid out in chapters 8 and 9, for the UK and Greece respectively.

Chapter 10 concludes the study, outlining the theoretical conclusions based on the empirical findings and the implications of the text-based and empirical data as regards the adequacy of bidder remedies to enforce the law.

There is little comprehensive work on legal remedies in general and no empirical research on the use of procurement remedies. It is hoped that this study will increase understanding of how remedies are perceived and used and that it will, thus, interest all involved in contract awards, namely firms, public bodies and lawyers. It is further hoped that the study will be of interest to policy makers, in procurement as well as in other areas where legal remedies are envisaged as principal law enforcement mechanisms. European institutions involved in the EC legislative process, in particular, may be interested to learn whether the legal framework they have put in place is functioning effectively and fulfilling its purpose to enforce the rules. Finally, it is hoped that the study will give a sector-specific insider view of the issues that arise in one of the much discussed problems of EC law, national enforcement[26], and thus interest scholars of EC law in general.

Chapter 2

Centralised enforcement

[26] Snyder, "The effectiveness of European Community Law: Institutions, Processes, Tools and Techniques" (1993) 56 Modern Law Review, p.19 at p.22.

The European Commission plays an active part in the enforcement of the EC rules. Its intervention can be a useful addition or alternative to bidder action before national review bodies.

1 Articles 226 (ex 169) and 228 (ex 171) EC: the infringement procedure

The main mechanism through which the Commission acts against breaches of EC law is the infringement procedure laid down in article 226 (ex 169) EC. The Commission is thereby empowered to start proceedings against Member States failing to comply with their obligations under EC law.

Action against infringing Member States is entrusted to the Commission, because it is the Community institution that is responsible for supervising the application of EC law. According to article 211 (ex 155) EC, the Commission,

"in order to ensure the proper functioning and development of the common market shall:

- ensure that the provisions of this Treaty and measures taken by the institutions pursuant thereto are applied...".

The Commission may, therefore, act to ensure that EC law is applied and safeguard Community legality. It does not act to protect the interests of individuals[27], even though this might be a consequence of its action.

The Commission acts after being informed that an irregularity has occurred. The decision to start or not the infringement procedure is a matter left entirely to its discretion: the Commission may be informed of a breach and decide nevertheless not to take up the case. This decision cannot be subject to a review: the Commission cannot be forced to initiate the procedure[28].

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[27] As held by the Court, "proceedings by an individual are intended to protect individual rights in a specific case, whilst the intervention by the Community authorities has as its object the general and uniform observance of Community law" in C-28/67 *Firma Molkerei-Zentrale Westfalen/Lippe GmbH v Hauptzollamt Paderborn* [1968] E.C.R. 143.

[28] T-126/95*Dumez v Commission of the European Communities* [1995] E.C.R. II-2863.

The Commission can be informed of a breach through its own sources. In procurement, it can find out about infringements through examining national implementing measures, which are communicated to it, through studying statistical data available to it, through its own monitoring in Community subsidised projects and even through the press in contracts of very big public interest.

The Commission can also be informed through complaints, whether by bidders (who need not to have suffered harm to be able to bring a complaint) or by third parties. The input of individuals is important, as the Commission is often unable to monitor compliance in the Member States on its own.

Firms sometimes -and increasingly so- wish to involve the Commission[29] and thus lodge a complaint with it rather than or in addition to proceeding before the national courts.

It has been argued that this is due to various reasons[30]. First, if the Commission takes up a case instead of the aggrieved bidder, it may be possible for that bidder to retain his anonymity[31]. Firms often wish to stay anonymous, in order not to jeopardise their relationship with the contracting authority and diminish their chances of being awarded that or future contracts and thus approach the Commission informally to put it on notice of the alleged breach, but asking it not to disclose its identity[32].

Another advantage of the infringement procedure for bidders is that the Commission bears the costs, in contrast to national procedures where the firm will have to bear the often considerable legal expenses.

Furthermore, bidders hope that the Commission's intervention will lead to a satisfactory settlement of the dispute, as the Commission has considerable leverage vis-à-vis the Member States. The majority of infringement cases are settled between

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[29] EuroStrategy Consultants, *Dismantling of Barriers. Public Procurement,* The Single Market Review Series, Subseries III: Volume 2, Office for Official Publications of the European Communities, 1997, p.88.

[30] The validity of these reasons will be explored in the empirical research.

[31] "This may be possible where the breaches complained of are generalised and not 'traceable', but is more difficult where it is the result of an isolated incident"; the complainant can in these cases be identified by the contracting authority, Trepte, *Public Procurement, op. cit.* footnote 3 of chapter 1, p.208.

the Commission and the Member State before they are taken to the European Court of Justice (we examine the steps of the procedure below)[33]. The interests of the aggrieved firm are often taken into account in such settlements; the firm achieves thus its objective while avoiding an often costly and of uncertain outcome action before national bodies. In case a settlement is not reached, the dispute will probably reach the Court of Justice, which, in some cases, might offer bidders a more effective protection than the national bodies (for example, as far as the suspension of concluded contracts is concerned, as we will see later), since it is generally less concerned with the inconvenience of holding up an award and more with enforcing the EC rules, while the contrary may be true of a national review body[34].

Lastly, complaints to the Commission are sometimes used by subcontractors and trade associations of bidders, the standing of which before the national review bodies is doubtful and often refused, which means that the Commission is their only resort.

Bidders who have brought a complaint (or other concerned bidders) do not have formal standing or procedural safeguards in the procedure. In cases where the complainant approaches the Commission informally, he does not participate in the development of the procedure. In cases of formal complaints, the Commission (though under no legal obligation) often keeps the complainant informed and offers him the opportunity to make further observations, if deemed necessary[35].

The infringement procedure of article 226 (ex 169) is opened against the Member State where the award takes place and not against the contracting authority. Member States are, however, responsible to ensure compliance with EC law by all national public bodies. The case of private law awarding entities is controversial and it is not clear whether and, if yes, when a Member State should be held responsible for their conduct. In the case of public sector procurement directives, however, it would seem

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[32] *Ibid*.
[33] Fernández-Martín, *The EC.., op. cit.* footnote 3 of chapter 1, p.147.
[34] For example, national judges may be reluctant to grant relief when proceedings are very time-consuming and may hold up awards indefinitely, Arrowsmith/Linarelli/Wallace, *Regulating Public Procurement: National and International Perspectives* (2000), p.774.

that Member States are responsible for all the bodies falling under the definition of "contracting authorities"[36].

The infringement procedure comprises two stages: a pre-judicial administrative one and a judicial one. The objective of the administrative procedure is to allow for discussions between the Commission and the Member State held responsible for the infringement, eventually leading to the correction of the breach or alternatively to the persuasion of the Commission that there has been none. The judicial stage will be initiated only if the administrative one has proven fruitless. Most disputes are settled through negotiation; "litigation is only a part, sometimes inevitable but nevertheless generally a minor part of this process"[37].

The steps of the procedure are the following: the Commission is informed that there has been a breach of primary or secondary EC rules, which are, in procurement, the relevant articles of the Treaty, general principles of Community law and the provisions of the procurement directives. If the Commission decides to take up the case, it starts informal discussions with the Member State concerned. If the Member State neither convinces the Commission that no violation of EC rules has occurred nor, alternatively, corrects the infringement, then the Commission sends a letter, called the "letter of infringement", setting out the issue and asking the Member State to submit its observations. If there is no satisfactory, according to the Commission, reaction to the letter, then the Commission issues a so-called "reasoned opinion" on the matter, asking the Member to correct the breach within a time limit set by the Commission itself. If the Member State fails to comply with the reasoned opinion, then the case is brought before the Court.

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[35] Trepte, *Public Procurement, op. cit.* footnote 3 of chapter 1, p.209.

[36] Advocate General Lenz in C-24/91 *Commission v Spain* [1994] 2 C.M.L.R. 621 and in C-247/89 *Commission v Portugal* [1991] E.C.R. I-3659.

[37] Snyder "The effectiveness...", *op. cit.* footnote 26 of chapter 1, p.30. See also Craufurd Smith, "Remedies for Breaches of EU Law in National Courts: Legal Variation and Selection" in Craig and De Búrca (eds.), *The evolution of EU Law* (1999): "In the context of Member State infractions the approach chosen was one of negotiated settlement between the Commission and the state concerned, with *independent judicial scrutiny only as a measure of last resort when there was no further prospect of a voluntary resolution*" [emphasis added].

If there is a need for urgent action the Commission can (and indeed must, if it wishes to ask for the suspension of the procedure, as we will see later) speed up the procedure, as long as the time left to the Member State to comply with the reasoned opinion is reasonable[38].

The Commission can stop the procedure at any of these phases, without having to justify its decisions: the procedure is entirely dependent on its discretion, until it reaches the Court, after which point it can no longer be stopped. The Commission may decide not to take up or stop pursuing a complaint for several reasons, including that it does not seem important enough or because it does not have sufficient resources available or even as a matter of internal policy not to take action against all breaches - for example, the Commission may be disinclined to involve itself in an area, such as procurement, where political sensitivities are high[39]. The limitations of the Commission's resources are, in fact, such that it can carry out no more than a selective review of the application of EC law in the Member States.

Nevertheless, in procurement the Commission has often used the infringement procedure against breaches of the EC rules occurring in procedures falling within the scope of the procurement directives. It has even incurred criticism that it is a waste of Commission resources to pursue all breaches rather than limiting the use of the infringement procedure to major cases only[40]. The Commission itself has recognised it recently and proposes to concentrate on cases with a Community-wide impact or causing major questions of interpretation[41].

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[38] This is subject to control by the Court. In C-328/96 *Commission v. Austria* [1991] E.C.R. I-7503 the Commission allowed Austria one week to answer to the letter of infringement and another two weeks to respond to the reasoned opinion. Austria submitted that these time limits were unreasonably short, making it impossible for authorities to liaise and reply. The Court held that very short time limits can apply in cases of urgency or where the Member State has been fully informed of the Commission's allegations since the beginning of the infringement procedure (both elements were present in that case) and rejected Austria's contention. See Dischendorfer and Oehler "Case C-328/96: The Position of Unlawfully Concluded Contracts under Community Law" (2000) 9 P.P.L.R. p.CS50.

[39] Trepte, *op. cit.* footnote 3 of chapter 1, pp.189 and 207-8.

[40] For example, Arrowsmith, *The Law…, op. cit.* footnote 3 of chapter 1, p.921; Fernández-Martín, *The EC.., op. cit.* footnote 3 of chapter 1, p.153-158.

[41] Commission Green Paper, p.16, and Commission Communication, p.13, *op. cit.* footnote 22 of chapter 1.

If the case reaches the Court of Justice, this will rule on whether the Member State has acted in breach of its obligations under EC law. The judgment has only a declaratory value and is not capable in itself of annulling an unlawful decision. The Commission cannot ask for any particular measure on behalf of the injured firm. Nor can the Court order the Member State to act or refrain from acting in any particular way[42]; at the most it may indicate such measures as it considers necessary to eliminate the breach[43]. According to article 228 (ex 171) (1) EC, "[I]f the Court of Justice finds that a Member State has failed to fulfil an obligation under the Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice". The choice, however, of the adequate measures belongs to the Member State. These measures must be taken as soon as possible[44] and will normally entail the removal of the litigious unlawful act[45].

From the point of view of the protection of the aggrieved firm, a judgement condemning the Member State is useful not only because it demands the correction of the breach but also because it constitutes a *res iudicata* assessment of the unlawfulness of the contested act, on the basis of which the firm can ask for annulment and/or damages before the competent national courts. The delay involved is however so long as to render this advantage very marginal. Proceedings under article 226 (ex 169) can take up to 3 years to be completed, counting from when the reasoned opinion is issued until the moment when the Court delivers its judgement, due both to the inadequate Commission resources and to the considerable backlog of cases pending before the Court, all of which delay the procedure[46]. At least, the judgement will help interpret and clarify the law, if this is necessary in view of the facts of the case, and this

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[42] Arrowsmith, "Enforcing the Public procurement Rules: Legal Remedies in the Court of Justice and the National Courts" p.40 in Arrowsmith (ed.), *Remedies for Enforcing the Public Procurement Rules* (1993).
[43] Lenaerts/Arts, *Procedural Law of the European Union,* (1999), p.110.
[44] C-131/84 *Commission v Italy* [1986] 3 C.M.L.R. 693.
[45] There is controversy on whether a Member State is required to set aside a concluded contract, if a breach is found in the award procedure, see Arrowsmith "Enforcing the Public…" *op. cit.* footnote 16, p.41.
[46] Commission Green Paper *op. cit.* footnote 22 of chapter 1, p.16. The delay may in fact be longer than that. The interval between bringing the case before the Court and the judgment may be more than 2

interpretation will guide in the future both the contracting authority in award procedures and the national review body dealing with relevant disputes.

If the Member State fails to comply with the judgement, the Commission can initiate article 226 (ex 169) proceedings on that ground and ask for the imposition of a lump sum or a penalty payment on the recalcitrant Member State, according to article 228 (ex 171(2)(2)).

2 Articles 242 (ex 185) and 243 (ex 186) EC: interim relief sought before the Court of Justice

Actions brought before the Court of Justice do not have a suspensory effect. In order to prevent that situations are created before the delivery of the judgment, which could detract from its effect, a party to a pending case can ask the Court to grant interim measures under articles 242 (ex 185) and 243 (ex 186) EC. The Court can order either the suspension of the act contested in the main proceedings (article 242-ex 185) or any other necessary (and not just suspensory) measures (article 243-ex 186). Thus, in procurement infringement cases, the Commission could apply for interim measures against the Member State.

In procurement the Court has granted interim measures twice in the context of infringement procedures against Member States; in one case, the Court ordered the suspension of an already concluded contract[47].

Articles 83-88 of the Rules of Procedure of the Court of Justice set out the requirements for the grant of interim relief. According to article 83(2), in order for interim measures to be granted, the applicant has to prove first a *prima facie* case

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years, Clerc, *L'ouverture des Marchés Publics: Effectivité et Protection Juridique,* Éditions Universitaires Fribourg Suisse, 1997, p.87; also, Trepte, *Public Procurement, op. cit.* footnote 3 of chapter 1, p.212.

[47] C-194/88R *Commission v Italy (La Spezia)* [1988] E.C.R. 5647, relief granted mainly in view of the authority's own fault in delaying to start the award procedure; C-272/91R *Commission v Italy (Lottomatica)* [1992] E.C.R. I-4367, relief granted against a concluded contract; the relevant Italian legislation had already held unlawful by the Court in a previous case: C-3/88 *Commission v Italy (Re Data Processing)* [1989] E.C.R. 4035.

(*fumus bonis iuris)* and secondly the existence of urgency (*periculum in mora)* requiring prompt judicial protection. A third requirement that has arisen out of case law is that, for relief to be granted, the applicant's interest to be granted interim measures must outweigh other interests at stake in the proceedings. The order in which the judge[48] considers the three requirements is of little consequence[49]. All requirements must be satisfied; it is sufficient that one of them is not fulfilled for interim relief to be refused.

The requirement of a *prima facie* case, first, means in practice that the applicant must show that the main action has a reasonable chance of succeeding[50].

Secondly, an application is urgent when, if interim relief is not granted, there is a risk of serious and irreparable harm to the party seeking it, as a result of the duration of the main

proceedings. Urgency is thus determined by the extent and nature of the threatened damage.

In procurement, it has been debated[51] whether the condition of urgency refers to the danger of harm to contractors or harm to the Community legal order because of the breach[52]. The Court has not given a clear answer on this. The need to prevent harm to Community interests is always taken into account by the Court. However, the Court has never dismissed the potential harm to contractors as irrelevant, and though it cannot constitute the basis of the Commission's application as such, it seems to add weight to it[53].

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[48] The personal pronoun "he" will be used for judges irrespective of their real life gender.
[49] Lenaerts/Arts, *op. cit.* footnote 17, p.299.
[50] For example, C-42/82R *Commission v. France* [1982] E.C.R. 841 (not related to procurement).
[51] See for example Arrowsmith "Enforcing the Public…", *op. cit.* footnote 16, p.27-32.
[52] In principle, a party may request interim measures only to protect their own interests and not those of others, see C-22/75 *Köster v. European Parliament* [1975] E.C.R. 277, paras 6-8 of the judgment (not related to procurement), but the Commission is always entitled to ask for interim relief to protect the Community interests, C-87/94R *Commission v Belgium (Walloon Buses)* [1994] E.C.R. I-1395.
[53] For example, in C-45/87R *Commission v Ireland (Dundalk)* [1987] E.C.R. 1369 and C-194/88R *Commission v Italy (La Spezia)* [1988] E.C.R. 5647 the Court referred to harm that would be caused to

The test on which the Court judges the extent of harm and thus the existence of urgency in procurement appears to be the risk of an irreversible unlawful situation being created, if relief is refused[54]. Irreversible situations in this field are the conclusion and performance of the contract. If performance begins, even if the infringement is proven in the main action, it will be *de facto* impossible to reverse the situation, correct the breach and restore legality. In these circumstances, final relief would serve no purpose. Therefore, the condition of urgency will be satisfied, if the continuation of the award procedure would mean that the contract will be concluded and work will be advanced or completed by the time the final judgement is issued.

In a relatively recent order (where relief was refused)[55], the Court required the Commission to act promptly and to notify "quickly and unequivocally" the Member State of its intention to ask for the suspension of the procedure, especially when relief is sought against a concluded contract: the party asking for interim relief on grounds of urgency

should not be itself guilty of delay which could have prevented the urgency from arising. This is an implication, in the area of interim relief, of the general principle of estoppel, common to the law of many Member States; one cannot rely on one's own fault (*"nemo potest auditur turpitudinem suam allegans"*).

The Court showed, thus, a determination to assess rigorously the facts and the behaviour of the litigants and a reluctance to uphold the Commission's requests, if the latter does not show sufficient diligence in the use of its powers. This development probably reflects an intention on the part of the Court to refrain from provoking national sensitivities in the often politically charged field of procurement. It also arguably indicates that the Court is now more critical of the Commission and less

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contractors who had been unlawfully excluded from the award. See also below on the weight of third parties in the balance of interests test.

[54] C-272/91R *Commission v Italy (Lottomatica)* [1992] E.C.R. I-4367.

[55] C-87/94R *Commission v Belgium (Walloon Buses)* [1994] E.C.R. I-1395.

willing to assist it, at least when the Commission is at fault and the credibility of its action is, accordingly, low.

Finally, the Court "balances the interests" at stake to decide. Thus, it examines whether there are interests that outweigh the applicant's interest in interim relief; these interests can concern the opposite party (the Member State) or third parties or the public interest[56]. However, an interest against the grant of relief originating in an omission or shortcoming of the concerned party carries little weight[57]. The Court has refused interim relief on the balance of interests in procurement cases, though the conditions of a *prima facie* case and urgency were satisfied[58].

The interim order takes one to two months to be reached. This period may be sometimes sufficient for the contracting authority to award the contract and even for performance to begin. The Court is empowered to order interim relief *ex parte,* before the party against which the measures are sought has submitted observations, according to article 87 of the Rules of Procedure of the Court. The Court grants the order in cases of particular urgency, to avoid *faits accomplis*. The *ex parte* order can be subject to cancellation or modification. In procurement, relief *ex parte* was granted in two cases[59].

All in all, the Court seems willing (though careful) to use the instruments available to it, where it considers that interim relief is necessary to ensure observance of EC law. Interim procedures before it are relatively quick, in comparison with those in some Member States[60].

However, for interim measures to be sought, the case must have reached the Court, after previous exhaustion of the administrative stage of article 226 (ex 169). Even if

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[56] Lenaerts/Arts, *op. cit.* footnote 17, p.304.
[57] C-87/94R *Commission v Belgium (Walloon Buses)* [1994] ECR I-1395.
[58] C-45/87R *Commission v Ireland (Dundalk)* [1987] E.C.R. 1369, relief refused on the balance of interests on grounds of threat to public health and safety that would result from the delay in awarding he contract. C-87/94R *Commission v Belgium (Walloon Buses)* [1994] E.C.R. I-1395, relief refused on the balance of interests on grounds of serious danger to the security of the public and also due to the Commission's lack of diligence in proceeding.
[59] C-45/87R *Commission v Ireland (Dundalk)* and C-194/88R *Commission v Italy (La Spezia)*.

the Commission is diligent, the delay is considerable and greatly reduces the practical impact of interim (and *ex parte*) relief and their role to prevent irreversible situations.

3 A variation of the infringement procedure: the corrective mechanism

Article 3 of the Remedies Directive and article 8 of the Utilities Remedies Directive provide that the Commission may intervene in award procedures, at a stage prior to the conclusion of the contract, when it considers that "a clear and manifest" breach of EC law has been committed. Under this procedure (called the "corrective mechanism"), the Commission invites the Member State and the contracting authority to either correct the breach or state why no correction is made within 21 days. If there is no satisfactory reply, the Commission can consider the notification under articles 3 or 8 of the Directives as

equivalent to a letter of infringement under article 226 (ex 169) of the Treaty and proceed to issue a reasoned opinion[61].

The corrective mechanism neither replaces nor derogates from the Commission powers under article 226 (ex 169)[62]. It does not however add to these powers either, other than by allowing the Commission to address the contracting authority directly and invite it (and not only the Member State, as is the case under the normal infringement procedure) to explain and/or correct the breach.

4 Soft law

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[60] Advisory Committee for Public Procurement, *Study on the Remedies applied in the Member States in the field of Public* Procurement, (study prepared by Herbert Smith Brussels on behalf of the Commission), CCO/97/13 Brussels 1997.

[61] That was done in the case C-359/93 *Commission v Netherlands (Unix)* [1995] ECR I-157.

[62] C-353/96 *Commission v. Ireland* E.C.R. I-8565. In C-328/96 *Commission v. Austria* [1999] E.C.R. I-7503 the Court held that the two mechanisms are distinct from one another and that even shorter time limits than the ones under the corrective mechanism can be allowed in procedures under article 226 (ex 169) if considered necessary, which it was in that case.

The Commission, to promote enforcement of EC law in areas that belong to its competence or interest it, has used what is called "soft law", i.e. rules of conduct without, in principle, legally binding effect, in the form of Papers, Interpretative Notices and Communications[63].

In these publications, the Commission gives its interpretation of EC rules and Court judgments, mentions what it considers that these imply for the Member States and their citizens and sets out its own future course of action. While these documents cannot impose legal obligations on Member States[64]; they can however become legally binding through judicial recognition, if the Court decides to follow the view offered by the Commission in one of its judgments.

These documents usually concern a whole sector of economic activity and are therefore more comprehensive, systematic and often clearer than the piecemeal jurisprudence of the Court or EC legal texts, which may be either too specific or dealing with a horizontal issue of Community interest but with limited or uncertain application in a particular sector. While neither the interpretations given are binding (though they might arguably be binding on the Commission itself) nor the proposed action will necessarily follow, soft law operating "in the shadow of Community law" can inform and guide all concerned, by stating "what is settled and what is in dispute, circumscribe the arena for debate, and define the agenda for negotiation and, if necessary, litigation"[65].

In procurement, in its general communication on procurement in 1998, the Commission has made commitment to use interpretative documents to clearly state its

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[63] Snyder, "The Effectiveness…" *op. cit.* footnote 26 of chapter 1, p.33: "…beginning in 1980 after the *Cassis de Dijon* case, the Commission has developed the quasi-legal form of the communication…In the Commission's view the legal basis of communications lies in Articles 5 and 155 EEC".

[64] See C-303/90 *Commission v France* [1991] E.C.R. I-5340. The Court held that, by adopting a Code of Conduct on the reporting of fraud against the Community, the Commission had imposed legal obligations on the Member States while lacking the competence to do so, and upheld the French argument that the Code of Conduct could be challenged by an application for annulment.

[65] Snyder, "The Effectiveness…" *op. cit.* footnote 26 of chapter 1, p.33.

positions on matters of procurement interest[66]. Indeed, since 1998, four important interpretative communications have been issued[67].

5 Conclusions of chapter 2

The procedures of articles 226 (ex 169) and 242-3 (ex 185-6) enhance to a certain extent compliance with EC law. As regards protection of bidders' interests, these procedures, though not designed for their benefit, may improve their position. This is achieved either

because they result in the correction of irregularities or because they have a preventive deterrent effect, in the sense that Member States wishing to avoid the risk of an infringement procedure and the possible suspension of awards under it will probably try to ensure that their contracting authorities follow the procurement rules[68].

Nevertheless, we have seen that the infringement and interim relief procedures have some defects or shortcomings, which impair their potential to ensure compliance with EC law as well as to provide protection of the bidders' rights under it. On the basis of the analysis above, the defects of the procedures can be summarised in the following way.

First of all, the Commission is not informed of all the breaches. That means a large number of irregularities are not detected and cannot be pursued by the Commission, which creates imbalances in the enforcement of the law and the protection of bidders.

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[66] Commission Communication*, op. cit.* footnote 22 of chapter 1, p.10.

[67] *Draft Commission interpretative Communication on concessions under Community law on public contracts* [1999] OJ C94/4; *Commission interpretative Communication on concessions under EC law*, [2000] OJ C121/2; *Commission interpretative communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement law*, COM(2001) 566 final; *Commission interpretative communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement law* COM(2001) 566 final. They are all available at http://www.simap.eu.int.

[68] This will be investigated in the empirical research.

Secondly, taking up and pursuing the procedure is entirely dependent on the Commission's discretion, which may decide on non-legal considerations, for example for policy reasons, that it is best not to act.

If the case is pursued, the procedure is very slow, taking, as was mentioned, more than 3 years in the cases where it culminates with a Court judgement, by which time the contract will often have been awarded and performance begun. Even if interim relief is sought, and this is not always the case, it will probably be already too late and, besides, applications for interim relief are not always successful. The final judgement (which can, as already mentioned, only declare the Member State in breach without defining the measures necessary to correct the breach) will then only serve as a precedent.

In this state of affairs, the value of national remedies seems obvious. However, remedies can only prove useful if they are successful in enforcing the law and protecting the aggrieved bidders. In the next chapter, we will see what standards national procurement remedies are required to meet to fulfil their role.

Chapter 3

National remedies

SECTION 1

GENERAL PRINCIPLES

The aim of this chapter is to discuss the requirements national procurement review systems are expected to meet in the light of the relevant case law of the European Court of Justice.

We remind that there are two harmonising directives on procurement remedies, in the public and the utilities sectors, the Remedies Directive or Directive 89/665 and the

Utilities Remedies Directive or Directive 92/13, respectively. This study examines in detail only the former, which we will look at in section 2 of this chapter. We only remind here that Directive 89/665 provides for three specific remedies, namely interim measures, the set aside of decisions taken unlawfully and the compensation of bidders for harm suffered as a result of infringements of the applicable rules. We will examine the general principles on national enforcement of EC law developed by the Court of Justice first, since they form the context in which the provisions of the Remedies Directive will be analysed, complemented and assessed.

The Court, in its decisions delivered in procedures under articles 226 (ex 169) and 242 (ex 186) as well as under article 234 (ex 177)[69], has shown a determination to ensure Member State compliance with EC law. In the area of public procurement, the Court has acknowledged the direct effect of many provisions of the substantive procurement directives and has followed a strict interpretation when Member States tried to avoid following the rules. In proceedings under article 242 (ex 186), we have seen that the Court has gone as far as to suspend the execution of a contract already concluded, because it was awarded in breach of the law[70]. The case law of the Court on the substantive EC procurement law is not directly relevant to this study[71], which is centred on national remedies for bidders; national case law, which is relevant, is discussed in the chapters on the UK and Greek procurement review systems. However, the case law of the Court on national enforcement of EC law is relevant and will be examined.

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[69] Under article 234 (ex 177), national courts, when in doubt as to the meaning of an EC provision (of primary or secondary law), which is relevant to a dispute pending before them, can refer a question on the interpretation of the rule to the Court, if they consider that "a decision on the question is necessary to enable [them] to give judgment" (article 234, para. 2). It is a system based on cooperation and division of competence between the Court and the national courts. The Court cannot give an interpretative ruling on its own initiative, it can only interpret EC law but not the relevant national laws and cannot examine the merits of the case. It rests with the national judge to refer a question, interpret the national laws and apply the ruling of the Court to the facts of the case. See Dingel, *Public Procurement. A Harmonization of the National Judicial Review of the Application of European Community Law* (1999), p.25.

[70] C-272/91R *Commission v Italy (Lottomatica)* [1992] E.C.R. I-4367.

[71] We have only examined the procurement case law on article 242 (ex 186), in order to examine the conditions of the grant of interim relief by the Court.

We will, first of all, briefly mention the special characteristics of the relevant legal context: national remedies for enforcing the EC rules form part of national procedural law, which is in principle reserved to the Member States and is only subject to minimal EC law control (in part 1). We will then give a brief overview of the case law of the Court of Justice on national enforcement of EC law. We will then discuss how the Community principles of non-discrimination and effectiveness may be applied and the extent of control on national remedies they may require (in part 2). We will then focus on the principle of effectiveness, as it can justify a tighter control of national review systems than other EC requirements, and discuss how it may interpreted and applied in this area (in part 3). The *Alcatel*[72] case, which refers to effectiveness in the field of procurement remedies, will be discussed in detail. Finally, the possible applications of the doctrines of direct and indirect effect and of state liability will be examined, mentioning again *Alcatel*, which refers to all three doctrines (in part 4).

1 The procedural autonomy of the Member States

The implementation, application and enforcement of EC rules are primarily entrusted to the Member States[73], according to the concept of indirect administration that transcends the Treaty[74]. The Member States have the obligation, stated in Article 10 (ex 5) EC, to

> "… take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action

[72] C-81/98 *Alcatel Austria AG and Others, Siemens AG Österreich, Sag-Schrack Anlagen Technik AG v. Bundesministerium für Wissenshaft und Verkehr,* [1999] E.C.R. I-7963.
[73] "Implementation" or "transposition" refers to the transposition of EC legislation, such as contained in a directive, into national law by either the adoption of special national measures to that effect or by reliance on existing national rules. "Application" refers to the actual use, in the Member States, of rules of EC origin, which are either the EC rules themselves or national implementing measures. We have examined the meaning of enforcement in footnote 1 of chapter 1.
[74] Temple Lang, "Community Constitutional Law: Article 5 EEC Treaty", (1990) 27 C.M.L.Rev. p.645.

taken by the institutions of the Community...They shall abstain from any measure which could jeopardise the attainment of the objectives of the Treaty."

Thus, under Article 10 (ex 5) EC, Member States are obliged to ensure the application of EC law (positive obligation) and refrain from doing anything that could jeopardise this application (negative obligation). These obligations constitute the so-called duty of "Community fidelity" and are binding on the legislative, executive and judicial branches of the Member States and on their central and decentralised authorities[75]. Member States are not required to change their institutional structure in order to implement, apply and enforce EC law, but may use their national channels and mechanisms, as these exist. This constitutes the so-called principle of institutional autonomy of the Member States.

We have seen in chapter 1 that decentralised enforcement of EC law is mainly realised through national remedies, brought before national review bodies by individuals wishing to enforce their EC rights. The choice of forum, form of remedies and procedure is left to the Member States. This procedural free choice is the expression of the principle of institutional autonomy at the procedural level; it is the so-called principle of procedural autonomy[76].

National procedural autonomy is restrained when there are harmonising EC rules. In procurement there exist such rules stemming, first, from the Remedies Directives and, secondly, from the general principles on national enforcement of EC law developed in the case law of the Court, which we will examine now.

The general principles apply equally to the two Remedies Directives and for this reason, in parts 2 and 3 of this section, where they are discussed, no distinction will be made between the two Directives, as it is unnecessary and confusing.

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[75] Prechal, *Directives…*, footnote 1 of chapter 1, p.72.
[76] For a detailed analysis of the principle see Fernández-Martín, *The EC..,. op. cit.* footnote 3 of chapter 1, pp.179-203.

2 The standards required of national enforcement procedures by the Court of Justice

National procedures to enforce all EC law (and not just procurement rules) are required to follow some standards laid down in the jurisprudence of the Court of Justice. These standards are often expressed in the form of legal principles. They were adopted to palliate the shortcomings of national procedures[77], through the control and condemnation of national insufficiencies[78]. They aim to ensure a minimum of effective judicial protection and of uniformity of application of EC law in all Member States[79] and avoid inequalities at the level of individual enjoyment of rights, political tension at Member State level and disruption at Community level. Their role is to limit the reach of national procedural autonomy[80] and to complement, shape and to a certain extent unify national procedures. If the principle of procedural autonomy applied in absolute terms, the Community would have no control at all on how EC rules are complied with and cases of lack of or of faulty application would subsist.

Generally, legal principles are for the most part deliberately left vague in order to maximise their applicability to different contexts. It is left to the judge to decide on their meaning and implications in each case. For that reason, it is not easy to define them clearly or predict whether they will be used and how they will be construed in a specific context[81]. The relevance of EC legal principles on national enforcement to procurement remedies, in particular, has rarely been dealt with by the Court of Justice, which adds to the difficulty of defining what they may entail here. What will be

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[77] See Fernández-Martín, *The EC.., op. cit.* footnote 3 of chapter 1, pp.181-183 and Prechal, *op. cit.* footnote 1 of chapter 1, p.149.

[78] These are due both to general structural problems and to the fact that EC objectives and rules are sometimes alien to some national legal orders, which are neither conscious of these objectives nor designed to ensure them.

[79] C-205-215/82 *Deutsches Milchkontor Gmbh & Others v. Germany* [1983] ECR 2633 at 2665. There exist different perceptions of law and approaches to enforcement in the Member States, due to the diversity of national legal traditions.

[80] It has even been suggested that where national courts apply Community law, they belong, functionally, to the Community legal order and therefore cannot be said to possess procedural autonomy, Kakouris, "Do Member States possess Judicial Procedural 'Autonomy'?", (1997) C.M.L.Rev. pp.1389-1412.

argued below on the application of the discussed legal principles and especially of the principle of effectiveness, which is the most vague, are mostly suggestions as to how each principle could be interpreted and as to what the judge (whether the Court of Justice or a national review body) might consider it to require. We note here that as long as the content of a principle, the existence of which has been recognised by the Court of Justice, is not defined as a matter of Community law, national judges may give their own interpretation of its implications.

According to the case law of the Court, national procedures for the enforcement of EC law are required to meet two cumulative minimum conditions[82]: their substantive and procedural conditions must not be "less favourable than those governing the same right of action on an internal matter"; also, these conditions must not render "virtually impossible" or "excessively difficult" the exercise of EC rights[83]. In this study, we will refer to the EC procedural requirements as the *Rewe/Comet* requirements, since they first appeared in these two cases. These requirements constitute accordingly the so-called principles of non-discrimination or equivalence (the "not less favourable" condition) and the principle of effectiveness[84] (the "not virtually impossible/excessively difficult" condition) as regards national enforcement of EC law.

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[81] Prechal, *op. cit.* footnote 1 of chapter 1, p.11 "... it may be asked whether…. the system -if there is any- has become unworkable for the national courts and entirely opaque for the individual".

[82] C-3/76 *Rewe v. Landwirtschaftskammer Saarland* [1976] E.C.R. 1989 and C-45/76 *Comet v. Produktschap voor Siegerwassen* [1976] E.C.R. 2043.

[83] The "not excessively difficult" condition was added by case C-199/82 *Administrazione delle Finanze dello Stato v San Giorgio* [1983] E.C.R 3595. The Court does not appear in most cases to distinguish between the two, see Prechal, *op. cit.* footnote 1 of chapter 1, p.152. There seems, however, to be a difference of degree, "excessively difficult" requiring a higher degree of ease of use of the remedies available. In its recent case C-261/95 *Palsimani v. INPS* [1997] E.C.R. I-4025 the Court referred to this gradation between the two conditions, stating that the procedural condition at issue "cannot be regarded as making it excessively difficult or, *a fortiori,* virtually impossible to lodge a claim…" [italics in the original].

[84] The Court also refers to "effective judicial protection", first in C-14/83 *Von Colson v Land Nordrhein Westfalen* [1984] ECR 1891 and more clearly in C-222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] E.C.R. 1651, [1986] 3 C.M.L.R. 240 and C-226/84 UNECTEF v. *Heylens* [1987] E.C.R. 4097; [1989] 1 C.M.L.R. 901. This appears to be used as a generic term encompassing various requirements that the principle of effectiveness lays on national procedural rules, covering a whole range of issues, such as access to the courts, rules of evidence, time limits and types of redress that

2.1 The principle of non-discrimination

The principle of non-discrimination or equivalence has several implications for national enforcement of EC law, which are the same in the context of procurement remedies as in the context of procedures to enforce other EC rules.

First of all, the principle requires that, where a remedy exists for the enforcement of a right under national law, it must be available for the enforcement of a similar right under EC law[85]. Access to remedies should be "no less favourable" for the purpose of enforcing EC rules than for the purpose of enforcing similar domestic rules; it is not possible to discriminate depending on the origin (stemming from Community or national law) of the dispute. While this appears to be a fairly straightforward requirement, it hinges on a test

of similarity, which is not always easy to apply. There may be doubts concerning what can be considered, for the purpose of applying the principle, a similar domestic rule or right, the enforcement of which the remedy seeks to ensure. It is especially difficult to identify correctly which rules are similar (and thus comparable) to each other, when there is no equivalent for an EC rule in the domestic legal order. In procurement, this is notably the case of Member States where there was no relevant domestic legislation, before the substantive procurement directives were implemented. Where, however, similarity appears to exist (at the discretion of the judge), the availability of the relevant remedy is required under the principle of non-discrimination.

Secondly, the principle also requires that, when there are specific remedies for the enforcement of EC rules, their conditions should be "no less favourable" than the conditions of similar remedies for the enforcement of domestic rules. This

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must be available, and seem to be applications of the *Rewe/Comet* rule. See however Prechal, *op. cit.* footnote 1 of chapter 1, p.160.

[85] "..[T]he remedies and forms of action available to ensure the observance of national law must be made available in the same way to ensure the observance of Community law", Craig and De Búrca, *EU Law. Texts, Cases and Materials,* (1998), p.215.

requirement is not devoid of problems of interpretation either. Besides the fact that, as was mentioned, it is not easy to compare remedies -and their conditions, it is not clear how intrusive EC control of national review systems under the principle can be and whether non-discrimination can be interpreted as requiring to compare similar remedies for enforcing EC and domestic rules and include in the former any elements of the latter which appear, after the comparison, to be more favourable.

In a recent series of decisions on preliminary references under article 234 (ex 177) concerning national time limits for actions based on rights derived from Community law, the Court examined how to assess the similarity of actions for infringement of EC law to actions for infringement of national law and what is required by the Member States for the purpose of complying with the principle of equivalence[86].

The Court stated that it is for the national judge to decide which domestic action can be used as a comparator and to find whether the procedural rules applying to it are less favourable than the rules applying to the action for the enforcement of the Community law claim[87]. It, however, spelt out the criteria on the basis of which the comparison of claims should be done, examining at the same time in detail the national laws at issue[88], as well as what is expected of the Member States, if the remedies enforcing EC rules are found to have less favourable conditions than those enforcing domestic rules.

The national court must, in order to establish the comparability of two actions, take, first of all, into account the objective of each action, as well as the essential characteristics of the domestic system of reference[89]. The purpose and cause of

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[86] C-261/95 *Palsimani v. INPS* [1997] E.C.R. I-4025; C-231/96 *Edilizia Industriale Siderurgica Srl (Edis)* [1998] E.C.R. I-4951; C-260/96 *SPAC SpA* [1998] E.C.R. I-4979, joined cases C-279/96, C-280/96 and C-281/96 *Ansaldo Energia SpA/Marine Insurance Consultants Srl/GMB Srl and Others* [1998] E.C.R. I-5025; joined cases C-10/97 to C-22/97 *IN.GO.CE.'90 Srl and Others* [1998] E.C.R. I-6288; C-228/96 *Aprile Srl* [1998] E.C.R. I-7164; C-326/96 *Levez* [1998] E.C.R. I-7835; C-343/96 *Dixelport Srl* [1999] E.C.R. I-600.

[87] For example, *Palsimani* para. 33 and *Levez* para. 39 *seq.*

[88] Advocate General Jacobs in his opinion in case C-62/93 *BP Supergas* [1995] E.C.R. I-1883 at 1904 had sustained that it is doubtful whether the Court, to interpret the principle of equivalence, should engage "in the difficult and somewhat artificial exercise of seeking a comparable claim under national law".

[89] *Palsimani,* paras. 34 and 39. In this case, the Court suggested (though it was left for the national court to decide) that some of domestic actions mentioned by the referring judge may be inappropriate

allegedly similar actions must be considered as well. If the actions are indeed found to be similar, the same procedural rules must apply to both without distinction[90]. To determine whether the procedural rules of actions to enforce EC law are less favourable than those governing similar domestic actions, "the national court must take into account the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the national courts…"[91].

The kind of actions that would be compared on the basis of the aforementioned criteria, for the purpose of complying with the principle of equivalence, are actions belonging roughly to the same area of law. The principle requires that Member States extend their most favourable procedural rules governing domestic actions to actions to enforce EC law, with respect to the same kind of dispute[92]. This means that Member States may differentiate between areas of the law and introduce different procedural requirements and limitations for different substantive subjects[93]. This would be a legitimate choice for the Member States. They only have the duty not to specifically target actions based on Community law[94] and not to apply different procedural rules depending on the origin (Community or national law) of the action with respect to the same kind of claims[95].

In short, the stringency of control placed on national procedures for the enforcement of EC rules under the principle of equivalence will depend on the degree of similarity or "comparability" of the remedies under discussion, which is ultimately decided by the national judge.

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comparators, since they had a different aim from the relevant action enforcing the right derived under EC law.

[90] *Levez* paras. 41-43.

[91] *Levez* paras. 44.

[92] For example, "with respect to the same kind of charges or dues", *Edis* paras. 36 and 37.

[93] Biondi "The European Court of Justice and Certain National Procedural Limitations: not Such a Tough Relatioship", (1999) 36 C.M.L.Rev., p. 1271 at 1274.

[94] *Dixelport,* para. 43.

[95] The duty of non-discrimination extends also to the diligence that national authorities show with regard to the enforcement of EC law: it must be the same as for the enforcement of domestic law, C-68/88 *Commission v. Greece* [1989] EC.R. 2965.

In the case of EC procurement, it has been suggested that the fact that there is a separate system of remedies for its enforcement based on the two Remedies Directives means that the principle of non-discrimination should not be construed to require judges and lawmakers to incorporate into these remedies the beneficial features of similar domestic actions. It only requires that all remedies (under domestic rules and under the Directive and its implementing measures) are made available to all bidders without distinction in disputes related to EC procurement[96].

It is submitted that domestic actions that have the same traits and operate in the same area of law, in particular actions for the enforcement of national procurement law, should be construed as comparable to the remedies introduced by the Directives for the purpose of applying the principle[97]. If domestic remedies are found to be in some aspects more favourable than remedies under the Directive, then these advantageous aspects of the former should be incorporated into the latter. Otherwise, the application of the principle of non-discrimination would be entirely and unjustifiably excluded and Member States would be, in theory, free to provide for remedies with conditions less favourable than those of similar national remedies, thus impairing uncontrolled the enforcement of EC law.

Suggestions concerning the precise implications of the principle of non-discrimination in the UK and Greek review systems will be made when examining each system.

2.2 The principle of effectiveness

[96] "The adoption of implementing measures in conformity with the Directive, in addition to respect of non-discrimination on grounds of nationality between litigants pursuing identical procedures, forestalls any spillover argument that Community litigants may select beneficial elements in existing national procedures and use them to adjust specific implementing measures which have been introduced in conformity with a Directive concerned to introduce harmonised remedies at national level." This is argued in relation to procurement remedies in the UK by Weatherill, "Enforcing the Public Procurement Rules in the United Kingdom" in Arrowsmith (ed.), *Remedies for Enforcing the Public Procurement Rules* (1993), p.303.

[97] It is left to the discretion of the judge to decide which remedies might be deemed to be comparable.

The principle which may be used to exercise a more stringent control of national procedures to enforce EC law and which is, therefore, the most limiting of national procedural autonomy, is the principle of effectiveness.

The Court has avoided giving a definition of the principle and has opted rather for a case by case approach, which allows for jurisprudential manoeuvres. The closer the Court has got to a definition was in the *Simmenthal* where it held that

> "every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals...any provision of a national legal system and any legislative, administrative or judicial practice which might impair the *effectiveness* of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules having *full force and effect* are incompatible with those requirements which are the very essence of Community law" [emphasis added][98].

The principle requires, in brief, that EC rules must be applied in such a way as to ensure their full force and effect. This implies that Member States should do all in their power at any level of their internal legal order in this direction and that stricter standards than the ones referring to the application of domestic rules have to be followed where national standards are not adequately high[99]. The Court has a long case law on minimum standards that national law must comply with[100].

The principle of effectiveness is very broad. It refers not only to enforcement but to all aspects of national "treatment" of EC rules, including implementation, application,

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[98] C-106/77 *Administrazione delle Finanze dello Stato v Simmenthal SpA* [1978] E.CR 629. The Court relied on the supremacy of the EC legal order to reach its conclusion.
[99] Fernández-Martín, *op.cit.* footnote 3 of chapter 1, p.94 *seq.*
[100] Mancusi, "La Longue Marche de la Cour de Justice vers une 'Protection Provisoire Européenne'", (1997) 9 European Review of Public Law (3), p.622. We will refer to the case law of the Court of Justice on several procedural matters when examining the measures implementing Directive 89/665 in the UK and Greece.

enforcement, pre- and post- litigation compliance and impact of EC rules[101]. Regarding enforcement, the principle has been relied on to require the existence of procedures to enforce EC law that are neither impossible nor unduly difficult to use**,** which are, that is to say, *effectively* available. These requirements cover only one aspect of the principle of effectiveness, its procedural aspect.

3 Effectiveness and procurement remedies

3.1 The significance of the Remedies Directives

There is a particularity concerning the application of the principle of effectiveness to procurement remedies. The aspect of the principle that *a priori* appears to be relevant is the procedural aspect (the "not impossible or unduly difficult" requirement regarding national procedural rules), since we are dealing with national procedures to enforce EC law. The subject matter seems to coincide with that under *Rewe/Comet.*

The particularity is that national remedies in this area are provided for in EC legislation, the two Remedies Directives. Therefore, the rules included in the Directives must, like all EC rules, be applied by the Member States in a way to ensure their full force and effect, according to the *Simmenthal* requirement. It is submitted that it is the general aspect of the principle of effectiveness (under *Simmenthal*) that is applicable here; national remedies in the field should be assessed in its light in order to see whether the full force of the provisions of the Remedies Directives is ensured and not in the light of the procedural *Rewe/Comet* effectiveness.

It is submitted that it is important to discuss which aspect of the principle of effectiveness (the procedural or the general one) is applicable here, because the

[101] Snyder, "The Effectiveness...", *op. cit.* footnote 26 of chapter 1, p.24: "Effectiveness may refer not only to compliance but also to implementation, enforcement and impact".

Simmenthal requirement of "full force and effect" can arguably be interpreted to justify a more stringent control of national procedural rules in the field than would be possible under the *Rewe/Comet* requirement of "not impossible or excessively difficult" procedures. This is because the *Rewe/Comet* requirement of effectiveness intervenes in an area which is in principle entirely national and intact by EC law, the area of national procedural rules. It is, accordingly, only a minimum requirement, as EC law cannot go very far in this field[102]. On the contrary, the requirements of the general principle are much more limiting of national autonomy. This is because they operate where there already exist EC rules, in areas which, therefore, belong to EC law (even though they might have been initially left outside its scope, as is the case with national remedies in procurement), where, consequently, EC intervention is more justified and typically stronger.

Assuming that the general principle applies here, we are faced with another problem. "Effectiveness" in itself does not mean much: it must be placed in a specific context and explained by reference to it. Its significance and implications differ according to the specific circumstances in which it is invoked. Here we are in presence of procedural rules which by definition exist to ensure the effect of other, substantive, rules; the effectiveness of the former is judged by reference to the effectiveness of the latter. Effectiveness here would mean that the EC provisions on remedies should be implemented and applied in a way to ensure the effectiveness of the substantive procurement rules they are adopted to enforce, by having sufficient power to achieve observance of these rules through the correction or prevention[103] of breaches.

We will discuss now what the principle of effectiveness -in its *Simmenthal* sense- might be interpreted to require as regards procurement remedies. One can only

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[102] The Court does not adopt an interventionist approach, when ruling on the effectiveness of national procedural rules, because of the political sensitivities involved, as procedural rules are considered specifically national in character: see the opinion of Advocate General Tesauro in joined cases C-46-48/93 *Brasserie du Pêcheur SA v. Germany* and *R. v. Secretary of State for Transport, ex p. 3Ltd (No. 4)* [1996] E.C.R. I-1029; [1996] 1 C.M.L.R. 889.

[103] "Real and effective judicial protection" should have a "real deterrent effect" against possible future breaches, C-14/83 *Von Colson v Land Nordrhein Westfalen* [1984] E.C.R. 1891.

speculate as to how the principle would be construed in this area, as the Court has not dealt with it, unless briefly in the *Alcatel* case, which will be examined in detail. We will discuss the aspects of effective judicial review in procurement and their implications, which can be taken into account by any court, national or the Court of Justice, that hears a procurement case.

3.2 The interests protected under the Remedies Directives

Related to the requirements of the principle of effectiveness as regards procurement remedies is the aim of the Remedies Directives[104]. Are remedies provided for the benefit of bidders to ensure that their rights are fully protected? Or are they aiming to ensure compliance with the substantive procurement rules and, therefore, focus on correction and prevention of breaches rather than on full protection of aggrieved firms? Of course, the two objectives, to a certain extent, co-exist: remedies in general serve both the purpose of enforcing the law and of protecting the rights of individuals harmed or risking to be harmed by breaches of the law. The question here is which is the primary aim of the Remedies Directives, the reason behind their design and adoption, that is, which objective was mainly intended to be served and should therefore probably be given special weight and which is ancillary or whether such a distinction can be made.

The relevance of the intention of the Remedies Directives to the principle of effectiveness lies in the level of protection that this principle can be construed to expect of each remedy, under a teleological interpretation of its requirements. These requirements can vary. If the objective of the remedies is primarily to uphold the EC procurement policy, less stress will be put on the effectiveness of the remedy of damages, an instrument mainly aimed at protecting the individuals, (so some limitation of compensation could be, for example, allowed), and more on the access to

and grant of interim measures and set-asides, both of which are designed to prevent breaches or re-establish the legality that has been violated by a breach. The protection of individuals as a priority aim on the other hand would mean that the effectiveness of the redress available should be judged from this point of view and would probably require a generous calculation of damages and not very stringent procedural rules concerning this remedy.

The two objectives are linked: if redress is sufficiently generous to motivate firms to take action, the risk of facing increased litigation will arguably put pressure on the contracting authorities and deter them from infringing the rules[105], while the reduction of infringements because of the deterring power of the enforcement regime means that enjoyment of the firms' rights is ensured.

There seems to be no doubt that the objective of upholding the substantive procurement rules is there[106]. The Remedies Directives refer to it throughout their preamble. It also transpires from their provisions that grant a role (albeit minimal) to the Commission[107], which acts, as always, in the Community interest. There seems, however, to be no certain answer on the existence of an intention to protect individual rights as well, though, as we will argue in section 2, it appears to be taken into account, in particular in the rules on standing and damages. We have seen that the Court refers to individual interests in its cases on interim measures sought by the Commission under Article 242 (ex 186) EC and they seem to carry weight in its decisions.

The protection of individuals as an aim of the provision for procurement remedies is not clarified as a matter of EC law. It is submitted, however, that since Member States have the duty to provide a review system with full force and effect, both interests

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[104] Arrowsmith, "Enforcing the Public…" *op. cit.* footnote 16 of chapter 2, p.49
[105] This is examined in the empirical study.
[106] S. Arrowsmith, "Enforcing the Public…" *op. cit.* footnote 16 of chapter 2, p.49.
[107] Article 3 of the Remedies Directive and Article 8 of the Utilities Remedies Directive on the corrective mechanism, examined in chapter 2.

should be taken into account to maximise the effect of all remedies, whether preventive, corrective or compensatory and that no distinction should be attempted between them.

3.3 Effectiveness in practice: its implications on a review system as a whole

The principal quality of any remedies system that seeks to be effective is to be functional: well designed and clear in text and capable of offering protection in an accessible, uncomplicated, inexpensive and speedy manner in practice[108]. Procedural inconveniences could render the system unusable and they should therefore be minimised. These qualities should also be found in public procurement review procedures.

Each procurement remedy should be individually effective in order for the principle of effectiveness to be complied with. The principle would, in this respect, apply to several aspects of each and every remedy, concerning, for example, standing, time limits, evidential rules, burden of proof, the quantum of damages and more. The requirements of the principle concerning each remedy separately will not be discussed here, but in section 2 on the Remedies Directive and, in more detail, when we look at the UK and Greek review systems, in chapters 5 and 6 respectively.

In addition to the requirement for each remedy to be separately effective, the principle of effectiveness could also arguably be construed to impose requirements concerning the effectiveness of a national procurement review system as a whole.

3.3.1 Interdependence of the remedies

[108] Craig and de Búrca, *op. cit.* footnote 17, p.235.

The principle of effectiveness could be construed to concern the articulation of the remedies and to the possibility of one complementing the other[109]. Under this view, the principle of effectiveness could require one remedy to cover for the deficiencies of another and ensure, thus, that the system as a whole functions effectively. For example, if the award of damages is very difficult, for reasons such as a very stringent burden of proof or the impossibility of recovering lost profits (these are very common problems of compensation law of the Member States[110]), then under our interpretation of effectiveness, interim relief should be more easily granted in order to "make amends" for the difficulty of being compensated (and eventually preventing, at the same time, the creation of situations for which compensation is necessary).

Naturally this "complementing" function of the remedies is relevant only when it leads to the improvement of the system: it could not be sustained, for example, that because interim relief is easy to obtain, damages could be limited. All remedies should be effective individually always. This interpretation of the principle of effectiveness as applicable to a remedies system in its entirety serves precisely to correct situations where each remedy is not individually effective. If each remedy has no defects, then there is no need to have recourse to such an application of the principle.

3.3.2 Structural deficiencies

The principle of effectiveness could conceivably also be applied to the function of a review system in practice and more precisely to its structural traits. It is possible that, even when Member States implement the Remedies Directives in a way that satisfies the requirements of the principle of effectiveness, there may exist serious problems concerning the organisation and operation of the review system, which hinder or

[109] Arrowsmith, "Enforcing the Public…" *op. cit.* footnote 16 of chapter 2, p.66.
[110] Advisory Committee for Public Procurement, *op. cit.* footnote 34 of chapter 2.

altogether block its function and thus render it ineffective. Such problems would include, for example, the absence of suitably trained judges, the caseload of the courts and the resulting delays, and the cost of proceedings. These are not legal but practical issues. They are normally the same for the whole judicial system of a country and do not appear just in relation to a specific area of law like procurement.

These practical difficulties could possibly serve as arguments to substantiate a claim that the principle of effectiveness has been violated.

It is, however, doubtful whether this would be a valid interpretation of the principle of effectiveness and whether a national review system could be challenged on that basis. Structural deficiencies and problems due to endogenous factors like the overload of the courts are limits to effectiveness which result from non-legal causes and it would be unreasonable to extend the principle to cover them and require their solution[111]. The principle of effectiveness does require that stricter standards than the ones used for the application of national law are sometimes necessary for the correct application of EC law, but structural reform seems to be too radical a demand to be implied in it[112]. It would certainly be very difficult for the Court (or a national judge in a case brought before him by a bidder) to condemn in a comprehensive way practical deficiencies of a remedies system and it is unlikely that the Commission opens an infringement procedure against a Member State on this basis[113].

3.3.3 The need for speed

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[111] Fernández-Martín, *The EC.., op.cit.* footnote 3 of chapter 1, p.199. See, however, Arrowsmith "The Community's legal framework on Public Procurement: the way forward at last?" 1999, 38 C.M.L.Rev. 13, where the author remarks that "[t]he Green Paper and the Communication provided an opportunity to make a clear commitment to a policy of action against the Member States which lack a truly effective system, but this is an opportunity missed: neither document gives any real attention to the problem" and argues that the Commission should consider this problem.

[112] Snyder, "The Effectiveness.." *op.cit.* footnote 26 of chapter 1, p.53: "…when used as a tool to achieve major institutional changes, such as the harmonisation of national remedies, the increasingly broad interpretation of the principle of Article 5 may have reached its limits. Its further extension may jeopardise the legitimacy of the Court of Justice…".

[113] Pachnou, "Enforcement of the E.C. Procurement Rules: The Standards Required of National Review Systems under E.C. Law in the Context of the Principle of Effectiveness", (2000) 9 P.P.L.R., p.55.

There is one aspect of the operation of remedies, which is of paramount importance in procurement and is a necessary condition of any review system in the area that seeks to be effective: the need to ensure speedy proceedings[114].

The reason why speed is vital has to do with the inherent characteristics of procurement award procedures: irreversible situations are very easily created, as soon as, in fact, the contract is concluded. This is because, first of all, in most Member States, concluded contracts cannot be set aside[115]. We will see that, in such cases, harmed bidders may only seek compensation, which not only is a second best substitute to satisfaction *in specie*, but often involves, as we will see in the following chapters, many problems of calculation and proof. Secondly, even when the law allows contracts to be set aside, work by the successful firm often starts soon or immediately after conclusion. If national review proceedings are not speedy, by the time a final court decision is reached, the work will have progressed substantially or even be completed, thus making it *de facto* impossible to reverse the created situation and correct the breach and limiting again remedies to damages. If review is not quick, many firms will probably not even be interested in bringing an action[116].

Speed of review is also important for its effectiveness, because of the influence it may have on the competent judge's decision, especially when he considers whether to suspend an award procedure. The judge will arguably feel more comfortable to suspend a procedure, if he knows that a final decision will be reached promptly and thus the suspension will not harm the public interest or the interests of the other bidders, by holding up the completion of the award procedure for a long time[117].

Another reason that speed is important as regards the effectiveness of a review system is the fact that contracting authorities might be overcautious in applying the procurement rules or eager to reach an out-of-court agreement, even when the

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[114] Arrowsmith/Linarelli/Wallace, *Regulating.., op. cit.* footnote 8 of chapter 2, p.773.
[115] Advisory Committee for Public Procurement, *op. cit.* footnote 34 of chapter 2.
[116] The soundness of this statement and its implications will be examined in the empirical study.
[117] Arrowsmith/Linarelli/Wallace, *Regulating.., op. cit.* footnote 8 of chapter 2, p.773.

infringement is not clear, rather than face a long delay[118]. The objective of the Remedies Directives is to ensure the enforcement of the EC procurement law, not to induce the authorities to act in a less efficient or a "court-averse" way. An out-of-court settlement based on an uncertain breach does not ensure enforcement; it is a practical answer to a procedural anomaly, delay, but it is an unorthodox way of using (or rather avoiding to use) the available remedies.

The importance of speed is stressed in articles 1(1) of both Directives, which state that "decisions taken by the contracting authorities [entities in the Utilities Remedies Directive] may be reviewed effectively and, in particular, as rapidly as possible...". This statement shows that the Community legislator is aware of the importance of speed of review. However, the Directives do not lay down any specific procedural rules in that respect or time limits. It would be difficult, and possibly outside the Community's competence, to agree on such detailed rules at supranational level, though their existence would certainly help, especially considering that not all national review systems are speedy and some are, in fact, very slow[119]. It is then left to the case law of the Court and the development of the principle of effectiveness therein to give the guidelines on what constitutes a satisfactory degree of speed. *Alcatel* refers to speed but does not offer any specific guidelines.

It is submitted that national procedural rules should be adopted to ensure that proceedings in procurement are quick, for example, by laying down maximum deadlines within which judges must decide. Furthermore, competent judges should try to ensure speed in practice, for example, by giving priority to hearing procurement cases. It is also submitted that effectiveness of the review system, in the sense of its speed, implies that special importance needs to be attached to interim relief and that its conditions should be made relatively easy, as it is the only remedy that can intervene

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[118] *ibid.* p.771. This will be investigated in the empirical research.
[119] Advisory Committee for Public Procurement, *op. cit.,* footnote 34 of chapter 2, p.17. We will see that this is sometimes the case in Greece.

quickly in award procedures and provide a temporary standstill, thus preventing the creation of irreversible situations.

3.4 Effectiveness as regards the implementation of the Remedies Directives: does effectiveness require detailed national rules?

Effectiveness is one of the two principles that are central to the case law of the Court concerning the implementation of EC directives[120]. The other one is legal certainty, which requires that implementing provisions be specific and clear[121]. Especially where directives create rights for individuals, implementing measures should be formulated in an unequivocal manner enabling the persons or entities concerned to have a clear and precise understanding of their rights and obligations[122] and, "where appropriate, to rely on them before national courts"[123].

Legal certainty is intertwined with effectiveness: clarity, precision and specificity are essential conditions of effectiveness. However, effectiveness goes further than certainty. One can imagine national rules on remedies, which grant ascertainable rights to individuals and allow any interested parties to rely on them before the courts without needing any further elucidation. The same rules may, however, not be effective, because of procedural omissions that impair their function. The requirements stemming from the principle of effectiveness encompass legal certainty but exceed it.

Member States, when implementing the Remedies Directives, should ensure their full effect[124]. What effectiveness may be construed to require in relation to specific

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[120] Prechal, *Directives.., op. cit.* footnote 1 of chapter 1, p.90.
[121] C-131/88 *Commission v. Germany* [1991] E.C.R. I-825.
[122] C-119/89 *Commission v Spain* [1991] E.C.R. 642.
[123] C-29/84 *Commission v. Germany* [1985] E.C.R. 1661, reiterated in later cases. It was repeated by the Court in C-235/95 *Commission v. Greece* [1995] E.C.R. I-4459, which is discussed at more length in chapter 6 on the Greek review system.
[124] Member States must implement directives to ensure that they are "fully effective, in accordance with the objective which [they pursue]": C-14/83 *Von Colson v Land Nordrhein Westfalen* [1984] E.C.R. 1891.

procedural rules adopted in implementation of the Directives will be examined for each remedy in section 2 and, in the context of the UK and Greek review systems, in chapters 5 and 6, respectively. What we will examine here is the level of specificity of the national implementing measures that effectiveness may be interpreted to require.

For the purpose of discussing the question of specificity in implementation, let us imagine a situation where there are no discrepancies between the Remedies Directives and the national implementing measures[125] or the national pre-existing review system, where Member States decide to rely on that. The question is whether lack of discrepancies means that the implementation of the Directives is adequate from the point of view of effectiveness.

The text of the Directives is laconic. Neither Directive includes any rules on the conditions to be fulfilled for relief to be granted. This is because, in general, directives are frameworks rather than detailed legal texts. It is for the Member States and not for the Community legislator to provide for the procedures necessary to achieve the objectives of directives. Besides, the adoption of detailed procedural rules at supranational level would involve a loss of national procedural autonomy, which is a domain still left, to a large extent, intact from the intervention of EC law, due to the general unwillingness of the Member States to relinquish such powers. A more intense intervention on the part of the Community would not be easily accepted politically.

This does not, however, mean that the Member States should be as brief as the Community legislator. It is submitted that national implementing measures should, in the case of procurement remedies at least, be more detailed than the Directives. A translation of the Directives would not, in this sense, be a correct implementation. The particular needs of enforcement in procurement should be considered, especially as far as speed is concerned. An omission of addressing these needs and ensuring that

they are met in the implementing measures disregards the obligation of the Member States to provide for effective remedies and does not constitute an adequate implementation in this respect.

Detailed rules are also necessary to motivate bidders to participate in enforcement by using the available remedies. In order to encourage recourse to remedies, there must be rules clarifying what can be expected to be achieved under each remedy, thus enabling bidders to decide whether the identifiable outcome at trial is worth bringing an action[126]. Effectiveness then requires implementing rules to be sufficiently specific for firms to know what the conditions for the award of interim and final relief are; they must also know how damages are calculated and what they can expect to recover under this remedy.

Detailed implementation is also important so that a certain degree of effectiveness of the remedies is ensured and is not left entirely to the discretion of the judge. National legislation containing only very basic rules on remedies and leaving the regulation of the details to the review bodies may be, in some cases, unable to ensure the full effect of the provisions of the Remedies Directives.

For all the above reasons, it is submitted that the principle of effectiveness entails the obligation for the Member States to adopt precise and detailed implementing provisions. This conclusion is not influenced by the possibility that national review bodies may develop an elaborate case law to cover the defects or gaps of the national rules. The fact that there is case law filling the gaps of implementing measures or correcting their eventual incompatibilities with EC law does not release Member States from their obligation of correct implementation[127].

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[125] Implementing measures, where they are taken, often consist in a translation of the Remedies Directives without any added procedural rules, Advisory Committee for Public Procurement, *op. cit.* footnote 34 of chapter 2.
[126] This is examined in the empirical study.
[127] See the opinion of the Advocate General in C-412/85 *Commission v. Germany* [1987] E.C.R. 3503.

3.5 Effectiveness of public procurement remedies in the case law of the Court: the Alcatel *case and the challenge of the award decision*

Alcatel is the only case which refers *expressis verbis* to effectiveness regarding national procurement remedies and we will discuss it in detail, to see how the principle can be construed in this field.

The Court of Justice was requested by the Austrian Bundesvergabeamt (the Austrian Federal Procurement Office, competent for hearing applications for set aside and interim measures) to give a preliminary ruling on several questions concerning the interpretation of the public sector Remedies Directive. The first preliminary question was whether Member States are obliged, under the Directive, to provide for the remedies of set aside and interim measures against the award decision, notwithstanding the possibility provided for in article 2(6) of the Directive of limiting the available remedies to a damages action only, after a contract is concluded.

The Court in *Alcatel* used effectiveness as one of the arguments for reaching its decision. The principle and its implications were not analysed in detail and possibly the Court would not have based a judgment only on it, if it did not have more arguments to support its finding[128]. However, the judgment showcases an application of effectiveness in procurement remedies.

The Court ruled that the Remedies Directive should be interpreted to mean that the Member States are required to provide for the availability of the remedies of set aside and interim relief against the award decision, notwithstanding their discretion to provide for the irreversibility of concluded contracts. One of the arguments that the Court used to reach its decision was that Directive 89/665 seeks to reinforce the effective and speedy enforcement of the substantive EC procurement rules, in

[128] The Court in points 31, 32, 35 and 37 of the judgment used more arguments to back its decision, based mainly on a textual interpretation of the Directive.

particular at a stage where infringements can still be rectified[129] (points 33 and 34 of the judgment). The Court stated that the award decision is the most important decision leading to the conclusion of the contract and to remove it from the purview of the remedies of interim measures and set aside would undermine the Directive's objective to provide for effective and rapid remedies (point 38 of the judgment).

The Court was silent on the way Member States should fulfil this obligation. The question of whether there should be a delay between the award and conclusion of the contract and whether that delay should be of reasonable length was not examined. Rather, the Court avoided the question of delay by stating that it was irrelevant for the purpose of deciding on the obligation to provide for the review of the award decision (point 40 of the judgment).

It may be that the Court, having given a ruling on the essence of the question and having thereby obliged the Member States to ensure that the challenge of the award decision is possible, preferred to avoid becoming involved in the technicalities of how this ruling should be applied in practice. The judgment defines the result, but not the means, expected by the Member States and constitutes a precedent for the benefit of firms wishing to challenge an award decision.

Probably the Court appreciated that this was as far as it could or should intervene in the area national procedural rules, to avoid interfering with national particularities and prerogatives and causing Member States to react. One could imagine that, if Community involvement in the area increases and becomes more accepted, the Court might come up with more specific requirements concerning the delay between the award and the conclusion of the contract in a future judgment.

Independently, however, of whether it may be politically wise on the part of the Court to limit its involvement, the judgment is disappointing, as it does not provide clear guidelines for the benefit of anyone involved in a similar case -firms, judges and

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[129] C-433/93 *Commission v. Germany* [1995] E.C.R. I-2303, para. 23, where the same argument was used.

legislators who have to decide whether and how national law needs to be amended to be made compatible with the judgment[130]. The way of ensuring the availability of the remedies of set aside and interim measures against the award decision and the question of delay between the award decision and the conclusion of the contract remains uncertain as a matter of EC law and depends on how the judgment will be interpreted in each Member State.

The matter seems to require further clarification, eventually, as was mentioned, by a future judgement. It is unfortunate however that the Court, when it had the opportunity to settle the issue, chose not to do so and dealt with it partially instead.

4 Direct and indirect effect of directives and state liability: their applicability in relation to procurement remedies

Apart from the examined principles of non-discrimination and effectiveness, the Court, in order to limit national procedural autonomy and ensure effective national enforcement of EC law, has elaborated a series of interconnected techniques, with which national lawmakers and, above all, national judges must comply[131].

The Court first developed the doctrine of direct effect, according to which EC rules with certain characteristics may be invoked directly before the national review bodies, continued with the doctrine of indirect effect or consistent interpretation, according to which national legislation should be interpreted and applied in conformity with EC law, and finally produced the doctrine of state liability, according to which Member States are liable for their conduct that harms individual rights constituted under EC

[130] See, in chapter 5, the initiative of the UK Office of Government Commerce regarding amendment of the law to bring it into line with *Alcatel*.

[131] The link that unites the jurisprudence of the Court in the matter is the principle of effectiveness, based on a far reaching interpretation of Article 10 (ex 5) EC: "The imperative of Article 5, whereby all "obligations arising out of this Treaty' must be fulfilled, has been utilised to develop ... techniques to ensure the effectiveness of Community law in the national legal systems", Szyszczak, "Making Europe More Relevant To Its Citizens: Effective Judicial process", (1996) 21 European Law Review, p.356.

law. These doctrines constitute a very radical line of jurisprudence, which earned the Court its reputation for being an activist court[132].

This case law was developed mostly on the basis of lack of or faulty transposition of directives. Directives need to be completed by national implementing rules, according to Article 249 (ex 189) EC. Since Member State action is a condition for their application, there is an increased need, first of all, to ensure that Member State inertia or bad faith will not prevent the full application of the EC rules and, secondly, to harmonise national discrepancies, which may result from the discretion that Member States enjoy in transposing directives. However, though the doctrines of direct effect, indirect effect and state liability, when their conditions are fulfilled, provide solutions to cases of incorrect transposition of EC law[133], they do not exonerate Member States from their obligation of implementation.

In relation to procurement remedies, the doctrines of direct and indirect effect and of state liability could be useful in cases where the Remedies Directives have not been implemented correctly. There have been a few relevant cases brought before the Court of Justice.

In the following paragraphs, we will discuss the application of the doctrines to procurement remedies. Each doctrine will be examined separately; first, we will give first a very brief overview of what it entails in general and then we will discuss how it could be interpreted and applied to procurement remedies. Special mention will be made in each case to the *Alcatel* case, which refers to them. There will be no distinction made between the two Directives, unless where expressly mentioned

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[132] "At its most extreme the term activist is used to indicate judicial law-making which has no foundation in, and which may even run counter to, the existing textual or case-law authorities", Craufurd Smith, "Remedies.." *op. cit.* footnote 11 of chapter 2, p.287.

[133] C-334/92 *Teodoro Wagner Miret* [1993] ECR I-6911 explains very well the line of "pathological" effects of the lack or faulty implementation of the directives. First, the national judge dealing with a relevant case should examine whether the provisions at issue are directly effective and thus invocable. If direct effect is not found, then the judge should try to interpret national rules to make it compatible the directive. Finally, if such interpretation is not possible, the state is liable for any harm caused to rights constituted under the directive.

otherwise, as their provisions are, to a large extent, similar and in principle the doctrines apply in the same way to both.

4.1 Direct effect

4.1.1 The doctrine

The Court has held that, in order to give full effect to EC law, the enforcement of clear, precise and unconditional EC rules may be requested before the national courts by individuals standing to benefit under these rules[134]. Rules presenting these characteristics are deemed to be "directly effective" and are actionable even in the absence of national implementing measures.

The Court has recognised the direct effect of clear, precise and unconditional provisions of non- or incorrectly implemented directives[135]. The Court arrives at its conclusion in each case after examining the nature, background and wording of the provision in question. The case law on the subject is long and will not be discussed here. The provisions of directives that are found to meet the requirements of direct effect may be invoked by individuals only against the state or an emanation of the state[136], but not against another individual[137].

4.1.2 Application to procurement remedies

[134] The principle of direct effect was first enunciated in the landmark case of EC law C-26/62 *Van Gend en Loos v Nederlanse Administratie der Belastinden* [1963] ECR 1.
[135] C-41/74 *Van Duyn* [1974] ECR 1337 was the first case in an extensive case law to this effect.
[136] The Court, for the purposes of examining the direct invocability of a directive, follows a functional definition of the notion of state, based on the functions performed by a public authority (if it provides a service under state control and enjoys specials powers, it is included in the notion of state) rather than on its formal categorisation. It was first adopted in C-247/89 *Foster v British Gas* [1990] ECR I-3313 and there is a long case law on it.
[137] The Court does not recognise the direct effect of directives in horizontal disputes between two individuals, C-91/92 *Paola Faccini Dori* [1994] ECR I-3325.

The pertinent question here is whether (some of) the provisions of the Remedies Directives can be considered to be directly effective and thus able to be relied on by bidders in procurement disputes before national review bodies, in cases where the Directives have been transposed incorrectly or not at all. Direct invocation would be possible in such disputes, as they oppose bidders and contracting authorities, the definition of which, under the substantive public sector directives at least, seems to fit within the definition of the notion of state in the direct effect jurisprudence of the Court[138].

However, the provisions of the Directives do not seem *a priori* to have direct effect[139]. The Directives leave to the Member States a wide margin of discretion in the design of the review system, on issues such as forum, procedure, time limits and effects of decisions, as well as on matters such as the irreversibility of concluded contracts, the availability of interim measures when the public interest is at stake and, in the case of the Utilities Remedies Directive, the provision for financial penalties instead of interim measures and set asides. The question is whether national discretion prevents the provisions of the Directives from having direct effect. It is submitted that it does, as it means that the extent of individual rights under the Directives are conditional on action on the part of the Member States. Therefore, one of the conditions of direct effect, the unconditional character of the relevant provision, is missing[140].

The Court has briefly dealt with the matter in the context of public sector remedies. First of all, as far as the appointment of the competent court is concerned, it has been held in a series of cases[141] that, the fact that the Member States have discretion in this respect, prevents Directive 89/665 from being directly effective. The Court has

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[138] Arrowsmith, *The Law…, op. cit.* footnote 3 of chapter 1, p.902.

[139] See however Bedford, "The EC Public Procurement Regime: the Remedies Directive" in Tyrell and Bedford (eds.), *Public procurement in Europe: Enforcement and Remedies* (1997) p.3.

[140] It is suggested that articles 1(2) of both Directives on the duty of non-discrimination between undertakings claiming injury and articles 1(3)of both Directives on standing are sufficiently clear and unconditional to be directly effective, Clerc, *L'ouverture…*, *op. cit.* footnote 20 of chapter 2, p.102.

repeated each time that "it is for the legal system of the Member States to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law...it is the Member States' responsibility to ensure that those rights are effectively protected in each case. Subject to that reservation, it is not for the Court to involve itself in the resolution of questions of jurisdiction..."[142]. Thus, the Court may not take the place of the Member State and indicate which court should be competent to hear procurement disputes, as this would encroach on the domain of the national legislature[143].

The issue of the direct effect of Directive 89/665 was brought up in the preliminary question sent to the Court in the *Alcatel* case. The Court was asked whether, if Member States are obliged under the Directive to provide for the possibility to challenge the award decision and national law does not provide for it, articles 2(1)(a) and (b) of the Directive (which refer to the obligation of the Member States to provide for the remedies of interim relief and of set aside of unlawful decisions taken in the course of contract awards) could be held to be directly effective, so that a harmed contractor could challenge the award decision before the competent national review body, on their basis only, even in the absence of national implementing measures.

We have seen that the obligation to provide for the challenge of the award decision was upheld. Regarding direct effect, the Court stated that the relevant provisions could not "be interpreted to the effect that, even where there is no award decision which may be the subject of an application to have it set aside, the bodies in the Member States...may hear applications under conditions laid down in that provision" [144].

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[141] C-54/96 *Dorsch Consult* [1997] ECR I-4961; C-76/97 *Tögel* [1998] ECR I-5357; C-111/97 *EvoBus Austria* [1997] ECR I-541; C-258/97 *HI*, [1999] ECR I-1405.
[142] First stated in *Dorsch Consult*, point 40 of the judgment.
[143] Advocate General Tesauro (point 48 of the opinion) in *Dorsch Consult*.
[144] Advocate General Mischo had maintained (points 84-95 of the opinion) that the provisions in question granted rights to individuals and were sufficiently clear and should be recognised as directly effective in Member States that have decided on the review body, as their discretion in the matter has been exhausted and can no longer prevent the recognition of direct effect.

It appears that the Court thereby rules out the existence of direct effect of the provisions at issue, as it does not accept that review against the award decision can be sought before the national courts on the basis of the Directive's provisions only.

However, the decision is not clear. The term "direct effect" is not mentioned once in the whole judgment. The Court refrained from denying explicitly its existence. Neither did it articulate the reasons for arriving at its decision. This is unfortunate because it leaves doubts as to the Court's position and reduces the value of the judgment as a precedent, independently of whether the provisions in question indeed lack direct effect. In fact, the Court's conclusion was even inaccurate on the facts. The Court stated that in Austria there was no "award decision which may be the subject of an application to have it set aside" and ruled that, therefore, "in such circumstances, ...it is doubtful whether the national court is in a position to give effect to the right of individuals to obtain review...". Nevertheless, according to the facts of the case, there was such a decision, only it was not open to review, since in practice it was not known before the conclusion of the contract. In Austria, the contractual relationship between the authority and the tenderer comes into being when the tenderer receives notification of the acceptance of his offer by the authority. The award decision is made before it is notified and thus precedes, in reality, the conclusion of the contract. Its immunity from challenges is due to the fact that other bidders are only informed of it after the contract is concluded and rendered, under Austrian law, irreversible.

The Court possibly considered that the problem in the case could be solved through interpreting Austrian law so as to make it compatible with EC law[145] and may have chosen not to adopt the more radical (and controversial) solution of recognising the direct effect of the Directive in a case where the problem could be solved through

[145] The Advocate General had suggested (points 96-98 of the opinion) that consistent interpretation could, indeed, solve the problem and render it superfluous to examine the question of direct effect. However, normally the examination of direct effect precedes that of indirect effect, see C-334/92 *Teodoro Wagner Miret* [1993] ECR I-6911.

another approach. If the reasons for the judgment were legal and not policy ones, it would be hard to explain why the Court refrained from stating them.

Whatever the reason for refusing the direct effect of the provisions at issue, the decision does not satisfy the need to have clear Court of Justice precedents and avoid speculations on the Court's position. It is regrettable that the Court did not settle the issue of direct effect clearly, when it had the opportunity.

4.2 Indirect effect

4.2.1 The doctrine

The doctrine of direct effect of EC rules was followed by that of their indirect effect (or consistent interpretation or interpretative obligation).

Indirect effect is another technique referring to national enforcement of EC law, which was developed to fill the gaps of the doctrine of direct effect and ensure the application of a non implemented Community rule that either does not satisfy the test of direct effect or concerns a "horizontal" dispute between two individuals, where Treaty articles may be invoked[146] but non implemented provisions of directives, even if otherwise fulfilling the conditions of direct effect, may not.

The relevant case law of the Court was mostly developed to deal with cases of incorrectly implemented directives. The Court has held that, national courts, when such directives have a bearing on a case before them, must interpret relevant national rules, whether adopted before or after the directive, as far as possible in the light of the wording and the purpose of the directive so as to achieve the effect that this had in view[147]. The competent court must apply the national solution that seems to conform

[146] The horizontal direct effect of Treaty articles is possible. For example, article 141 (ex 119) was found to be directly effective between individuals in C-43/75 *Defrenne v. Sabena* [1976] E.C.R 455, [1976] 2 C.M.L.R. 98.

[147] The first case where this was stated is C-14/83 *Von Colson v Land Nordrhein Westfalen* [1984] E.C.R. 1891; [1986] 2 C.M.L.R. 230. There is extensive case law on the matter.

more with the directive and disregard any national rule that seems to contravene it "in so far as it is given discretion to do so under national law"[148] and subject to the EC principles of legal certainty and non retroactivity[149].

However, the national courts may sometimes be unable to interpret national provisions in a way that conforms to the directive. The prevalent view is that the national court cannot go as far as disregard an express national provision contravening the directive in question[150]: the interpretation cannot be *contra legem*[151]. Also, for the interpretative obligation to be operable there must be some national legislation falling within the ambit of the directive: if there is none, the problem cannot be solved by judicial interpretation, because there is nothing to interpret. The duty of consistent interpretation does not go as far as to oblige or allow judges to invent new national rules.

4.2.2 Application to procurement remedies

The concept of indirect effect would be useful if the Remedies Directives were not considered to have direct effect. It could ensure that, in cases where they have not been implemented correctly and there are discrepancies between their provisions and the national provisions, the latter are adjusted to conform to the former as far as possible. Naturally, interpretation can function, as was mentioned, first of all, only where there is a national rule to interpret and, secondly, only where there is no national rule to forbid the interpretation which appears to be compatible with EC law (whereas direct effect can function in the absence of any national measure or against existing contrary ones).

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[148] In *Von Colson;* see also C-106/89 *Marleasing v La Comercial de Alimentación* [1990] E.C.R. I-4135; [1992] 1 C.M.L.R. 305.
[149] C-80/86 *Kolpinghuis Nijmegen* [1987] E.C.R. 3969; [1989] 2 C.M.L.R. 18.
[150] This would be contrary to the principle of legal certainty, which is, as was mentioned, one of the limits of indirect effect.
[151] Szyszczak *op. cit.* footnote 53, p.359; also opinion of Advocate General Van Gerven in C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] E.C.R I-1889; [1990] 2 C.M.L.R. 513.

The Directives leave, as we have seen, most procedural arrangements to the discretion of the Member States. This reduces the possible indirect effect of their provisions, as they are not always sufficiently concrete so as to provide the national judge, called on to interpret national law in accordance to them, with clear guidance as to what they require.

Where, however, a provision of the Directive has been interpreted by the Court, this interpretation defines the content of the rule as a matter of EC law and it is compulsory for the Member States. Therefore, national judges should exercise their interpretative obligation as regards this rule in the light of the interpretation given by the Court.

The decision in *Alcatel* is an example of this. With respect to the question of the challenge of the award decision, *Alcatel* is now the authority, on the basis of which national courts should approach national law. The Court ruled that the purpose of the Directive was to ensure that all contracting decisions could be reviewed and that the possibility to challenge the award decision must always be available to bidders. National judges are required, as far as they are able to, to give effect to the judgment (more precisely, to EC law as interpreted by the judgment), by interpreting national law to ensure that the challenge of award decisions is possible[152].

4.3 State liability

4.3.1 The doctrine

[152] The Advocate General had suggested in *Alcatel* that it is possible to interpret Austrian law to require that authorities allow for a cooling-off period between the award and the conclusion of the contract. However, there appears to be no provision in Austria that can be construed to require contracting authorities to inform unsuccessful bidders of their award decisions and, furthermore, there are no sanctions, in the event that authorities fail to conform with their obligations under EC law. Hence, here indirect effect does not appear to be capable of achieving the result sought by the Court, which would be ensured only by legislative action, see Dischendorfer and Oehler "Case C-81/98: The Ability to Challenge the Contract Award Decision" (2000) 9 P.P.L.R. p.CS58 and Gutknecht "The Judgment of the Court of Justice in C-81/98, *Alcatel Austria AG et. al. v. Federal Ministry for Science and Transport* –"Ökopoints" and the Consequences for Austrian Procurement Law", (1998) 7 P.P.L.R. p.CS18.

If neither direct nor indirect effect can ensure compliance with an incorrectly implemented EC rule, individuals standing to benefit under it (but unable to enforce their rights because of lack or defects of implementing measures) can ask for damages from the defaulting Member State. The Court has stated that the full effect of EC law and the protection of Community rights would be weakened, if individuals could not obtain compensation where their rights are infringed by a breach of Community law for which a Member State is responsible. Compensation is particularly important where, as is the case with directives, the application of EC rules is subject to Member State action and where, if a state fails to act, individuals cannot rely on their rights before the national courts.

The Court, in *Francovich*[153] and follow-up cases[154], laid down the conditions of Member State liability for breach of Community rules. Thus, the plaintiff needs to establish that the violated rule is intended to confer rights on individuals; that the content of these rights is capable of being ascertained on the basis of that rule; that the violation is sufficiently serious or "flagrant" (a condition developed in the state liability jurisprudence following *Francovich,* which aligns the regime of state liability with that of liability of the EC institutions under Article 288 (ex 215) EC[155]); and that there is a causal link between the violation and the sustained harm.

4.3.2 Application to procurement remedies

If the Remedies Directives are not implemented properly and no satisfying solution can be achieved through interpretation of the national law, the aggrieved firm could

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[153] Joined cases C-6/90 and C9/90 *Francovich and others v. Italy* [1991] E.C.R. I-5357; [1993] 2 C.M.L.R. 66. For a detailed discussion see Craufurd Smith, *op. cit.* footnote 11 of chapter 2.

[154] Joined cases C-46-48/93 *Brasserie du Pêcheur SA v. Germany* and *R. v. Secretary of State for Transport, ex p. Factortame Ltd (No. 3)* [1996] E.C.R. I-1029; [1996] 1 C.M.L.R. 889; case C-392/93 *R. v. H. M. Treasury, ex p. British Telecommunications Plc* [1996] E.C.R. I-1631; [1996] 2 C.M.L.R. 217; case C-5/94 *R. v. Ministry of Agriculture, Fisheries and Food, ex p. Hedley Lomas (Ireland Ltd)* [1996] E.C.R. I-2553*;* [1996] 2 C.M.L.R. 391; joined cases C-178/94, 179/94, 188/94, 189/94 and 190/94 *Dillenkofer v. Germany* [1996] E.C.R. I-4845; [1996] 3 C.M.L.R. 469 .

argue that it has thereby been refused an opportunity to obtain relief and claim damages from the defaulting state. *Alcatel* refers to this possibility. However, the conditions of state liability cannot be met easily here.

First of all, it is debatable whether the rights of bidders in the Directives are sufficiently "ascertainable" to satisfy the *Francovich* test[156]. We have seen that the provisions of the Directives leave considerable discretionary power to Member States and that, while it is obvious that they grant rights of redress to bidders, the form and sometimes the extent of these rights is left for the Member States to decide. For example, Member States have discretion to decide whether concluded contracts can be set aside, whether interim relief should be granted in the case of an overriding public interest opposing it, whether for damages to be claimed the harmful act should be set aside first.

Arguably though, the options left to the Member States do not prevent the rights under the Directives from being ascertainable. In *Francovich,* it was held that the choice between three alternative dates, which the directive under discussion left to the Member States, did not, in itself, prevent its direct effect[157]. The fact that a directive allows Member States to derogate from its general rule (and the aforementioned options in the Directives are derogations from their general provisions) cannot be invoked by the defaulting Member State to exempt it from applying that general rule[158]. The fact that the existence of options does not prevent direct effect can be used as an argument *a fortiori* in the context of state liability, where what is needed is an ascertainable right, a concept arguably more flexible and loose than the direct effect requirement of a clear and unconditional right. The Court in *Francovich* found that

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[155] See *Brasserie du Pêcheur*. In this case, the Court spelt out several factors on which national courts will decide, in state liability cases brought before them, whether a sufficiently serious breach has occurred.

[156] Arrowsmith, "Enforcing the Public…" *op. cit.* footnote 16 of chapter 2, pp. 69 and 78; Gilliams "Effectiveness of European Community Public Procurement Law after Francovich", (1992) 1 P.P.L.R. p.292, where the author suggests that where a provision is not sufficiently precise for the conditions of direct effect to be met, it is unlikely that this provision is sufficiently "ascertainable" to meet the *Francovich* liability test and that the directive at issue in *Francovich* was rather exceptional in this sense.

[157] The directive in *Francovich* was found to lack direct effect on other grounds.

[158] Gilliams *op. cit.* footnote 88, p.296.

the alternatives offered by that directive made it possible to ascertain a "minimum" that should be protected under it and this minimum was sufficient to fulfil this condition of state liability. Arguably, there is an ascertainable minimum in the Remedies Directives, that the remedies provided for should at least exist.

However, the existence of a wide national discretion makes it difficult for state liability to be established for another reason: the condition of a sufficiently serious breach of EC rules cannot easily be met in this case. Discretion and flagrant violation of Member State obligations under EC law are generally mutually exclusive, except in very extreme cases. *Francovich* was such a case because it concerned the non-transposition of a directive, which is a serious breach of the Member States' non-discretionary obligation to implement directives[159]. In the area of procurement remedies, however, there is no case of complete non-implementation, as the required remedies exist, more or less, in all the Member States[160]. There are, in some Member States, defects in the design and carrying out of the review procedures -we have seen that some exist in Austria and we will see that there are defects in the UK and Greece as well- for which the Member State could be held liable. Nevertheless, for state liability under EC law to be established, one needs to prove that these procedural defects constitute, on the part of the Member State, a sufficiently manifest breach of its obligation to apply correctly the Directives. It would be very difficult to argue this successfully, precisely because of the discretion Member States enjoy in setting up their review system. Discretion implies by definition a margin of error and defects of the provided procedures would generally fall inside this margin, except in very flagrant cases, for example when a remedy is systematically rejected by the courts[161].

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[159] After *Francovich,* the Court ruled, in joined cases C-178/94, 179/94, 188/94, 189/94 and 190/94 *Dillenkofer v. Germany* [1996] E.C.R. I-4845; [1996] 3 C.M.L.R. 469*,* that the non-transposition of a directive was a sufficiently serious breach pf EC law in itself, as Member States are obliged to transpose directives under Article 249 (ex 189) EC and have no discretion in this regard.

[160] Advisory Committee for Public Procurement, *op. cit*. footnote 34 of chapter 2.

[161] Emiliou "State Liability under Community Law: Shedding More Light on the Francovich Principle?" (1996) 21 E.L.Rev p.399.

Nonetheless, Member States' discretion is limited by harmonising EC rules and principles. In the area of procurement remedies, the Member States have the duty to implement the Directives so as to ensure their full force and effect. Furthermore, as we have seen in *Alcatel,* the Court appears to accept the need for effective and speedy remedies (mentioned in articles 1(1) of both Directives[162]) as a limit of the Member States' discretion in applying Directive 89/665.

The finding that there is a sufficiently serious breach of a Member State's obligation to provide for such remedies will ultimately depend on the strictness with which speed and effectiveness are interpreted. If, for example, effectiveness is interpreted to require a generous calculation of damages, then arguably Member Sates do not have the discretion to limit it to bid costs and in case they do this, they might be liable for compensation. It is not, nevertheless, clear what the Court or a national judge would consider either speed or effectiveness (and especially the latter, which is by definition vaguer) to require here.

Even if a sufficiently serious breach of a Member State's obligations is established, bidders have to overcome another hurdle for state liability to be engaged: they have to show that the Member State's failure to properly implement or apply the EC rule (here, the Remedies Directives) has harmed them. Harm is established according to the relevant national liability rules[163]. Thus, for example, in countries where plaintiffs in procurement damages actions need to show that they would have won or would have had a real chance of winning the contract, were it not for the breach, in order to establish harm, they would have to prove harm due to the incorrect implementation of the Directives under the same rules, to claim damages under *Francovich*[164]. It is usually very difficult and sometimes impossible to establish such damage.

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[162] 'The Member States shall take the measures necessary to ensure that, ..., decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible..." The preambles to the Directives also refer to this obligation.

[163] "... [I]t is in accordance with the rules of national law on liability that the State must make reparation for the consequences of the harm caused ...", *Francovich* (point 42 of the judgment).

[164] Legally speaking, it is not the same harm that is sought to be compensated in the two actions: harm under the procurement action in damages is that caused to the bidder's rights and interests by

In short, an action in damages for state liability would, in practice, rarely be successful in the area of procurement remedies.

5 Conclusions of section 1

We have seen that national remedies to enforce EC procurement law are required to comply not only with the requirements of the Remedies Directives but also with the Court of Justice principles of non-discrimination and effectiveness.

The principle of effectiveness, in particular, could offer a legal basis for a more stringent Community control of procurement remedies than of national remedies to enforce EC law in other areas. The reason is the existence of the Remedies Directives and the ensuing need to ensure their "full force and effect" as that of any EC legal text. There are, however, almost no Court of Justice cases concerning procurement remedies and we do not know how effectiveness would be construed.

The principle of effectiveness can arguably be interpreted to concern not only each remedy separately but also the overall function of a review system as a whole and require that one remedy should complement and compensate for the defects in another. We have also seen that effectiveness requires, in this area, speedy proceedings and favourable rules on interim relief. It does not seem, however, possible to extend the principle of effectiveness to cover (and require the correction of) structural deficiencies of national review systems, since these problems result from

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irregularities in the award procedure, while harm under the *Francovich* damages action is the absence of (effective) remedies to enforce the bidders' rights. The ultimate actual damage suffered is, however, the same: it is the unlawful deterioration of the bidder's position as regards his chances of winning the contract (or, if the action under *Francovich* concerns defects of the action in damages under the Directives, as regards his chances of being compensated for any damage unlawfully sustained). It will be therefore calculated in the same way. However, in the case of a *Francovich* action, the bidder would have to prove additionally that the harm he claims to have suffered is a result of the absence of effective remedies, for example, prove that the forbidding case law on interim relief has deprived him of an effective chance to enforce his rights and win as well as assess the impact that inadequate enforcement

non-legal factors and their control under the principle does not seem reasonable. The Commission, at least, is unlikely to start infringement proceedings based on such a far reaching interpretation of the principle of effectiveness, as the situation regarding EC regulation of national procedures to enforce EC law does not seem to be mature enough to justify such intervention[165].

The doctrines of direct effect and of state liability have only a limited application in the field of procurement remedies, since the provisions of the Remedies Directives do not seem to be unconditional or sufficiently ascertainable for their purposes, principally because of the wide discretion that Member States enjoy in putting in place their procurement review system. The same applies to indirect effect (though to a lesser extent than in direct effect or state liability, since it does not require a very high level of precision of the rules), as some of the provisions of the Directives are not specific enough to serve as clear interpretative guidance for national courts.

The application of the doctrines of indirect effect and of state liability, in particular, will depend, to a large extent, on the attitude of the Court of Justice. The Court can clarify the meaning of the provisions of the Directives and thus make clearer the interpretative obligation of the national judge. It can also limit the extent of the Member States' discretion in the design and operation of the review system, define more what can be considered to constitute (in)correct implementation of the Directives and increase thus the possibilities of Member State liability for damage caused to individuals through faulty implementation. However, the use of either doctrine can in practice prove to be complicated or impossible for the judge or the individual wishing to rely on them.

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had on his chances of winning. This additional requirement might lessen the extent of harm the bidder is able to establish (and thus the compensation he is able to ask for) even further.

[165] Pachnou, *op. cit.* footnote 45, p.74.

SECTION 2

DIRECTIVE 89/665

National procedural arrangements to enforce EC law are, in general, varied, due to the disparity of the legal traditions of the Member States[166]. This causes "lengthy discussions about the adequacy of one chosen system over another and about whether a satisfactory degree of effectiveness is achieved....[E]ven if one assumes that national systems of redress achieved an acceptable degree of effectiveness, another main objective of Community law, its uniform application, would still be jeopardised"[167].

We have seen that the Community takes action to eliminate cases of inefficient enforcement and smooth differences. However, that action is sporadic, fragmented and not always effective. First of all, the Commission, which may start, on its discretion, an infringement procedure against defaulting Member States, has limited resources and is subject to political considerations, both of which lessen the frequency and determination of its intervention. The Commission itself has stated that it is incapable of identifying "each and every breach of Community rules" and of taking action in each case[168]. Secondly, the Court, which controls national review systems in cases before it to see if they comply with the principles of non-discrimination and effectiveness (and sometimes goes as far as to request, though often not expressly, the creation of previously non-existing remedies in order to ensure the effective enforcement of EC law[169]), is restrained by the facts of the cases brought. Besides, the

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[166] In the context of national remedies, the terms "procedures" and "procedural" will be used broadly as encompassing "any rules and principles of organisational or substantive nature which concern actions in law aiming at judicial protection": Prechal, "EC Requirements for an Effective Judicial Remedy", in Lonbay and Biondi (eds.), *Remedies for Breach of EC Law,* (1997).

[167] Fernández-Martín, *The EC.., op. cit.*, footnote 3 of chapter 1, p.202.

[168] Commission Green Paper, *op. cit.* footnote 22 of chapter 1, p.16.

[169] For example, in C-28/67 *Firma Molkerei-Zentrale Westfalen/Lippe GmbH v Hauptzollamt Paderborn* [1968] ECR 143 it was held that "every time a rule of Community law confers rights on individuals, those rights, without prejudice to the methods of recourse made available by the Treaty, must be safeguarded by proceedings brought before the competent national courts"; C-222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] E.C.R. 1651 the absence of remedies was held to constitute a violation of the supremacy of EC law; in C-222/86 *Heylens v. UNECTEF* [1987] E.C.R. 4097 the Court stated that, in relation to rights conferred by EC law "the existence of a remedy of a judicial nature against any decision of a national authority... is essential in order to secure the individual effective protection".

Court is careful when intervening in national enforcement, as its competence is limited and the political sensibilities of the Member States, which oppose loss of their prerogatives, are high. We have seen, furthermore, that the principles on national enforcement that the Court has laid down do not spell out precise requirements but function as guidelines, setting the limits of national procedural discretion, and are defined *ad hoc,* which means that their application and implications in each case are a matter of interpretation and will vary according to the national legal system in relation to which they are invoked.

It was for those reasons that the Community adopted the two Remedies Directives, aiming thereby to ensure minimum standards of effectiveness and uniformity in national enforcement of the EC procurement rules. The Community acted on the belief that the "vast majority of individual problems encountered by economic operators should be tackled at national level"[170] and the assumption that legal remedies for bidders were the best enforcement mechanisms. Bidders are better placed than anyone else to know when a breach has occurred. In procurement procedures under the EC rules, bidders are often big specialised firms, receiving legal advice and expected, as a result, to be acquainted with the market and the opportunities it offers as well as aware of the applicable rules and their rights under them. Their information about award procedures and their possible involvement in them enable them to find out whether the rules are followed and it was assumed that they would have an interest in seeing their rights complied with. National remedies are more familiar and accessible to bidders than remedies before other (for example, international) *fora* and it was hoped that bidders, assuming they did wish to act to enforce their rights as it was expected of them, would find it easy to use them[171].

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[170] Commission Green Paper *op. cit.* footnote 22 of chapter 1, p.16.

[171] "It is clear that the reactions of suppliers provide the best and the most immediate way of ensuring that contracting authorities practice open and competitive tendering. They are best placed to see whether the procurement rules are being followed and they can, where necessary, quickly draw purchasing entities attention to breaches they have committed. Sometimes, breaches are immediately corrected when the contracting entity is made aware of them. When they are not corrected, however, formal remedies can be used, including action through the courts" *ibid.* p.14.

There is, as a general rule, no Community legislation on national remedies to enforce EC law in most areas of Community activity. There are some provisions on national enforcement in a few EC legal texts[172] but, to our knowledge, the two Directives are unique examples of EC legislation dealing solely with remedies.

As we have mentioned in the introduction, this study focuses on the public sector Remedies Directive only, which we will examine now.

1 Implementation

Directives set out their objectives but entrust the choice of form and means required to achieve them to the Member States, according to article 249 (ex 189) EC. Directive 89/665 is no exception: it provides for the institution of specific remedies but the precise procedural rules are left to the discretion of the Member States.

We have seen in section 1 that national implementing measures must guarantee the full effect of the transposed directive[173] and that they must be set out "in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts"[174]. Implementing legislation may not be necessary, if there are general principles of domestic law which guarantee the application of the directive, provided that these principles ensure that national authorities will, in fact, apply the directive fully and that the persons concerned are made fully aware of their rights and are afforded the possibility of relying on them[175]. If the existing system does not have these qualities, then the Member State has to adopt implementing measures. Mere administrative practices,

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[172] For example, Directive 64/221/EEC on free movement of workers, Directive 75/117/EEC on equal pay, Directive 76/207/EEC on equal treatment, Directive 79/7on social security, Directives 98/552 and 97/36 EC on broadcasting.
[173] C-14/83 *Von Colson v Land Nordrhein Westfalen* [1984] E.C.R. 1891.
[174] C-59/89 *Commission v Germany* [1991] E.C.R. I-2607.
[175] C-29/84 *Commission v Germany* [1986] 3 C.M.L.R. 579.

"which by their nature may be altered at the whim of the administration"[176], do not constitute proper implementation. Member States are required to adopt provisions of a binding nature, which are less easily changeable and more public.

In the case of Directive 89/665, some Member States that did not have a developed system of remedies guaranteeing the level of judicial protection envisaged in the Directive proceeded to implement it (for example, the UK and Ireland). Other Member States, where there already were remedies, preferred to rely on them or to introduce measures covering only some aspects of the Directive, presumably those that national provisions did not cover[177]. However, Member States that have chosen to rely on existing provisions must make sure that these provisions are clear, precise and binding; otherwise their implementing obligations are not properly fulfilled. Greece was condemned by the Court in this respect, because of the complexity and lack of precision of the rules on which it had decided to rely[178]. The case is discussed in chapter 6 on the Greek review system.

2 Scope

The Directive provides for remedies against infringements "of Community law in the field of public procurement or of national rules implementing that law" which occur in the course of award procedures falling within the scope of the substantive public sector directives (article 1(1) of the Directive). Therefore, remedies cover breaches of the provisions of the public sector directives, of relevant Treaty rules and of general principles (they all are "Community law in the field of public procurement"), as well as breaches of applicable provisions of national legislation.

The Directive does not cover infringements occurring in award procedures outside the scope of the substantive directives, but Member States are free to make the

[176] C-96/81 *Commission v. Germany* [1982] E.C.R. 1791.
[177] Advisory Committee for Public Procurement, *op. cit.* footnote 34 of chapter 2, pp.4-5.

provided remedies available in all public procurement awards. This does not seem to have been the approach followed by the majority of Member States who adopted specific implementing measures: most fashioned the scope of their implementing instrument on the scope of the Directive and continued at the same time to apply their pre-existing system in relation to cases not covered by the public sector directives[179]. Where this is the case, there co-exist three different enforcement systems for similar breaches: one for cases falling within the scope of the substantive directives, one for cases that are outside the substantive directives but are covered by general Community law, such as EC Treaty rules and EC principles, and one for domestic cases of no Community interest. The first category will be governed by Directive 89/665 and its implementing instrument, the second by general national rules, as these are conditioned by EC law requirements, the third only by general national rules. This situation is complex and unsatisfactory, from the point of view of clarity and legal certainty. It creates difficulties for plaintiffs and judges and could generate problems of access to and administration of justice. It would arguably have been better if the Directive covered all breaches of Community law relating to procurement awards[180].

In some Member States however, the measures implementing the Directive cover all cases, including purely domestic ones. In such cases, the Directive was used a model to reform national law[181].

3 Locus standi

Article 1(3) defines the conditions under which a firm may ask for the remedies provided for in the Directive. Standing is recognised "at least to any person having or having had an interest in obtaining a particular...contract and who has been or risks

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[178] *Commission v Greece* C-235/95 [1995] E.C.R. I-4459.
[179] Advisory Committee de Public Procurement *op. cit.* footnote 34 of chapter 2.
[180] Arrowsmith "Enforcing the Public…" *op. cit.* footnote 16 of chapter 2, p.55.
[181] This is, for example, the case in Sweden and France; see Advisory Committee for Public Procurement, *op. cit.* footnote 34 of chapter 2, p.4.

being harmed by an alleged infringement". This provision strengthens the argument that protection of the individual interests of suppliers is aimed at by the Directive[182].

This definition of standing is broad. The problem here is to define the notion of "interest" in obtaining a contract. It seems to cover at least all the firms who have expressed an interest in participating to the procedure or might have done so, if the contract had been advertised, though establishing an interest in cases where the contract was not advertised might be very difficult. Likelihood of obtaining the contract does not have to be proven, since the article requires an interest and not a probability of winning. However, it is arguably in accordance with Community law to deny standing to a firm that could not possible have been awarded the contract[183].

Standing is not given, expressly at least, to contractors' trade associations, to subcontractors or to interested bodies (such as a ministry or an environmental association), since they do not have an interest in winning the contract. Nor does a general citizen action, an *actio popularis,* challenging a procedure on grounds of harm to the public interest, for example for non-economical use of public funds, seem to be envisaged. The Member States are of course free to provide for a broader access to justice in their implementing legislation, since the Directive mentions that standing is granted "at least" to persons under its definition.

4 Forum

Member States are free to choose the forum before which the dispute is heard. The choice of forum is very important, since the speed, cost, outcome and use of remedies will depend on it. There generally seems to be a higher number of cases in Member States where the review body is a specialised procurement tribunal or agency, because the procedure before such bodies is usually simpler as well as quicker, since they have

[182] Dingel, *Public Procurement…, op. cit.* footnote 1, p.228.
[183] *Ibid.*

to deal exclusively with procurement cases[184]. On the other hand, ordinary courts usually have a better knowledge of general law and are better acquainted with methods of interpretation, use of legal principles and construction of new ones, especially when compared to a specialised body that is not staffed by judges.

In the case that the review body is not judicial in character, article 2(8) provides for some safeguards. The review body has to give written reasons for its decisions. Provisions should exist to guarantee that an appeal is available before a different independent body, either judicial or a body capable of addressing a preliminary question to the Court of Justice[185]. Article 2(8) also lays down some conditions to ensure that the members of this body are adequately qualified and the procedure followed before it respects basic defence rights.

The Directive provides, in article 2(2), that different remedies can be brought before "separate bodies responsible for different aspects of the procedure". This provision was adopted to accommodate the distinction made in continental legal orders between public and private law and the corresponding distinction between administrative and civil courts, the first having jurisdiction in public law matters and the second in private law matters. In the field of public procurement, in many Member States the remedies of set aside and interim relief are introduced before administrative courts whereas damages actions are brought before the civil courts; in other Member States jurisdiction depends on the (private or administrative) nature of the relevant contract (this, as we will see, is the case in Greece)[186]. In common law Member States, the UK and Ireland, a single court deals with all procurement remedies. This system has the

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[184] For example, there is a high number of cases in Denmark, where the procedure before the competent body, a specialised procurement Board, is cheap and accessible, Advisory Committee for Public Procurement, *op. cit.* footnote 34 of chapter 2, p.8.

[185] There is an extensive jurisprudence of the Court with regard to whether a body is a court or tribunal and thus allowed to refer a preliminary question under article 234 (ex 177) EC. The categorisation of that body under national law is not conclusive; the Court decides on its nature. The Court, in its assessment, takes into account several factors such as whether the body is established by law, permanent, independent, whether its jurisdiction is compulsory and whether it applies an adversarial procedure, see for example, C-246/80 *C. Broekmeulen v. Huisarts* Registratie *Commissie* [1981] E.C.R. 2311, [1982] 1 C.M.L.R. 91.

[186] Advisory Committee for Public Procurement, *op. cit.* footnote 34 of chapter 2, p.6.

advantage of being simpler and more coherent and ensures that the risk of conflicting judgments is avoided.

5 Preliminary administrative stage

Article 1(3) states that "...Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review".

This provision was basically adopted to take into account the common, in some Member States, system of administrative pre-judicial complaints before the contracting authority or any other (usually superior) authority appointed for this purpose. This procedure can have a quasi-judicial character and it may constitute a prerequisite for the institution of judicial proceedings. Usually, review at this stage covers both matters of law and of fact.

Contracting authorities are hereby given the opportunity to correct the breach before the matter reaches the courts; it might prove useful, especially where the breach is caused by negligence, and could lead to a speedy inexpensive solution of the dispute.

This procedure has the disadvantage of informing the contracting authority of the firm's intention to start proceedings. If the breach is deliberate and the authority is in bad faith, it might take advantage of the time needed for the completion of the administrative procedure and hasten to award the contract[187]. When it is not possible under national law to reverse a concluded contract (an option examined at more length later), the firm's remedies will, as a result, be limited to damages.

Under the principle of effectiveness, arguably the administrative stage cannot unduly delay the whole procedure nor can it render the access to judicial protection very difficult, through, for example, complicated procedural requirements.

6 Interim measures

Article 2(1)(a) provides that the Member States must adopt provisions for the power to "take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority"[188]. Article 2(3) states that "review procedures need not in themselves have an automatic suspensive effect on the contract award procedures to which they relate".

Interim measures are necessary to maintain the *status quo* and prevent the creation of unalterable situations. It has already been mentioned that in procurement such situations are created basically where there is the risk that, unless interim measures suspending the award procedure or correcting provisionally the breach are granted, the procedure will continue and culminate with the award and conclusion of an often irreversible contract, before a decision is taken in the main action.

In this respect, it is important that interim measures are awarded rapidly and easily, otherwise they will not be able to achieve their objective of "freezing" the procedure while the judge decides in the main. Their importance is increased in Member States where it takes a long time to reach a decision in the main proceedings, because the risk of *faits accomplis* is higher there. It has been submitted that the principle of effectiveness requires that special importance should be attached to the remedy of interim measures, precisely because they are the only remedy that can prevent the creation of unalterable situations, and that, therefore, they should be granted relatively

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[187] *Ibid.* p.9.

[188] The Member States would probably be required to provide for the possibility to ask for interim measures against acts breaching EC law, even in the absence of the Directive, under C-213/89 *R. v. Secretary of State for Transport, ex parte Factortame Ltd (No 1)* [1990] E.C.R. I-2433, [1990] 3 C.M.L.R.1, decided shortly after the adoption of the Directive.

easily. The award of interim relief must arguably be made easier where other relief is impossible (for example, because it is systematically refused) or very difficult to obtain (for example, where rules on proof are very stringent), under our interpretation of effectiveness as applying to the system of remedies as a whole, as submitted in section 1 of the chapter.

The criteria for granting interim relief are left to the Member States to decide. Notwithstanding national discretion in the matter, it is submitted that the aforementioned special role of interim relief in awards and its increased importance, when other remedies can be of no avail, should be taken into consideration by the legislator and the judge. It important that legal mechanisms ensuring an effective (i.e. not unduly difficult or slow) possibility of obtaining interim relief exist but also that the competent review body is not unjustifiably reluctant to grant it.

The conditions for the award of interim relief are, as a rule, the following: first of all, a *prima facie* case should exist indicating that there is a breach (the required degree of merit of the main action varies from one Member State to another); then it should be demonstrated that the harm that the bidder risks to suffer, if interim relief is not granted, is irreparable or at least serious; finally, there should be no other interest overriding the private interest of the applicant to obtain relief[189]. We will now discuss the usual problems encountered in the Member States concerning the conditions of interim relief.

As regards the existence of an arguable case, in some Member States, the judge requires a virtual certainty of breach in order to order interim measures[190]. This can lead to the impossibility of obtaining interim relief in most cases and contravenes the requirement to provide for it under the Remedies Directive.

As regards the condition of serious or irreparable harm, in some Member States, interim relief is systematically refused on the grounds that the harm the applicant risks

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[189] Advisory Committee for Public Procurement, *op. cit.* footnote 34 of chapter 2, p.10.
[190] This problem will be examined in relation to the Greek review system.

to suffer, if relief is not granted and the authority consequently goes ahead with the procedure and awards the contract to another bidder, is financial and can, therefore, be adequately compensated by the award of damages[191]. Such harm is reparable and does not, thus, justify the award of interim relief.

This reasoning could lead to virtually preclude the possibility of ever obtaining interim relief. This is contrary to the clear obligation under the Directive to provide for the remedy. Furthermore, the dependence of interim relief on the availability of damages seems to present further legal and practical problems.

First of all, reliance on the adequacy of damages for the purpose of deciding on interim relief sits uneasily with the requirement under the Directive, as complemented by the principle of effectiveness, to provide for three separate remedies, effective in their own right. The Directive does not exclude any remedy from the requirement of effectiveness. Nor does it establish a hierarchy between the remedies or subjects the function of one to an assessment of the availability of another in each case. It is submitted that national legislators or courts do not have this option either, because it is incompatible with the EC requirements.

The combined remedy approach is also problematic as far as the reasoning of the interim relief case is concerned. The grant of interim relief will depend on the court's appreciation of the availability of damages and will not be done on considerations specific to it only (such as, for example, the assessment of the urgency of the situation). It is submitted that interim relief should be granted whenever it is considered that the procedure can and should be suspended in view of the irregularities occurred and of the interests involved and not depending on the availability of another remedy which obeys a different logic. To subordinate one to the other would not lead to coherent solutions from the point of view of either logic or law, while coherence in this case would be sacrificed for no easily identifiable reason.

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[191] For example, in Belgium, see Advisory Committee for Public Procurement, *op. cit.* footnote 34 of chapter 2, p.10. This problem will be examined in relation to the UK review system.

Furthermore, the logical end of such a combined examination of the two remedies would be to make the case law on interim relief follow the fluctuations of the case law on damages, in the sense that, if damages become more easily available, this would lessen the chances of obtaining interim relief and vice versa. This would create instability in the jurisprudence, lack of clarity, confusion for both applicants and judges and complications unnecessary and unjustified by legal or practical considerations.

The confusion would be exacerbated by the fact that this approach increases the factors which the court has to assess in order to grant or refuse interim relief. More precisely, it is thereby added to all the other factors taken into account by the court (the assessment of whether the case is arguable, of whether the interest of the applicant for the procedure to be suspended is stronger than the interests for the procedure to continue, of what is meant by public interest) the question of whether damages are available, in general (in the sense of the remedy being able to result in effective compensation) and on the facts of the case at hand in particular. This can generate debates as to what is meant by available or adequate and what must be taken into consideration when assessing such notions. By increasing the variables left to the court's discretion, this approach increases the uncertainty surrounding the conditions for the grant of interim relief and also increases the risk of conflicting judgments.

Besides, the argument that, where damages are available, interim relief can be always refused, since the contractor will ultimately suffer no harm (and the concept of harm to the contractor is indeed relevant in the decision to grant or not interim measures, under the balance of interests, as we will see later), is based on a incorrect perception of the notion of harm. Harm is not the same in the case of the application for interim relief as in that of the action for damages. Harm to the contractor, in the first case, is the risk that he might not achieve his objective of winning the contract and all that this implies (not only the profit under it but also increased experience, better reputation on the market, new potential clients and so forth). In the case of the

damages action, harm to the contractor refers to his financial sustained (expenditure incurred in the preparation of the bid) and expected (lost profits) loss.

Naturally, the notion of harm in interim relief covers also the risk of financial loss while a generous calculation of damages would probably cover a part at least of the bidder's harm in not winning the contract. However, while these two notions of harm might overlap, they are not identical and the reparation of one does not entirely cover the reparation of the other. The primary objective of bidders is to win the contract and gain the benefits under it, not to be awarded compensation for losing it. Only interim relief can help in this respect, by ensuring that suppliers still have a chance of winning. Compensation is, in a way, a "second best" solution, a form of substitutive justice. Moreover, regarding expectations of future work, they may be deemed too remote to be compensated[192] and, besides, even if damages are granted, they cannot entirely make amends. "In fact, any other remedy that prevents the damages from arising is more desirable"[193]. The Court, in interim relief applications before it, has rejected the argument that interim relief should be refused on the ground that a remedy in damages exists at national level[194].

Finally, independently of the question of reparation of harm caused to the bidder, damages cannot substitute interim relief in another sense. We have already argued in section 1 of the chapter that procurement remedies have two objectives: ensure compliance with the EC procurement rules and protect the interests of bidders under them. In this respect, damages cannot be a replacement for interim relief that seeks to prevent or suspend an alleged infringement and thus restore legality (as well as, naturally, guaranteeing that bidders retain a possibility of being awarded the contract and thus protecting their interests). The action in damages is primarily focused on achieving the second of the aforementioned objectives of enforcement, the protection

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[192] This question will be examined in relation to the UK review system.
[193] Fernández-Martín, *The EC..*, *op. cit.* footnote 3 of chapter 1, p.198.
[194] C-194/88R *Commission v Italy (La Spezia)* [1988] E.C.R. 5647and C-87/94R *Commission v Belgium (Walloon Buses)* [1994] E.C.R. I-1395.

of the interests of bidders, since it is a compensatory and not a corrective remedy, and thus incapable of removing a breach. The availability of damages may deter authorities from breaching the law and thus ensure preventive enforcement, but arguably, the threat of delaying award procedures posed by interim measures is a stronger deterrent[195]. In brief, the objective of compliance with the procurement rules is not protected in a satisfactory way by the remedy of damages, which cannot, in this regard, substitute interim relief.

However, in a case brought by a bidder against the European Commission (awarding authority)[196], *Esedra,* the Court of First Instance (CFI) held that financial loss can be repaired by the award of damages and that interim measures are justified, only where there is danger to the applicant's future existence or risk of irredeemable harm to its position in the market. This is difficult test to satisfy, as a bidder would rarely be damaged to this degree by the loss of a single contract[197]. The applicant (Esedra) had contended that the loss of the contract, apart from direct financial harm, would also damage its credibility and reputation and that this damage could not be made good by the award of compensation. The CFI found against the applicant, as the allegations of non-financial loss were held to be either purely hypothetical or not firmly established. The CFI held that participation in an award procedure involves risks for all bidders and the rejection of a bid is not in itself prejudicial to the firm that placed it.

The question is whether this case law can be taken out of the context of the non-contractual responsibility of the EC institutions and applied to national courts. It is submitted that the fact that one of the European Courts, the CFI, has applied a strict test in a case before it would make it very difficult for the other European Court to disallow a similar approach of national courts on the grounds that it does not guarantee the effectiveness of the interim relief remedy.

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[195] We will examine the deterrent force of remedies in the empirical study.
[196] T-19/00R *Esedra Sprl v. Commission,* Order of the President of the Court of First Instance, July 20, 2000, E.C.R [2000] II-2951.
[197] Brown, "Interim Measures against the Community Institutions in Procurement Cases: A Note on the *Esedra Case*", (2001) 10 P.P.L.R. p.NA52.

As regards the balance of interests, article 2(4) provides that "[t]he Member States may provide that when considering whether to order interim measures the body responsible may take into account the probable consequences of the measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures where their negative consequences could exceed their benefits. A decision not to grant interim measures shall not prejudice any other claim of the person seeking these measures".

The test involves a balance of conflicting interests affected by interim relief. There are typically three sets of affected interests: the interest of the applicant to continue in the procedure or participate on better terms, the interest of other participants for the procedure not to delay and for their position as regards winning the contract not to worsen[198] and the public interest, represented by the contracting authority to award the contract quickly and on the best terms possible, so that public needs envisaged by the contract are fulfilled. There is a general tendency of the national judges, especially in cases where the competent body is an administrative court, to give greater weight to the public interest[199]. Arguably, however, "the need to refuse interim relief to protect the public interest only arises in many states because of the breach of the obligation to provide rapid review procedures"[200] and Member States (and their judges) should not rely on their own insufficiencies to refuse a Community obligation. It is submitted that existence of an overriding public interest may be accepted only when special circumstances are present, for example, when there is imminent risk to public health if the contract is not awarded and performed as quickly as possible. Any systematic refusal of interim relief on grounds of public interest would be a breach of the obligation to provide effective remedies.

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[198] It has been argued that the interests of subcontractors can be taken into account at this stage, Le Baut, *La Réglementation Communautaire des Marchés Publics: La Directive "Recours" du 21 décembre 1989,* mémoire présenté à l'Université Jean Moulin Lyon III Faculté de Droit, octobre 1991, p.106.

[199] Advisory Committee for Public Procurement, *op. cit.* footnote 34 of chapter 2, p.10.

[200] Arrowsmith "Public Procurement: Example of a Developed Field of National Remedies Established by Community Law" p.143 in Micklitz and Reich (eds.), *Public Interest Litigation before European Courts* (1996).

7 Set aside

Article 2(1)(b) requires that Member States provide for the possibility to "either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure".

The competent body should then be empowered to set aside unlawful decisions. National bodies often do not review the soundness of the authority's decision or the way it has used its discretionary power but only examine whether the authority has committed a serious error and especially whether it has flagrantly misused its powers[201]. It is not always clear, in such cases, whether abstract concepts like "urgency" will be considered as matters of law and be reviewed or matters falling within the authority's discretion to decide and not be examined. Arguably, in order to ensure an effective role to this remedy, review bodies should be able to exercise some (if limited) control of the authority's use of its discretion, even in relation to abstract concepts. Otherwise, contracting authorities would be often uncontrolled, presenting their decisions as results of the lawful exercise of their discretion. There would be thus a high risk of abuse, especially in the context of procedures where the contract is awarded to the most economically advantageous offer (and not to the lowest bidder), where the discretion of authorities is wide, since they decide and apply the criteria of what constitutes an advantageous offer.

Recently, in a case concerning a contract advertised by the European Parliament, *Embassy Limousine*[202], the CFI held that the Parliament had a "broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a

[201] Advisory Committee for Public Procurement, *op. cit.* footnote 34 of chapter 2, p.11. The review of discretionary decisions is examined in more detail in the chapters on the UK and Greek review systems.

contract" and that its own role was limited to checking whether the institution had committed "a serious or manifest error" in exercising its discretion. As was mentioned in connection to interim relief, the fact that the CFI itself has applied a low level of review in a case before it indicates that the European courts are not likely to disallow a similar approach of national review bodies on the grounds that it impairs the effectiveness of the set aside remedy[203].

Nevertheless, in a more recent case opened by a preliminary question referred to the Court of Justice by the Supreme Court of Ireland concerning the public works directive, *SIAC*[204], the Advocate General maintained that the Irish High Court's decision in the case was too extreme. The Irish High Court had stated that, as regards the review of discretionary contracting decisions, it would intervene only if the contracting authority "was unreasonable in the sense that it *plainly and unambiguously flew in the face of fundamental reason and common sense*" [emphasis added]. According to the Advocate General, the test should rather be "whether the factors taken into account [by the contracting authority when reaching its decision] were capable of supporting the conclusions drawn from them". The Court essentially followed the Advocate General without however mentioning the Irish High Court's test or spelling out a clear cut general test for national courts to follow. It did however state that the opinion of an expert on the basis of which the award decision was taken must be "based in all essential points on objective factors", which must be "relevant and appropriate to the assessment made". The "fundamental reason and common sense" test is implicitly rejected. Thus, under *SIAC*, national courts are not expected to examine the merits of a contracting decision (or those of the professional opinion on which the decisions is based, as in this case) but they should however review whether the decision is reasonable and substantiated. It is submitted that this test can be

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[202] T-203/96 *Embassy Limousine & Services* [1998] E.C.R. II-4239.
[203] See on this Arrowsmith "The Judgment of the Court of First Instance in *Embassy Limousine*" (1999) 9 P.P.L.R. p.CS94.

interpreted to require a stricter review of contracting decisions than the test of "serious and manifest error" under *Embassy Limousine*, in that it allows to test the authorities' use of their discretion not only in cases of manifest error but also in less flagrant cases, where the error may not be very obvious; in a sense, it removes the condition of seriousness or blatancy of the error. It is submitted that a stricter level of review would help to check, quash and prevent instances of abuse on the part of the contracting authorities and maximise thus the value and impact of the set aside remedy. This is arguably the approach that should be followed by the national courts, considering also that *SIAC* is more recent than *Embassy Limousine.*

The court or tribunal must be empowered to order measures other than the set aside of unlawful acts, such as positive corrective measures in relation to documents containing unlawful specifications. In many Member States, the set aside of contracting acts falls within the jurisdiction of the *Conseil d'Etat* which, where it exists, has usually a traditional "annulment" competence and not a competence to substitute its own decision to the decision of the authority, amend documents, sever the unlawful provision or order the authority to take specific measures. In these Member States, the existing legislation should be amended to comply with the Directive.

Article 2(6) provides that "the effects of the exercise of powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law. Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedure shall be limited to awarding damages to any person harmed by an infringement".

Member States can then provide that concluded contracts may not be affected. The protection of legal certainty and of the rights of the successful contractor as well as the

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[204] C-19/00 *SIAC Construction Ltd v. County Council of the County of Mayo*, [2001] E.C.R. I-7725. See Brown, "Award Criteria under the E.C. Procurement Directives: A Note on the *SIAC Construction* Case",

need to avoid long delays and public expenses (both caused when the award procedure is reopened as a result of a decision setting aside the concluded contract) were thought to justify the irreversibility of a contract awarded in breach of the procurement rules[205]. Most Member States have taken advantage of the option to let concluded contracts stand[206], as it is often easier and less costly (as well as less certain, as we will see) to compensate the aggrieved firm than to reopen the award procedure. Unfortunately, where authorities act in bad faith and breach the rules deliberately to award the contract to a specific firm, the irreversibility of the concluded contract will help them achieve their objective, while limiting the aggrieved firm to an often unsuccessful damages action.

It has been argued that the legal security of the successful bidder is not worthy of protection, where the breach was deliberate and the bidder was aware of it, and that the principle of effectiveness should limit the discretion given under the Directive to provide for the inalterability of all contracts[207]. The principle of effectiveness, as applied to the remedy of set aside, requires that this remedy is capable of producing its full effects when granted. Nevertheless, in the case of concluded contracts, effectiveness gives exceptionally way to other principles, such as legal certainty and protection of the successful firm and of the public interest. Effectiveness is then limited, but for a reason. When the authority deliberately breaches the rules in the knowledge of the successful firm, that reason disappears. The successful firm is no longer an innocent third party deserving to be protected nor can the authority be allowed to rely on a situation caused by its own deliberate breach. The principle of effectiveness is thus no longer limited by other considerations and requires that the remedy of set aside should be fully effective. Under this view, the scope of the concluded contracts exception should be reduced and the option given to the Member

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(2002) 11 P.P.L.R. p.NA25.
[205] Clerc, *L'ouverture.., op. cit.* footnote 20 of chapter 2, p.179.
[206] See contributions to Arrowsmith (ed.), *Remedies for Enforcing the Public Procurement Rules* (1993).
[207] Arrowsmith "Public Procurement: Example …" *op cit.* footnote 132, p.145.

States under the Directive should be interpreted to exclude cases of deliberate breach known to the successful bidder.

A problem related to the irreversibility of concluded contracts is the question of when a contract is deemed to be concluded. In some Member States the award decision is regarded as concluding the contract[208]. In that case, the award decision is always untouchable, since it is immediately incorporated into an unalterable contract.

However, on the basis of *Alcatel*, Member States should ensure that the suspension and set aside of the award decision is possible. As we have seen in section 1 of the chapter, it is left to the Member States to choose how they will fulfil this obligation, since the Court refrained from asking Member States to provide for a delay between the award and the conclusion of the contract, in order to ensure that bidders have time to challenge the award decision. It is submitted that a reasonable cooling-off period should exist. Such a period would make sure that award decisions can be challenged, thus protect the interests of the bidders, allow irregular decisions to be set aside and therefore prevent contracts being concluded unlawfully, and would probably deter authorities from awarding contracts in an unlawful way, at least knowingly. This period should be sufficient to allow bidders to examine the award decision, decide whether they have grounds to proceed against it and prepare the application[209] but relatively short, so as not to delay for long the conclusion of public contracts or put a great burden on public funds[210]. National legislators and judges (under their EC interpretative obligation) should try to ensure it.

There is also the question of whether other bidders should be informed of the award decision before the conclusion of the contract, so that they have a real chance of challenging it. It is submitted that Member States should provide that other bidders

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[208] We will examine the situation in the UK and Greece in detail in the corresponding chapters.
[209] Clerc, *L'ouverture.., op. cit.* footnote 20 of chapter 2, proposes a standstill period of between 15 to 30 days, which seems reasonable.
[210] *ibid.* p.231.

must be notified promptly, i.e. as soon as possible and naturally before the contract is concluded and before the time limit for the challenge of the award decision runs out[211].

The concluded contract limitation to the remedy of set aside highlights the importance of interim measures and damages. We have argued that the principle of effectiveness could be applied to a review system as a whole to ensure that remedies 'cover' the defects of one another. In Member States where concluded contracts cannot be set aside, the principle of effectiveness could be interpreted to require that interim relief should be relatively easily granted, to allow for the suspension of the award procedure and prevent the conclusion of the contract until the judge decides on the lawfulness of the contested decision. In the same logic, where concluded contracts are irreversible, damages should also be easier to obtain, since, once the contract is concluded, they constitute the only course of action left to the supplier.

8 Damages

The Directive provides in its article 2(1)(c) that damages to persons harmed by an infringement should be available. The provision for the compensation of bidders reinforces the argument that the Directive aims not only to ensure the enforcement of EC procurement law but also to protect individual interests[212].

This is the shortest provision on remedies. The Directive does not give any guidelines on the conditions and extent of compensation. These matters are left to the discretion of the Member States, acting as always under the obligation to provide for an effective remedy and an effective overall review system.

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[211] It has even been submitted that "in view of the problems created by the concluded contract rule, an argument can be made that the Court of Justice should ... require as a condition of reliance on a concluded contract as a bar to remedies that states ensure that an effective opportunity to challenge the proposed contract be provided before it is actually concluded... However it is perhaps unlikely that the Court would go this far", Arrowsmith "Public Procurement: Example …" *op. cit.* footnote 132, p.145.

[212] Dingel, *op. cit.* footnote 1, p.238.

Typically, the plaintiff in a damages action must prove that there has been a breach, that he has suffered harm and that there is causal link between the breach and the harm[213]. We will see the relevant problems in the UK and Greece in the corresponding chapters. Here we will only make some general comments applicable to all Member States.

First of all, it is not unusual that Member States impose a stringent burden of proof on the plaintiff. For example, in some Member States, the plaintiff has to prove that he would have won the contract in order to be granted compensation for lost profits[214]. It is submitted that a very onerous proof paralyses the operation of this remedy and contravenes the obligation under the Directive and the principle of effectiveness to ensure its full effect. In this respect, it has been suggested that the burden of proof should be reversed in favour of the plaintiff: it should be left to the defendant to prove that the contract would not have been awarded to that firm[215]. Though the Directive does not impose such a precise obligation on Member States, it would be a solution compatible with the obligation to provide for an effective action in damages. In fact, there is a precedent in the case law of the Court, concerning compensation for sex discrimination in employment. The Court held that "it is for the employer, who has in his possession all the applications submitted, to adduce proof that the applicant would not have obtained the vacant position even if there had been no discrimination"[216]. It is not clear how far this case law is applicable to procurement, it is, however, an interesting *de lege ferenda* suggestion for the Member States.

Another usual problem is the *quantum* of damages. As there is nothing stated in the Directive, it is left to the Member States to decide on their calculation. The recovery of bid costs is usually covered in most Member States but the situation concerning lost

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[213] Advisory Committee for Public Procurement, *op. cit.* footnote 34 of chapter 2, p.14.
[214] *Ibid.,* p.18.
[215] Arrowsmith, *The Law…, op. cit.* footnote 3 of chapter 1, p.894.
[216] C-180/95 *Nils Draehmpaehl v Urania Immobilienservice OHG* [1997] E.C.R. I-2195.

profits is less certain. It is submitted that the extent of possible compensation should be sufficiently clear and satisfactory to allow bidders to decide whether they wish to sue. It is also submitted that calculation should be generous enough to fully compensate firms for their harm and therefore include lost profits[217].

The case law of the Court on state liability seems to indicate, in any event, that full compensation is in order. The Court has held that held that "reparation for loss or damage caused to individuals as a result of breaches of Community law must be *commensurate* with the loss or damage sustained so as to ensure the effective protection of their rights" [emphasis added][218]. Compensation must be full to have a "real deterrent effect"[219]. Consequently, it is insufficient to reimburse only expenses incurred[220]. Rules on mitigation of loss may be acceptable, if justified[221], but the exclusion of compensation for lost profits would fall foul of the requirement of adequate compensation. Member States should not adopt "ceilings", that is, maximum compensation levels, but should redress all the harm and include interest on the principal amount of damages from the date the breach took place to the date when the compensation is paid[222].

None of these cases are procurement related and it is not certain to what extent this case law fits the special features of procurement claims in damages. However, it illustrates the stance of the Court in relation to compensation obligations of Member States for breaches of Community law; the Court would arguably rule along the same lines if presented with a case regarding the procurement remedy of damages. The

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[217] It has been argued that compensation should be sufficiently high to counteract the risk of the plaintiff being blacklisted as a "troublemaker" and losing future business, Fernández-Martín, *The EC…, op. cit.* footnote 3 of chapter 1, p.213.

[218] Joined cases C-46-48/93 *Brasserie du Pêcheur SA v. Germany* and *R. v. Secretary of State for Transport, ex p. Factortame Ltd (No. 3)* [1996] E.C.R. I-1029; [1996] 1 C.M.L.R. 889.

[219] C-14/83 *Von Colson v Land Nordrhein Westfalen* [1984] E.C.R. 1891 and C-271/91 *M. H. Marshall v. Southampton and South West Hampshire area Health Authority (Marshall II)* [1993] E.C.R. I-4367. The deterrent effect of remedies is investigated in the empirical research.

[220] C-14/83 *Von Colson v Land Nordrhein Westfalen* [1984] E.C.R. 1891.

[221] Joined cases C-104/89 and C-37/90, *Mulder,* [1992] E.C.R. I-306 and joined cases C-46-48/93 *Brasserie du Pêcheur SA v. Germany* and *R. v. Secretary of State for Transport, ex p. Factortame Ltd (No. 3)* [1996] E.C.R. I-1029; [1996] 1 C.M.L.R. 889.

[222] In C-271/91 *M. H. Marshall v. Southampton and South West Hampshire area Health Authority (Marshall II)* [1993] E.C.R. I-4367 an upper limit on compensation was quashed by the Court.

Commission in its Green Paper referred to this case law to remind Member States that full compensation is due, including lost profits[223]. Actually, the fact that the remedy is provided in an EC directive should arguably give rise to stronger obligations in relation to its effectiveness than in general state liability claims for breach of EC law.

Proving that profit would have been made under the contract is not an easy task for the plaintiff, due mainly to the fact that the cost of performance cannot be calculated easily. It is suggested that, like in the case of proof that the plaintiff would have been awarded the contract, a presumption should be adopted that bid costs at least are owed[224], thus reversing the burden of proof in favour of the plaintiff: it would be for the defendant to prove that bid costs would not have been recouped. The plaintiff would have to prove further lost profits to recover them. The plaintiff would have still to put forward a figure for bid costs (though not prove that it would have been recouped) and it may be difficult to measure how much was spent to prepare the bid, especially in terms of hours of work.

The effectiveness of the whole review mechanism requires that compensation should be all the more generous if other remedies are not very effective, for example, if interim relief is not easy to obtain (especially as the argument for refusing relief is often precisely that compensation protects sufficiently the interests of aggrieved bidders) or if concluded contracts cannot be set aside (in which case a damages action is the only remedy left to the bidder).

Article 2(5) provides that "[t]he Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers". This provision was adopted to accommodate some national review systems that required the previous

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[223] In its Green Paper, *op. cit.* footnote 22 of chapter 1, p.15, the Commission reminded, in relation to remedies available to suppliers, the "possibilities offered by the recent case-law of the Court of Justice on the damage suffered by individuals as a result of breaches of Community law committed by Member States". The Commission even raised the question of whether damages should exceed full compensation in order to increase their deterrent effect.

[224] Arrowsmith, *The Law…, op. cit.* footnote 3 of chapter 1, p.894.

annulment of the contested decision to avoid the risk of conflicting judgments, where different courts have jurisdiction for different aspects of the procedure.

This option, where followed, can present several disadvantages. First of all, it delays the introduction of the action for damages. Secondly, it increases the legal expenses by obliging the bidder who wishes to lodge an action in damages to ask for a set aside first. Furthermore and more importantly perhaps, it makes the admission of an action in damages dependent on the success of the application to set aside. Non-compliance with any procedural requirement for lodging the application of set aside, which will cause it to be rejected, will also preclude the aggrieved firm from seeking compensation. Moreover, the firm will have to act in the time limit for the application to set aside and invoke all possible arguments concerning the breach then. Even if the time limit for the damages action is longer, it will not be able to take advantage of it, if it has not applied for a set aside first. Finally, the review body competent for the set aside, where different from the body competent for damages actions, will be under a lot of pressure, since the application to set aside the allegedly unlawful act will the only and final remedy in which the existence of the breach will be considered. In short, the obligation of a prior set aside can impair the function of the remedy of damages, except when a single court has jurisdiction and the two remedies can be joined in a single action, so no delays or procedural complications are caused.

9 Enforcement

Article 2(7) of the Directive requires that decisions taken by bodies responsible for review procedures can be effectively enforced.

This provision was adopted in view of the difficulty in some Member States to enforce judgments against the state. The state is normally under an obligation to

comply with the decisions of the courts but, in some Member States, voluntary compliance was the only option, as there was no possibility to execute a judgment[225].

10 Conclusions of section 2

The Remedies Directive is, as we have seen, a unique example of legislative Community intervention in national procedural law. When it was adopted, its provisions were innovative and helped to harmonise and align national procurement remedies -which were, until then, far from uniform, of varying effectiveness and sometimes non existent. It increased Member States' awareness and prompted in some cases significant changes of their review systems. For example, Germany, the UK and Ireland provided for procurement remedies for the first time[226] while others, like France, took the opportunity, when implementing the Directive, to modify their procurement review system in general, even for domestic procurement disputes[227]. However, the case law of the Court on national enforcement of EC law (mostly reached after the adoption of the Directive) goes in certain cases as far, and sometimes even further, than the Directive. Judgments like *Simmenthal*[228], *Francovich*[229] and *Factortame*[230] imply that, even if the Directive did not exist, the Member States would still have to make available the same remedies. This does not mean, however, that the Directive no longer has a purpose.

First of all, the Directive spells out the Community requirements as regards national review in EC procurement cases in a coherent, definite and clear way and thus avoids

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[225] See the contributions in Arrowsmith (ed.) *Remedies…, op. cit.* footnote 138.
[226] In these Member States, procurement was considered traditionally a purely internal administrative matter; the case of the UK is examined in chapter 5.
[227] Clerc, *L'ouverture*…, *op. cit.* footnote 20 of chapter 2.
[228] C-106/77 *Administrazione delle Finanze dello Stato v Simmenthal SpA* [1978] E.CR 629, in which it was held that a national court must be able to disapply national law to the extent that it conflicts with EC law, thus implying that the possibility to set aside acts contrary to EC law should always be provided.
[229] Joined cases C-6/90 and 9/90 *Francovich and others v.* Italy [1992] E.C.R. I-5357 where Member States were required to "eliminate the unlawful consequences of a breach of EC law" by compensating any harm sustained as a result of acts of public authorities breaching EC law.

discussions of whether the judgments, based as they are on facts irrelevant to procurement, could apply to it and if they applied, under which circumstances, on what grounds and to what extent. The Directive is a legal instrument concerned exclusively with the enforcement of the procurement rules, it provides clearly for three specific remedies (even though it does set out detailed procedural rules) and put a deadline for their national implementation. As a consequence, it leaves no doubts as to what and when Member States should do to enforce the EC procurement rules. It constitutes, so to speak, a codified expression of the general requirements on national enforcement developed by the Court, as applied to procurement. Thus, national legislators know what measures to adopt and national judges have specific obligations under the applicable procedural rules and can also use the Directive as a guidance tool when they interpret and apply these rules, whether taken in implementation of the Directive or not. Therefore, the Directive clarifies Member States' obligations in the area and precipitates and greatly facilitates the fulfilment of their obligations. In short, the existence of the Directive contributes to certainty, clarity and speedy law development in the area.

Related to the increase in clarity is that fact that the adoption of the Directive and of the implementing national measures, where taken, mean that remedies are more "visible" to bidders. This is due both to publicity and debate surrounding the adoption of the EC and national legislation[231] and the fact that bidders and their legal advisers have now at their availability a legal text, whether the implementing instrument or the Directive itself, which clarifies the content and extent of their rights of judicial protection.

In third place, the Directive requires a higher degree of uniformity and effectiveness of national remedies than could be asked under the Court's general case law.

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[230] C-213/89 *R v Secretary of State for Transport, ex parte Factortame-I* [1990] E.C.R. I-2433, where the Court required that interim relief should be available for breaches of EC law, even when it was not possible under domestic law.

The Directive has been criticised that it does not sufficiently guarantee uniformity and effectiveness[232]; it should, under this view, spell out specific requirements to ensure that judicial protection is adequate, in some respects at least -for example, clarify that compensation is due for lost profits or provide for a maximum duration of proceedings to ensure rapid relief[233]. It is probable that the Directive marked the highest point on which supranational consensus on national remedies could be found, as the more radical original proposal of the Commission[234], supported to a large extent by the European Parliament[235] and the Economic and Social Committee[236], failed to pass at the Council of Ministers.

Conclusions of chapter 3

Member States must provide for three procurement remedies, namely interim measures, set aside of unlawful decisions and the compensation of bidders for sustained harm, following the requirements of Directive 89/665 regarding aspects, traits or conditions of the procedures. The Directive should be implemented, applied and enforced by the Member States and their authorities at any level, in accordance with the relevant EC legal principles, namely those of non-discrimination and, in particular, effectiveness, as applied in this area.

Chapter 4

Means of enforcement other than remedies

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[231] The Commission organised an awareness campaign, directed at suppliers and contracting authorities, to draw attention on the EC procurement rules (substantive and procedural) and increase consciousness of and interest in them, Fernández-Martín, *The EC..., op. cit.* footnote 3 of chapter 1, p.24.
[232] *Ibid.* p.282.
[233] Arrowsmith "Public Procurement: Example…" *op. cit.* footnote 132, p.155.
[234] O.J. [1987] C230/6.
[235] O.J. [1988] C167/77.

There are mechanisms aiming to ensure observance of EC procurement rules other than remedies, which are based either on EC legislation or on initiatives at a political level. They share some common characteristics. First of all, they do not involve action before review bodies. Secondly, though they aim at law enforcement and often help to monitor national review procedures, they cannot lead to coercive measures. Thirdly, participation to their procedures is optional for the parties involved.

1 Attestation

The Utilities Remedies Directive (but not the public sector Remedies Directive) provides in its articles 3-7 for a system of voluntary audit, called "attestation", to test that utilities comply with the procurement rules. Utilities have thereby the option to submit to a periodical examination of their award procedures falling under the substantive utilities directive by an independent expert, appointed for that purpose, and receive a certificate that they apply the law in their awards.

This option, where exercised, does not constitute an alternative to judicial review. A utility that has received an attestation certificate would still be subject to challenge before the courts for any irregularities it has committed.

Attestation serves to indicate to contractors dealing with an "attested" authority that they run a smaller risk to be faced with irregularities and that they probably stand a fairer chance to win a contract. Attestation also provides contracting entities with an inexpensive opportunity, first, to demonstrate compliance with the EC rules to their potential clients and thus probably attract more tenders and, secondly, to check themselves that their award procedures comply with the often very complicated procurement rules -and eventually correct them.

Member States are responsible for providing an attestation system. They may identify some persons as attestors and can prescribe minimum qualifications that

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[236] O.J. [1987] C347/23.

attestors should have. Article 6 of Directive 92/13 lays down some conditions attestors are required to meet: they must be independent of the utility applying for the attestation, completely objective in carrying out their duties and must have relevant professional qualifications and experience.

Attestors will check the "procurement procedures and practices" (article 4 of Directive 92/13) applied by the utility, that is to say, both the rules and guidelines according to which the entity awards its contracts as well as its actual conduct throughout the award procedures. Once an attestor has been engaged by a utility, he/she must report the results of the examination in writing (article 5(1)). The attestor can award an attestation only where satisfied that any irregularities he/she has found have been corrected and will not be repeated.

Directive 92/13 mentions in its preamble that its provisions lay down the essential requirements for an attestation system but that operational details will be provided in a European Standard on attestation. Indeed, the European Standardisation bodies[237] have adopted a voluntary European standard for attestation, which can be used by Member States when putting their own system in place; compliance with it is optional. This standard contains certain requirements to ensure that attestors are sufficiently independent and qualified. It also contains a detailed checklist against which the attestor works and assesses the utility's procedures and practices.

If the utility obtains the certificate of attestation, it may include, in notices that it sends for publication in the Official Journal (O.J.), such as a periodic indicative notice or a notice of competition, a statement that on a certain date its contract award procedures and practices were found to be in accordance with Community law and national implementing rules (article 5(2)).

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[237] CEN (Comité Européen de Normalisation) and CENELEC (Comité Européen de Normalisation Electronique).

Attestation has hardly ever been used. Few Member States have made arrangements to that effect, for example Ireland[238]. However, after a decision of the Court of Justice, it appears that Member States are required to take legislative measures setting up an attestation system[239], in order to fulfil their obligation to provide for one under the Utilities Remedies Directive. Recently, the UK has adopted legislation referring, for the first time, to attestation[240]. The legislation provides only that utilities obtaining an attestation certificate may include a statement to this effect in notices sent to the O.J. and that a system set up in accordance with the European Attestation Standard is presumed to be compatible with the requirements of Directive 92/13. At the same time, the UK government has taken steps to set up a system[241]. Arrangements have been made for the first examination of potential attestors, and following this, the system will become available for utilities to use.

Even where an attestation system exists, utilities seem reluctant to take the trouble to submit to it[242]. It is only relatively recently that the first two attestations have been granted to two Irish firms, though more firms have applied since. The Commission repeated its belief in attestation in the Green Paper[243] and even expressed a wish to extend it to the public sector. In order to make attestation more attractive to utilities, the Commission proposed that benefits should be attached to attestation systems in favour of utilities using them, such as exemption from certain (unspecified) constraints currently imposed on utilities by the substantive directives.

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[238] Ireland has established an attestation system following the CEN standard, see Duffy "Establishment of an Attestation System in Ireland" (1997) 1 P.P.L.R. p. 27.

[239]. C-225/97 *Commission v. French Republic* [1999] E.C.R. I-3011; the Court stated that "directives must be implemented with unquestionable binding legal certainty and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty…" (point 37 of the judgment). See Arrowsmith "The Utilities Contracts (Amendment) Regulations 2001 and establishment of a System of attestation in the United Kingdom", (2002) 11 P.P.L.R. p.1 at p.4.

[240] The UK implemented the utilities substantive and remedies directives in the Utilities Contracts Regulations 1996 (S.I. 1996 No. 2911). In this instrument, the UK had made no provision for a system of attestation. The UK took the view that, since UK utilities had access to systems of attestation set up in other countries, such as Ireland, attestation was available in practice and there was no need for it to establish its own system, see Arrowsmith "The Utilities ..." *op. cit.* footnote 3, p.3. Since 1996, the Utilities Regulations have been amended a number of times. In 2001, the UK adopted a new amendment, the Utilities Contracts (Amendment) Regulations 2001 (S.I. 2001 No. 2418), which came into force on 26 July 2001 and which includes in its regulation 31A provisions on attestation.

[241] Arrowsmith "The Utilities ..." *op. cit.* footnote 3 p.4.

[242] Maund "The New Attestation Standard" (1996) 5 P.P.L.R. CS 39.

It appears, in short, that though attestation is viewed favourably by the Commission and some Member States, utilities may often be unwilling to endure the disruption of an audit, at least not unless some rewards are offered. It remains to be seen if and how much the system will work.

2 Conciliation

The Utilities Remedies Directive provides in its articles 9-11 for a voluntary dispute settlement procedure, called "conciliation". Conciliation was conceived as an alternative (but not a substitute) to judicial review, to encourage amicable settlements of disputes arising in awards covered by the substantive utilities directive. It was hoped that, by recourse to it, the cumbersome and time-consuming judicial proceedings would be avoided.

Conciliation is provided for only in the Utilities Remedies Directive (and not in the public sector one), because there was an increased concern to ensure flexibility of review procedures in the utilities sector. Many utilities are private bodies that put pressure during the adoption of the EC procurement legislation to obtain flexible enforcement choices.

Conciliation is voluntary, meaning that the parties involved in the award are free to suggest it, submit to it on the suggestion of another party or reject it. The procedure does not have to culminate with a settlement, the decision reached by the conciliators is not legally binding and the parties may withdraw from the procedure at any time (article 10(6) of Directive 92/13). Use of conciliation does not forfeit in any way the parties' right to bring an action before national review bodies, whenever they choose, or the Commission's right to open an infringement procedure likewise (article 11(2)). If legal proceedings are brought by a contractor whilst conciliation is in progress, the conciliators may decide not to go ahead with it (article 11(1)).

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[243] Commission Green Paper, *op. cit.* footnote 22 of chapter 1, p.18.

The conciliation procedure can be commenced on the initiative of anyone that has an interest in obtaining a utilities contract (article 9(1)), anyone, that is, who would normally have standing in court. The interested party may address a request in writing to the Commission or the competent national authority (listed in the Annex of Directive 92/13) that must in its turn forward the request to the Commission[244] (article 9(2)). The Commission, having ascertained that the dispute concerns the application of EC law, will then ask the utility whether it wishes for a conciliation procedure to open; initiation of the procedure depends on the utility's consent (article 10(1)). If that consent is granted, then a conciliation panel will be formed (article 10(2)). The panel consists of three persons: one appointed by the Commission (choosing from a list of independent accredited persons, proposed by the Member States) and approved by the parties, and one by each party. The conciliators may appoint up to two experts each to assist them in their work, if the parties to the dispute or the Commission do not oppose that. Parties to the conciliation as well as any other supplier interested in the award procedure, in the course of which the dispute arose, can make oral or written presentations before the conciliation panel (article 10(3)). The panel's task is to endeavour to reach as quickly as possible an agreement between the parties in accordance with EC law (article 10(4)); the findings of the panel and any result achieved will be reported by it to the Commission (article 10(5)). The costs of the procedure are shared between the parties and each bears its own costs (article 10(7)).

The Court of Justice recently required Member States to formally transpose in national law the Directive's provisions on conciliation to ensure the affected parties know about and can have recourse to it[245].

The conciliation procedure has failed so far to take off[246]. Many Member States have even neglected to propose conciliators for the Commission list. The Commission

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[244] In the UK, regulation 33 of the Utilities Contracts Regulations 1996, S.I. 1996/2911, provides for requests to be transmitted through the relevant Minister on to the Commission.

[245]. C-225/97 *Commission v. French Republic* [1999] E.C.R. I-3011. France had made no provision in its legislation but claimed that it was only necessary to publicise the procedure to those affected.

in its Green Paper[247] suggested that this is due to lack of information among suppliers and contracting entities but asked for suggestions as to any further possible reasons.

There are several problems in conciliation, the most obvious being that parties are perhaps reluctant to participate in a procedure where the Commission is involved. If the parties wanted to reach an amicable settlement, they would probably rather make their own arrangements, involving or not the assistance of an independent third neutral party, like a conciliator or arbitrator, but not involving the Commission. The participation of the Commission was provided to achieve maximum transparency and ensure procurement rules are observed by preventing wholly private negotiations that could lead to irregular (from the point of view of procurement law) settlements. The system fails, however, to take account of the need of the parties for confidentiality, since the Commission is present in the procedure. The parties, especially the utilities concerned, would understandably be reluctant to disclose any information that could later form the basis of a Commission action against them[248] -and such grounds are generally present for a conflict to arise in the first place.

The conciliation procedure, as is now designed, is fairly cumbersome, time consuming, sometimes confusing and can be expensive, especially considering that the costs of the procedure cannot be recovered, unless an agreement is reached beforehand that costs will be awarded depending on the outcome[249]. As a result, conciliation does not have comparative advantages, as it was supposed to have, in relation to legal remedies. Thus, first of all, the request for conciliation has to go through several channels before the procedure even gets started and the Commission, which is known for its delays, is always involved. The appointment of the panel itself can be very lengthy, especially if the parties or the Commission oppose each other's choice and considering always that the Commission does not act quickly in any case.

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[246] Only two requests for conciliation have been made and both have been rejected by the utilities concerned, Trepte "Conciliation under Directive 92/13: The Case for Reform" (1997) 6 P.P.L.R. p. 205.
[247] Commission Green Paper of 27.11.1998 *op. cit.,* p.18.
[248] Trepte "Conciliation …" *op. cit.* footnote 10, p.206.
[249] Trepte, *Public Procurement, op. cit.* footnote 3 of chapter 1, p.236.

Furthermore, it is not clear how the parties choose their own conciliators and on what grounds they may reject the conciliators of others. In any case, a panel of three might be not a flexible scheme and might result in disagreements between the conciliators themselves[250]. The procedure would need to undergo several changes to become operable, for example, providing for the appointment of only one properly accredited conciliator but excluding the Commission.

3 The pilot project on remedies

The Commission in its Green Paper launched a proposal for national authorities to be established or appointed by Member States, to monitor the application and ensure the observance of procurement rules[251]. The Commission hoped thus to enhance compliance and be relieved of some of its monitoring workload. The Commission suggested that the national authorities, in order to be effective, should, first of all, be "of genuine and unquestionable independence". Secondly, these authorities should be able to provide advice to contracting authorities, require them to correct procedural errors and exchange information with other similar bodies in other Member States. The Commission invited the Member States to consider the proposal and "run a pilot project to test how feasible the application of the concept might be".

In its Communication, the Commission reiterated its invitation to the Member States to establish national authorities in order to complement their review systems[252]. It did not however follow up the Green Paper idea of empowering such authorities to correct breaches; that seems to have been opposed by some Member States. Correction of breaches was left to the national review bodies. The designated authorities would rather "serve as contact points for the rapid informal solution of problems

[250] Trepte "Conciliation…" *op. cit.* footnote 10, p.207.
[251] Commission Green Paper, *op. cit.* footnote 22 of chapter 1, p.16.
[252] Commission Communication, *op. cit.* footnote 22 of chapter 1, p.13.

encountered". The Commission abandoned as well the Green Paper idea that authorities should enjoy "genuine and unquestionable independence".

A pilot project for the co-operation and co-ordination between designated national authorities was indeed launched, on the initiative of Denmark, based on the Danish Competition Authority's suggestions. The duration of the pilot project was set to be approximately three years starting January 1999; it was slightly prolonged and, at the time this study was completed (July 2002), it had just ended.

Participation to the project was voluntary and not all Member States welcomed the idea. 6 Member States initially took part, namely Denmark, Germany, the Netherlands, the United Kingdom, Spain and Italy. The original group was enlarged and more Member States, plus Norway, Switzerland and Liechtenstein participated in the project, which eventually included 15 countries[253].

The designated authorities (all of which are linked in some way to ministries or governmental departments, so not truly independent) acted as contact points and performed a number of tasks. The primary objective of the project was to help "identify methods to obtain reliable and speedy informal solutions"[254] and to lead to the correction of breaches without recourse to legal action.

Each participating authority could request from another authority to make enquiries in order to establish whether there was a breach in the Member State to which the latter ("requested") authority belongs. The requesting authority was informed of the breach either through its own sources or following the complaint of a supplier. The suppliers could contact either their home authority or directly the authority of the Member State where the alleged breach had occurred. It seems that suppliers preferred going to their home authority[255], an attitude that showed the importance of

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[253] Merete Rasmussen, "EU's Pilot Project on National Enforcement Authorities", paper delivered at the Public Procurement Global Revolution II conference, which took place in Nottingham on September 6 and 7, 2001.

[254] *Guidelines for Co-operation on Solution of Cross-Border Problems in relation to Access to Procurement Contracts Within the Framework of the Pilot Project on Public Procurement*, decision of 10.12.1998, published in (1999) P.P.L.R. 8 p.CS31.

[255] Haagsma "The European Pilot Project on Remedies in Public procurement" (1999) P.P.L.R. 8 p.CS25.

such a network of authorities. The requested authority then enquired into the matter, drew the attention of the contracting authority concerned to the issue and tried to achieve a "smooth" informal solution of the problem[256], eventually involving the correction of the breach, if a breach was indeed established. The designated authorities did not have real enforcement powers, as we have seen, but relied on their persuasive power vis-à-vis the contracting authority[257]. The requested authority informed the requesting authority at regular intervals of the results of the procedure. The requested Member State ought then to provide the Commission with statistical information on the outcome of requests. Bidders remained free to start legal proceedings throughout the procedure under the pilot project.

A Steering Committee, composed of representatives of the participating Member States, was appointed for the management of the project. The Commission had an observer status in the Committee and provided a certain financial support[258].

The project indeed proved useful in cases, as it increased awareness of different possible interpretations of the substantive law, clarified the problem for the benefit of the supplier (who could then decide whether or not to initiate proceedings, if the problem was not solved informally) and sometimes lead to amicable solutions, which were informal, speedy, cheap and reached at the lower conflict level possible[259]. However, the fact that the participating agencies were not independent from their governments and did not have real enforcement powers decreased the impact of the provided procedures.

Now that the project has reached its end, the participants have developed a web site[260], which refers to cases where the procedures of the project were used and indicates if and how the problem was resolved. This is useful to provide indications and information to bidders and authorities regarding dispute solving alternatives.

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[256] *Guidelines for Co-operation..., op. cit.* footnote 18.
[257] Rasmussen, *op. cit.* footnote 17.
[258] *Ibid.*
[259] Denmark has dealt with approximately 50 cases under the pilot project, of which one third had a successful outcome, M. Rasmussen, *op. cit.* footnote 17.

4 Proposals not carried through

The Commission in its Green Paper and Communication made some suggestions for improving enforcement of the EC procurement rules. They were however abandoned, mainly because they would involve a radical EC intervention in national enforcement, which the Member States wanted to avoid.

4.1 Investigation powers of the Commission

The Green Paper suggested the extension of the investigatory powers that the Commission has in competition to procurement, in order to increase the effectiveness and promptness of its action. The Commission has, under Regulation 17/62[261], the powers to request (and compel) information from Member State authorities and undertakings, inspect an undertaking, open its books and other business records and ask for oral explanations on the spot. If the Commission had such powers when dealing with procurement cases, its action would become faster, more effective and less dependent on the collaboration of the contracting entity for the collection of evidence. The Green Paper suggested alternatively to extend to procurement the powers that the Commission has in the field of fight against fraud under Regulation 2185/96[262], which are similar to the ones in competition, but more limited. Regulation 2185/96 already applies in relation to contract awards involving Community financing.

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[260] www.procurementsupport.com
[261] Regulation 17/62 JO [1962] p.204.
[262] Council Regulation (Euratom, EC) 2185/96 OJ [1996] L 292/2 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities.

The Commission Communication repeated the suggestions without however mentioning it would take any specific initiative in that direction[263].

It seems unlikely, for the time being, that the proposal will be accepted by the Member States who are traditionally hostile to the extension of the Commission's powers in that direction.

4.2 Sanctions and dissuasive damages

The Green Paper[264] suggested that contracting entities infringing the procurement rules should have to pay sanctions and/or dissuasive/punitive damages (damages exceeding the damage suffered) to aggrieved firms, rather than merely compensate them for their loss. It was thought that sanctions or dissuasive damages would be stronger deterrents against breaches than ordinary compensation. A reason for this proposal was the fact that national actions in damages vary considerably and that, in many Member States, the remedy is ineffective and without real deterrent power.

The Commission Communication did not however mention anything on the subject. It seems that the idea was not favoured by the Member States and was abandoned. The adoption of dissuasive damages would be against the legal tradition in some Member States, which requires damages to be only compensatory and not punitive. Besides, most Member States are probably reluctant to burden the state budget with the payment of such damages[265]. The adoption of sanctions and punitive damages would probably be problematic in view of the lack of EC competence on criminal matters, given that punitive damages is not a civil law notion, like compensatory damages, but rather a criminal law one.

5 Conclusions of chapter 4

[263] Commission Communication, *op. cit.* footnote 22 of chapter 1, p.12.
[264] Commission Green Paper *op. cit.* footnote 22 of chapter 1, p.15.

Non-judicial enforcement mechanisms have either failed to take off, as in attestation or conciliation, or have only relative success, as in the case of problem solving under the pilot project. The reasons range from the ill-conceived modalities of application of the mechanism (as in the case of the counterproductive Commission participation in conciliation) to the reluctance of the Member States to relinquish more powers in the field (as in the government dependent authorities participating in the pilot project).

It seems that the Member States are unwilling to change the present *status quo* as regards enforcement and are not prepared to allow more intervention in their procedural law than they already allowed through the Remedies Directives. The Commissions' suggestions to provide for sanctions and dissuasive damages or empower it to intervene more effectively were not taken up.

Thus, enforcement of the procurement rules still relies heavily on legal actions by bidders before the national courts. We will examine their procedural details in the UK and Greece in the following two chapters.

Chapter 5

The remedies system in the UK (England and Wales)

This chapter examines the remedies system in England and Wales for the enforcement of the public sector procurement rules. The reason that we do not refer to the other parts of the UK, Scotland and Northern Ireland, is that their judicial systems are sometimes different from the English and Welsh ones and it is not worthwhile or relevant to explain the differences in the context of this study, as they are small and often concern the terms used (which vary) rather than the procedures followed (which are, in procurement, the same). All procurement rules, substantive and procedural, taken in implementation of the EC procurement directives, apply equally to the whole of the UK and the case

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[265] Fernández-Martín *The EC… op. cit.* footnote 3 of chapter 1, p.216.

law of the Court of Appeal and of the House of Lords is binding on all UK courts. Wherever reference is made to UK law or UK courts, it means that the rule under discussion is applicable to the whole of the country.

Only provisions on remedies adopted specifically to implement Directive 89/665 will be examined in detail. Other rules on remedies will be referred to only where they can be used to fill gaps in the implementing regulations or where their examination is necessary to assess the implementing regulations in the light of the principle of non-discrimination.

1 The legal background

1.1 Absence of procurement regulation

Originally, public procurement was, as a general rule, not regulated in the UK by formal rules or legal principles, of either substantive or procedural nature. As a result, review of the public authorities' acts in the area was almost impossible, as there were no rules or procedures under which to bring a claim.

More precisely, the situation before the adoption of legislation implementing the EC procurement rules was the following. First of all, there were almost no statutes regulating procurement, with the exception of some rules applying to local authorities. There were government guidelines on contract awards, which, however, did not grant any rights to bidders. Consequently, contractors had no legal basis to challenge the way award procedures were conducted.

The English and Welsh courts have developed a body of general public law principles, called the principles of judicial review (enforced by way of an application for judicial review, examined below), which regulate the exercise of executive

power[266]. However, the courts did not apply these principles to public contracting, unless they considered that there was a special "public law" element in the examined contracting decision, which rendered it reviewable. That was not the case of most decisions.

The reason for exempting procurement from the application of the public law principles was the following: government contracts are no exception to the rule that, in UK law, all contracts, whatever their specific characteristics, are governed by private law. Hence it was considered that government contracts were exempt from the application of principles belonging to the sphere of public law: a private law situation, even involving the government, could not be governed by public law rules. Thus, the infringement of public law principles could not be relied on by contractors in order to institute proceedings.

The non-applicability of public law principles to procurement was disputed in literature[267]. It was argued that the fact that government contracts are subject to private law does not have to result in government immunity from judicial control. There seem to be no valid reason to distinguish this aspect of government activity (the exercise of contractual powers) from other government conduct and exclude the former from the application of public law principles applying to the latter as it is still the government acting in both cases. Public law obligations should apply because of the nature of the body making the decision[268]. The need to control government decisions exists in procurement as in any area of government action. Moreover, there is no reason to deny citizens affected by a decision (here the contractors) the protection public law would normally offer them.

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[266] Arrowsmith, *The Law…, op. cit.* footnote 3 of chapter 1, p.33.

[267] "...the fact that contractual *liability* is governed by the ordinary law does not mean that it is inappropriate to apply administrative law doctrines to the exercise of contractual power..." Arrowsmith "Enforcing the EC Public Procurement Rules: The Remedies System in England and Wales" (1992) 2 P.P.L.R., p.95. See also Arrowsmith "Government Contracts and Public Law" (1990) 10 Legal Studies, p.239 and Arrowsmith "Judicial Review and the Contractual Power of Public Authorities" (1990) 106 L.Q.R., p.291: "...it is difficult to see why the simple fact that the power in question is a contractual one should affect the scope of judicial review. It may be purely fortuitous whether a regulatory scheme involves a contractual relationship or whether it is carried out purely by unilateral regulation".

[268] Arrowsmith "Judicial Review…" *op. cit.* footnote 2, p.289.

Relatively recent case law of the English courts seems to indicate that public contracting may not be entirely free from scrutiny and that judicial review of contracting decisions will be allowed. It is, however, not a stable or clear case law. In some cases, the courts applied the principles of judicial review to procurement without examining whether the contracting decision presented a "public law" element[269]. In others, on the contrary, the court held that the decision is amenable to judicial review only if it presents a public law element[270].

In more recent procurement cases, courts have shown a clearer willingness to apply the principles of judicial review to contracting decisions. In *Ealing*[271], the Court of Appeal accepted that it might allow an application for judicial review, if bad faith is alleged, therefore indicating that challenge of contracting decisions for violation of public law principles, such as the obligation of public authorities to act in good faith, is possible. In *Barrett*[272], the High Court allowed judicial review against a contracting decision of a local authority on the basis that it contained a public law element[273]. However, due to the existence of conflicting previous judgments, which have not been overturned, there is significant uncertainty over the extent to which judicial review principles apply to procurement decisions. There is need for clarification by the Court of Appeal or the House of Lords[274].

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[269] *R. v. Lewisham B.C. ex parte Shell UK Ltd* [1988] 1 All E.R. 138, where a contracting decision was held to be unlawful under the "improper purposes" rule, as the authority was considered to have used the power of procurement for a purpose other than that for which it was conferred to it. Neill L.J. held that, in general, contracting authorities should not proceed in a way involving procedural impropriety or unfairness. Also, *R. v. Enfield L.B.C., ex parte T F Unwin Ltd.* [1989] C.O.D. 466, where the contracting authority's decisions were held to be subject to the principle of natural justice and that firms are entitled to a hearing before a decision affecting their interests is reached.

[270] *R. v. the Lord Chancellor's Department ex parte Hibbit and Sanders* [1993] C.O.D, where it was held that it is not sufficient that a decision is made by a public body in the exercise of governmental powers but that it must additionally present a public law element to be amenable to judicial review.

[271] *Ealing Community Transport Ltd. v. Council of the London Borough of Ealing*, [1999] C.O.D. 492, CA.

[272] R. *v. Bristol City Council, ex parte D.L. Barrett*, High Court, judgment of July 6, 2000.

[273] In Scotland, the Court of Session examined whether a contracting decision was unreasonable under the principles of judicial review, thus indicating (though not explicitly stating) that judicial review applies to procurement decisions, in *Clyde Solway Consortium v. The Scottish Ministers,* Inner House, Court of Session, judgment of January 22, 2001.

[274] See Arrowsmith "Judicial Review of Public Procurement: The Recent Decisions in the National Lottery Case and *R. v. Bristol City Council, ex p. D.L. Barrett"* (2001) 10 P.P.L.R. p.NA41.

1.2 Judicial review remedies

There are, in England and Wales, "public law" remedies, which can be introduced by way of an application for judicial review before the High Court. The application for judicial review is open for every breach of public law, both of legal principles and of statutes applicable to public bodies. However, as we have seen, there were originally no statutes in the field of procurement, with the limited exception of provisions applicable to local authorities (examined below). Therefore, an application for judicial review could be brought only for violation of the public law principles, on condition that the decision of the contracting authority was held to be reviewable, as we saw above.

Under the judicial review procedure, there are five remedies available (certiorari, mandamus, injunction, prohibition and declaration), by which the court can annul an act, compel a public body to take a lawful decision, prevent a public body from taking or implementing an unlawful decision or declare an act unlawful[275]. In principle, the only remedy available against the Crown is the last one, the declaration; traditionally, there could be no enforcement against the Crown or against central government departments (see, though, below on interim relief). However, all remedies can be sought against acts of Ministers performing functions conferred upon them by statute or against decisions of devolved public bodies. In procurement, it is generally assumed that it is the Minister in a separate capacity from the Crown who administers the award procedure, even if the Crown itself is the party to the contract [276].

1.3 Provisions applying to local government bodies

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[275] Kane, *An Introduction to Administrative Law* (1992), p.61 *seq*.; Craig "Towards a Judicial Protection in Europe? United Kingdom" European Public Law Review, vol.9, no 3, autumn 1997, p.881.

[276] Arrowsmith, "Protecting the Interests of Bidders for Public Contracts: The Role of the Common Law", Cambridge Law Journal, 53(1), March 1994, pp.104-139 at footnote 36.

There were and still are, in the UK, rules regulating procurement at local level. Until January 2000, the regime applying to local government was Compulsory Competitive Tendering (CCT), first introduced under Part III of the Local Government (Planning and Land) Act 1980 and added to subsequently by statutes and detailed legislation. CCT required that certain services[277] provided by local authorities were undertaken in-house only if the authority could do so competitively. Under CCT, a local authority, wishing to have one of the included services performed, should put it out to tender and run a competition following the specific CCT rules. In-house units established by the local authority could also tender for the service alongside outside providers. From the point of view of EC procurement law, the importance of the CCT was the following: when the services covered by it were performed in-house, the EC procurement rules did not apply. EC rules only concern award procedures. After, however, these services are put out to tender and thus an award procedure is embarked upon, the EC rules and the UK implementing measures will apply, if the procedure in question falls under their scope.

CCT rules created statutory rights for the participants to the tendering procedure, the enforcement of which could be sought before the courts by way of an application for judicial review.

CCT was abolished and ceased to have effect in January 2000. It was replaced by a new system, referred to as Best Value, provided for in Part I of Local Government Act 1999. Best Value came into force in three stages between August 10, 1999, and April 1, 2000. It is not restricted to services covered by CCT but applies to all aspects of local authorities' functions. The regime prescribes a duty for local authorities to

[277] These services are defined in Local Government (Planning and Land) Act 1980, Local Government Act 1988 and Local Government Act 1992. They consist in a range of "blue collar" services, such as construction, building maintenance, refuse collection and others and a range of "white collar" support services, such as finance, legal, personnel and IT.

obtain best value in providing services[278] but does not make detailed requirements. Rather, it enables the Secretary of State to introduce regulations containing the detailed obligations to be imposed on local authorities.

There are some other limited rules on local procurement procedures. The most important are those included in section 17 of the Local Government Act 1988, which prohibits local authorities from taking into account non-commercial considerations when awarding a contract. When the local authorities violate this obligation, contractors having suffered loss as a result have, in addition to the judicial review remedies, an action in damages against the authority (provided for in section 19 of the Act). Damages actions in UK law are examined below. However, Best Value legislation empowers the Secretary of State to specify by order matters to cease to be non-commercial considerations under section 17. This has not been done at the time this study was completed, July 2002.

1.4 Interim relief

Originally no interim relief was available against the Crown. This rule clashed with the requirement that remedies to enforce EC rules must be effective and also had the result that, while immunity from interim relief was granted to the Crown, this was not the case with Ministers[279] or devolved public bodies like the local authorities, thus making the operation of the remedy dependent on the nature of the public body.

As was mentioned, in procurement it is assumed that it is not the Crown but the Minister who administers the award. Therefore, the unavailability of an interim relief against the Crown was not, as such, a problem. In any event, the Court of Justice held in *Factortame,* in connection precisely to this rule, that a national court, which is

[278] Best value is defined in section 3(1) of the Act as the duty for a local authority to "make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness".
[279] *M. V. Home Office* [1993] 3 All E.R. 537.

precluded by a rule of national law from granting interim relief in a case before it concerning Community law must set aside that rule. After *Factortame,* the House of Lords acknowledged the availability of interim relief against the Crown in cases involving the protection of EC rights in *Factortame II*[280].

1.5 Damages actions

There is no general right to compensation in English administrative law for damage caused by an unlawful action of a public body[281]. There exists the action in tort for breach of statutory duty, when there is a right to damages conferred by legislation[282], which can be brought against public bodies[283]. We have however seen that, in procurement, there was no statute, so no action for damages could be brought on this ground.

Damages before the implementation of the Remedies Directive by Regulations could be sought under the tort of "misfeasance in public office"[284]. This claim is still available, independently to proceedings instituted under the Regulations, since it is a claim for a different tort. It can be brought either in conjunction with an application for judicial review or separately by summons or writ. Under the tort of misfeasance in public office, contractors can ask for compensation in cases where a public official acting in the exercise of public power maliciously or deliberately abuses his powers, that is, acts unlawfully with the intent to injure or is aware of the unlawfulness of his conduct. As long as there were no rules defining what constitutes lawful or unlawful conduct in the course of award procedures, this tort could not be used much. After the

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[280] *R v Secretary of State for Transport, ex parte Factortame-II* [1990] 3 CMLR 375.
[281] Arrowsmith, "Enforcing the EC…" *op. cit*. footnote 2, p.97. See, for example, *R. v. Knowsley M.B.C., ex p. Maguire* [1992] 90 L.G.R. 653.
[282] Either expressly or at least on the basis of an implied legislative intention to grant a right to damages to the interested parties, see Arrowsmith, *The Law…*, *op. cit*. footnote 3 of chapter 1, p.891.
[283] See for example, the Court of Appeal in *Crédit Suisse v. Borough Council of Allerdale* [1997] QB 306; for a detailed analysis of the tort, see Grubb (ed.), *The Law of Tort,* Butterworths Common Law Series 2002.
[284] Arrowsmith, *The Law…, op. cit*. footnote 3 of chapter 1, p.892.

adoption of the Regulations, the obligations of the contracting authorities are however defined. It would nonetheless often be difficult to adduce evidence that an authority has deliberately or maliciously abused its powers under the law. In *Harmon,* a damages case for breach of the EC rules on public works (as implemented), the High Court applied the tort of misfeasance, as we will see later[285].

Contractors also could (and still can) claim damages under other torts such as negligent mis-statement or misrepresentation or "economic torts" such as conspiracy and interference with trade by unlawful means.

All the above are specific torts which can form the legal basis of a claim in damages against public bodies; they are not however specifically designed in order to ensure compensation in procurement procedures.

The only action for damages adopted specifically for the benefit of contractors before the implementation of the Remedies Directive was the one under section 19 of the Local Government Act 1988, referred to above. Contractors can under this action ask for the recovery of costs "reasonably incurred" in preparing the bid (but not for the recovery of lost profits).

The Court of Appeal in *Blackpool and Fylde Aero Club Ltd. V. Blackpool B.C.*[286] has held that where a bid is submitted in response to an invitation to tender, there is an implied contract between the bidder and the contracting authority, previous to and independent from the main contract, binding the authority to at least consider the submitted bid. If the authority fails to do so, it is liable to pay the injured contractor (whose bid was not considered) damages for breach of the implied contract.

The judgment was an important development as it established a general rule on liability for unlawful contracting conduct. It is not however very detailed or precise and does not contain specific rules on the conditions for establishing breach of

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[285] *Harmon CFEM Facades (UK) Ltd v. The Corporate Officer of the House of Commons,* High Court, judgment of 28 October 1999 (1999) 67 Con. L.R.1. The case includes various significant points on remedies.

[286] [1990] All E.R. 237.

contract. Thus, first of all, it is not clear whether the theory of implied contract can be used in a different context than that of the case. It probably applies only in factual situations like those in *Blackpool,* where there was an invitation to tender addressed to parties already known to the invitor and the invitation prescribed a clear, orderly and familiar procedure[287]. In procurement, this situation bears similarities to the restricted and the negotiated procedure (where a limited number of candidates are invited to submit tenders or negotiate) but not to the open procedure[288]. Secondly, it is not clear whether the authority's obligation under *Blackpool* to consider the bid encompasses the obligation to assess it according to the rules of the followed procedure. The obligation of assessment in accordance with an expected procedure was spelt out in a later case[289].

The appropriateness of the theory of implied contract in award procedures to provide contractors with a remedy in damages has been doubted[290]. In *Harmon*, the theory and its possible application in EC procurement was discussed, as we will see later.

2 The Procurement Regulations

2.1 The implementation of the Remedies Directive

The UK initially implemented the works and the supplies directives by circulars ordering contracting authorities to comply with the requirements of the directives. However, implementation through circulars fell foul of the EC requirement of legal

[287] These factors were mentioned by the court.
[288] Trepte, *Public Procurement, op. cit*. footnote 3 of chapter 1, p.227.
[289] *Fairclough Building Ltd v. Port Talbot Borough Council*, decision of 16 July 1992, Construction Industry Law Letter 779.
[290] Arrowsmith, *The Law…, op. cit*. footnote 3 of chapter 1, p.40 "… in the tendering situation there is no element of bargain … which is normally required for a binding contract; nor any intention to create legal relations … The use of a contractual approach to protect bidders is thus questionable".

certainty as regards national transposition of EC law[291]. The UK proceeded to implement the directives by statute, through regulations adopted by the Treasury.

This was done on the basis of section 2(2) of the European Communities Act 1972, which provides for the implementation of EC law by Order in Council or by Ministerial or Departmental Regulation. According to section 2(2) as amended "any designated Minister or department may by regulations make provisions ... for the purpose of implementing any Community obligation of the United Kingdom". The designated ministry in procurement is the Treasury.

The works and the supplies directives were implemented in 1991[292] and the services directive in 1993[293]. The implementing Regulations all transpose the Remedies Directive as well, by including a section (Part VII of each Regulation) on enforcement and remedies. The relevant provisions are Regulation 31 of the Works Regulations, Regulation 29 of the Supply Regulations and Regulation 32 of the Services Regulations. The remedies provisions in the three Regulations are identical. It would arguably have been better to implement the Remedies Directive not by sectors, but by means of a single text, to increase "visibility" and concerned persons' awareness of the available remedies.

2.2 Scope and distinction from other remedies

The Regulations cover only award procedures falling under the EC directives. Other contract awards do not have to comply with their rules and are not subject to the same remedies. The three remedies of interim relief, set aside and damages may be brought

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[291] C-167/73 *Commission v. France* [1974] E.C.R. 359 where it was held, in relation to administrative guidelines, that their internal and verbal character created as regards those concerned "a state of uncertainty as to the possibilities available to them of relying on Community law". See section 2 of chapter 3 about the EC requirements as regards national implementation of EC law.

[292] The Public Works Contracts Regulations 1991, SI 1991 No. 2680, referred to in this study as "the Works Regulations", and the Public Supply Contracts Regulations 1991, SI 1991 No. 2679, replaced in 1995 by the Public Supply Contracts Regulations 1995, SI 1995 No. 201 (implementing the consolidated EC supplies directive), referred to in this study as "the Supply Regulations".

[293] The Public Services Contracts Regulations 1993, SI 1993 No. 3228, referred to in this study as "the Services Regulations".

against violations of the Regulations as well as against violations of any EC rule applicable to the covered award procedures.

The remedies may be sought in an action that has some of the characteristics of judicial review (for example, same time limits). The Regulations do not, however, include any provisions on the relationship between the remedies under them and the judicial review remedies, apart from the mention that the remedies in the Regulations are available "without prejudice to any other powers of the Court". Thus, the provisions for specific remedies does not seem to preclude contractors from using other remedies[294], such as applications for judicial review, provided that judicial review is deemed to apply to procurement decisions, which is, as we have seen, as yet uncertain under the present state of the law.

The articulation between the two sets of remedies needs to be discussed, because there are overlaps between them: the remedy of set aside is similar to certioriari (an order quashing the decision of a public body)[295] and to mandamus (an order compelling an authority to adopt a decision or perform a duty under the law) and interim relief to interlocutory injunction. It is therefore important to see whether and how judicial review and procurement remedies mutually exclude and/or complement each other.

Some commentators argue that judicial review remedies may be sought freely instead of or in addition to the ones under the Regulations, at the discretion of bidders[296].

Others, however, argue that, following the adoption of the Regulations, contractors do not have the option to apply for judicial review anymore. Under this view, the special procurement remedies are the only ones available for breaches of the

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[294] In *Harmon*, the judge rejected the defendant's argument that the Regulations are exhaustive of the remedies available to contractors.
[295] Arrowsmith "Enforcing the EC…" *op. cit.* footnote 2, p.100.
[296] Geddes, *Public and Utilities Procurement: a Practical Guide to UK Regulations and Associated Community Rules* (1997) at p.106.

Regulations[297]. The reason is that the limitations of the procurement remedies (for example, the impossibility to set aside concluded contracts) could be evaded, if contractors sought to enforce their rights under the Regulations through an application for judicial review, which is not subject to the same restrictions[298] -unless the courts applied, in such cases, the limitations of the Regulations to judicial review. Moreover, to allow judicial review in addition to the procurement remedies would mean that bidders would be able to ask for the enforcement of the same rule twice under similar remedies[299] -unless, again, the courts adopted a rule prohibiting such overlaps. The phrase "without prejudice to any other powers of the Court" would, under this interpretation, be construed to mean "without prejudice to any powers of the Court *different to the ones under the Regulations*". If other remedies, such as judicial review, can provide relief not available under the procurement remedies, then contractors should be allowed to take advantage of them, but not otherwise. Thus, bidders should be allowed to challenge contracting decisions on grounds over and above breaches of the Regulations, such as violation of public law principles, by way of judicial review. Remedies under the Regulations, in short, are not the only means of challenging contracting decisions but are "the only means of challenging such decisions *for breaches of the regulations themselves*"[300] [emphasis in the original].

Issues concerning the relationship between judicial review and procurement remedies were touched upon, though not analysed, in recent procurement case law. In *Ealing*[301], the Court of Appeal stated that its conclusion in proceedings under the Regulations that the contract had been entered into could "not be circumvented by an application for judicial review". The court commented that it would not entertain an

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[297] Bedford, "Remedies in the United Kingdom" in Tyrell and Bedford (eds.), *Public Procurement in Europe: Enforcement and Remedies* (1997), pp.217-235 at p.222.
[298] Bailey, "The Relationship between Judicial Review and the Public Services Contracts Regulations; R. v. London Borough of Tower Hamlets, ex p. Luck; judgment of October 30, 1998, Richards J.", (1999) 8 P.P.L.R. p.CS72 at p.CS77. Also, Bailey, "*Ex parte Luck* in the Court of Appeal", (2000) 9 P.P.L.R. p. CS33 at p.CS34.
[299] See on this Arrowsmith, "Enforcing …the EC" *op. cit.* footnote 2, pp.105-6.
[300] Bailey, "The Relationship between…" *op. cit.* footnote 33, p.CS77.
[301] *Ealing Community Transport Ltd. v. Council of the London Borough of Ealing,* [1999] C.O.D. 492, CA.

application to judicially review the authority's decision to enter into the contract and to ask for the contract to be set aside, since this would allow seeking relief unavailable under the Regulations. The Court of Appeal thus precluded the possibility to use judicial review to persuade the court "to make the same order in judicial review proceedings which the court cannot make under the regulations" given that "the regulations are comprehensive as they are". It however stated that the question of asking for relief that can only be obtained by judicial review is left open.

It appears, on the basis of this case law, that judicial review is available for cases under the Regulations. The court did not however spell out the conditions for this, apart from requiring that the limitations of the Regulations are not circumvented by an application for judicial review.

For awards not covered by the Regulations, judicial review remedies are naturally available, on condition, as we have seen above, that the court recognises that judicial review is available in the case.

In brief, the relationship between judicial review and procurement remedies is not clearly defined. It would have been better, from the point of view of legal certainty, if a provision delimiting the scope of judicial review were included in the Regulations.

In any event, all pre-existing remedies, either public law ones (judicial review remedies) or private law ones (for example, damages actions in tort) similar to the remedies under the Regulations function as the standard against which observance of the principle of non-discrimination is tested. If the remedies available in the context of domestic award procedures are found to be more favourable, then arguably the principle of non-discrimination is violated. The Regulations would then have to be interpreted as far as possible so as to ensure that the principle is complied with.

2.3 Forum

All remedies are brought before the High Court in England, Northern Ireland and Wales, according to Works Regulation 31(4), Supply Regulation 29(3) and Services Regulation 32(3). Decisions can be appealed before the Court of Appeal. The House of Lords can, with leave, hear such cases.

The regulations do not specify if proceedings must be brought by means of a writ action or by way of an application for judicial review. The Court of Appeal in *Luck*[302], dealing briefly with the matter, did not exclude either action. It however indicated that, in a writ action, first of all, discovery of facts will be allowed on a broader basis than is permitted in an application for judicial review and, secondly, it may be possible for the court to examine more closely the authority's decision than is allowed in judicial review proceedings[303], where the court reviews the decision only as to its irrationality[304].

2.4 Locus standi

According to Works Regulation 31(1), Supply Regulation 29(1) and Services Regulation 32(1), the obligation of a contracting authority to comply with the provisions of the Regulations and with any enforceable Community rule is a duty owed to bidders[305]. According to Works Regulation 31(3), Supply Regulation 29(2)

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[302] *R. v. London Borough of Tower Hamlets, ex parte Luck,* [1999] C.O.D. 294, CA.

[303] Bailey proposes that the proper method of bringing procurement remedies is in a writ action, unless the challenge is based on an allegation of violation of public law principles, where the only appropriate remedy is judicial review, see "The Relationship between…" *op. cit.* footnote 33 p.CS76 and "*Ex parte Luck*…" *op. cit*. footnote 33, p.CS34.

[304] However, in a judicial review case brought under the Local Government Act 1988, R. *v. Bristol City Council, ex parte D.L. Barrett*, High Court, judgment of July 6, 2000, the court reviewed the merits of the case and, in reality, second-guessed the authority's decision and quashed it, because it did not "stand up to critical scrutiny". It is however doubtful whether this judgment constitutes a good precedent and it may not be followed in future cases, see Arrowsmith "Judicial Review of Public Procurement: The Recent Decisions…" *op. cit*. footnote 9, p.NA43.

[305] There are some limited exceptions to the rule that the obligations of the purchaser under the Regulations are duties owed to contractors, exhaustively stated in Works Regulation 31(1), Supply Regulation 29(1) and Services Regulation 32(1). These exceptions concern obligations not directly related to the relationship between the contracting authority and the contractor, but regarding the transparency of the procedure, for example the obligation to keep certain records or report certain matters and the collaboration between national authorities and the Commission. The breach of these obligations cannot be challenged before the courts. See Arrowsmith, *The Law …, op. cit*. footnote 3 of chapter 1, p.900-1.

and Services Regulation 32(2) any breach of this duty is actionable by any bidder who "suffers, or risks suffering, loss or damage", as a result. The Regulations define bidders (called "contractors" in the Work Regulations, "suppliers" in the Supply Regulation and "service providers" in the Services Regulation) as "a person who sought, or who seeks, or who would have wished, to be the person to whom a ... contract is awarded"[306].

The condition of suffering or risking loss or damage does not seem to require showing prejudice to the claimant's chances of winning the contract, as indicated by the High Court in *Jobsin*[307]. It is suggested that it merely requires that the claimant shows a genuine interest in participating in an award from which he has not been lawfully excluded[308].

There is no provision on the position of other persons, such as the individual taxpayer or trade or representative bodies, who do not seem to be granted standing, since they do not participate in award procedures and do not qualify as contractors, suppliers or service providers. Intervention of such persons or bodies could prove useful, as they are unhindered by considerations that may deter bidders from litigation, such as reluctance to sue potential clients[309].

If individual taxpayers and trade organisations are considered to lack standing, this is arguably incompatible with the EC law principle of non-discrimination, since under domestic legislation they seem to have standing. First of all, section 19(7)(a) of the Local Government Act 1988 provides that remedies for breach of section 17 are open

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[306] The three Regulations were amended by Public Contracts (Works, Services and Supply) Regulations (Amendment) 2000, S.I. No 2009, to bring them into line with the requirements of GPA and now grant standing to providers from GPA states.

[307] *Jobsin Internet Services v. Department of Health,* High Court, judgment of May 18, 2001. The judge commented that, on the facts of the case, justice had not been "seen to be done" and that this justified standing. He did not however lay down a general rule to delimit the notion of damage to the contractor necessary to establish standing. The case went to the Court of Appeal (judgment of July 13, 2001) but this point was not dealt with.

[308] Arrowsmith "Categorisation of Services and Some Issues relating to Remedies: a Note on *Jobsin Internet Services v. Department of Health*" (2001) 10 P.P.L.R. p.NA116 at NA118.

[309] This will be examined in the empirical study.

to all potential providers but does not say that other interested parties are excluded[310]. Secondly, in judicial review proceedings, the applicant is recognised under section 31 of the Supreme Court Act 1981 as having standing, if he shows he has "sufficient interest" in the matter. It is not however necessary for him to allege that a personal right has been infringed[311]. A representative body for contractors could therefore bring proceedings if it shows it has sufficient interest, for example in ensuring that contracts are awarded according to the law [312]. An individual ratepayer has been granted standing to challenge a local authority decision made in breach of standing orders providing for competitive tendering procedures[313].

It is, however, debatable to what extent comparison between the remedies of the Regulations and domestic remedies is appropriate for the purpose of testing compliance with the principle of non-discrimination, since they have different objectives, scope and extent. In the *Matra* case[314], comparison between the damages claim under the Services Regulation and the one under the Local Government Act 1988 to examine whether there was discrimination, as regards time limits, was dismissed as inappropriate. It could be argued, however, that, in the absence of specific domestic remedies for breaches of the procurement rules, comparison between the general remedies and the ones under the Regulations is appropriate, especially concerning something as straightforward as standing. Besides, as regards judicial review in particular, the Court of Appeal in *Luck* and the High Court in *Severn*

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[310] For the breaches of the CCT regime, there was no express provision on the standing of the interested parties.

[311] Brealey/Hoskins, *Remedies in EC Law* (1998), p.180.

[312] See Lord Diplock in *R v. Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd.* [1982] AC 617 at 644E: "[i]t would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, …, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped"; Lord Keith in *R v. Secretary of State for Employment, ex parte Equal Opportunities Commission* [1995] 1 AC 1 at 26D: "[i]n my opinion it would be a very retrograde step now to hold that the … [Equal Opportunities Commission]… has no *locus standi* to agitate in judicial review proceedings questions related to sex discrimination which are of public importance and affect a large section of the population".

[313] *R. v. Hereford Corporation, ex parte Harrower* [1970] 1 W.L.R. 1424, see Arrowsmith "Enforcing the EC…" *op. cit.* footnote 2, p.106.

[314] *Matra Communications SA v. Home Office*; High Court, judgment of July 31, 1998; Court of Appeal [1999] 1 C.M.L.R. 1454, CA.

Trent[315] have indicated that the judicial review case law may provide guidance for interpreting provisions of the Regulations, thus accepting their interrelation. What constitutes a comparable domestic remedy for the purposes of compliance with the principle of non- discrimination is ultimately, as we have seen in section 1 of chapter 3, a question of judicial interpretation.

A recent judicial review application, partly based on an alleged breach of the Services Regulations, was brought by a community council and several individual residents of a village opposing a scheme to build a variety of facilities on local authority land[316]. The ground based on the Services Regulations concerned the contracting authority's use of the competitive form of the negotiated procedure. The High Court judge stated that he had "strong doubts" about the applicants' standing, since they had not been affected by the choice of procedure and thus appeared to lack sufficient interest. The judge did not thus base his conclusion on the standing provision of the Regulations, but on the condition of "sufficient interest" required under section 31 of the Supreme Court Rules 1981 for judicial review, which, as we have seen, does not seem to exclude the standing of persons other than bidders. This arguably means that in a different factual situation such standing could be allowed, even against breaches of the Regulations.

2.5 Time limits

2.5.1 Time running

The complainant must lodge the case as soon as possible and in any case no later than three months after the grounds for bringing the case first arose, according to

[315] *Severn Trent v. Dwr Cymru,* High Court, judgment of October 10, 2000.
[316] *R. v. Rhonda Cynon Taff County Borough Council ex parte Kathro,* High Court, judgment of July 6, 2001.

Works Regulation 31(5)(b), Supply Regulation 29(4)(b) and Services Regulation 32(4)(b). They are the same time limits as for the application for judicial review.

It is crucial here to know when the ground for bringing proceedings can be said to first arise, since the time starts running then. The judgment of the High Court in *Keymed*[317] indicates that the grounds are considered to first arise at the time of the breach (either actual or apprehended, i.e. not yet occurred), which is the time of the relevant decision.

If there is a wholesale failure to comply with the Regulations, the grounds are held to arise at the time that the purchaser formed its intention to seek offers and (was supposed to but) failed to publish a notice[318]. In this case, it is very difficult to identify the exact date of the breach and thus the calculation of the time limit is very unclear.

The time the plaintiff knows of the breach was considered in *Keymed* to be irrelevant for the purpose of defining when the time limit starts. The Court of Appeal in *Matra* seems to follow this. It held that once the plaintiff knows of the decision (here the decision stating the specifications) which means that he will be excluded from the award procedure, he cannot rely on a later decision excluding him (for not meeting the specifications) as giving rise to new ground for bringing proceedings, since the later decision is merely an effect of the former[319]. However, it failed to state clearly if the time limit starts when the first decision is issued or when the plaintiff knows of it. Recently, in *Jobsin*, the Court of Appeal, overturning the contrary judgment of the High Court, confirmed the conclusion in *Keymed* that knowledge of

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[317] *Keymed (Medical and Industrial Equipment) Ltd v. Forest Health Care NHS Trust* High Court, judgment on preliminary issues of 12 October 1997 [1998] E.L.R. 71. The judgment examines in certain depth the reasons for extending the time limit.

[318] *Keymed.* In this case, the contract was not advertised.

[319] Already in *Keymed* Langley J had stated that "[i]f it were otherwise and a supplier could select the last breach available to him … it would mean that he could sit back and do nothing even in respect of breaches of which he was aware or which could be apprehended".

the plaintiff is irrelevant and that the grounds first arise when the harmful document is issued, not when the plaintiff learns of it, for example by a later excluding decision[320].

For breaches that have not yet occurred, it is important to know when they are considered to be apprehended, as time starts to run then. In *Severn Trent*, the court held that a breach is apprehended when there is a real risk of it occurring.

It would be very useful for contractors wishing to bring proceedings if there were a clear rule on the beginning of the time limit. The transparency principle, with which "the contracting body must comply, at each stage of a tendering procedure", requires, in any event, that the participants in the award procedure must receive, "without any delay, precise information concerning the conduct of the entire procedure"[321]; this may serve to minimise the time gap between the issue of the decision and the knowledge of the participant. The need for a clear rule on time running remains though.

2.5.2 Promptness

An action can be bought within the three-month limit and still not be considered prompt by the court; the action will thus be time barred. The High Court in *Luck* ruled that the action, although brought just within the three-month limit, had not been commenced promptly[322]. Promptness may be interpreted to require bringing the action earlier than the end of the time limit, in particular if the applicant seeks to quash an award decision. A more lenient view of promptness may be taken where the remedy sought is damages, as the rights and interests of third parties are not an issue[323]. The case law on the very similar judicial review time limit may be used as guidance by the judge to decide on the promptness of the action[324].

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[320] *Jobsin Internet Services v. Department of Health*, Court of Appeal, judgment of July 13, 2001.
[321] T-203/96 *Embassy Limousine* [1998] E.C.R. II-4239.
[322] In *Severn Trent* the possibility of an action being time barred even if brought inside the three-month limit was reaffirmed. The action in this case was considered prompt.
[323] *Severn Trent.* See also Bailey, "The Relationship…" *op. cit.* footnote 33, p.CS77.
[324] Mentioned in *Severn Trent*. For example, a judicial review case on promptness is *R. V. Independent Television Commission, ex parte TV NI Ltd., The Times,* 30 December 1991.

This interpretation of promptness as justifying to time bar actions brought within the three-month limit diminishes the contractors' chances of success. It is arguable that this is done for good reason –to ensure the smooth flow of award procedures and avoid dilatory actions. It is however not very compatible with the principle of legal certainty, since no precise limit as such exists: it is difficult for case law to give a clear definition of "promptness" outside the specific facts of a case and it will ultimately depend on the (uncontrolled) discretion of the court whether an action will be heard, even if brought within the limit.

2.5.3 Extension of the time limit

The court has discretion under the Regulations to extend the time limit for good reason. There are several factors that may be taken into account by the court when deciding what constitutes a good reason for extension. The Court of Appeal in *Luck* indicates that the discretion may be exercised in the same way as in judicial review.

First of all, the length of the delay will be considered[325]; arguably the less the delay the more willing will the court be to grant an extension and accept the remedy.

The reasons for the delay will also be assessed. Delay caused by seeking clarification of the facts and allowing the authority time to investigate the matter has been accepted as a good reason[326]. On the contrary, efforts to reach an out-of-court solution to the dispute (by approaching directly the authority) were not considered to constitute a good reason and neither was the fact that a complaint had been made to the Commission[327].

The existence of a subsequent judgment by the Court of Justice, clarifying the individual's rights under EC law, has not been accepted as a good reason for

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[325] *Keymed*.
[326] *Ibid.*
[327] *Matra Communications SAS v. Home Office,* High Court, judgment of 31 July 1998; Court of Appeal, judgment of 25 February 1999.

extending the time limit in judicial review proceedings[328]. It is a case law that might be followed in cases brought under the Regulations, considering that, as we have seen, judicial review case law may serve as guidance for interpreting provisions on procurement remedies.

The role of both the plaintiff and the defendant in the delay is deemed to be relevant to the decision to grant an extension.

First of all, the plaintiff's knowledge or ignorance of the facts that might give rise to a claim is considered[329][330]. In *RMS,* extension was granted because the plaintiff had no knowledge of the breach until late[331]. In the case of apprehended breaches, the fact that there is uncertainty over whether the breach will definitely occur may be a reason justifying a delay in bringing proceedings[332]. However, the courts will be less willing to extend the time limit in cases where (part of) the delay can be imputed to the plaintiff, for example when he knew there was an irregularity and did not promptly bring proceedings. In *Keymed* the time limit was extended because the plaintiff acted speedily once it was clear that a claim existed[333].

The role of the contracting authority in the delayed lodging of the remedy will be examined. Extension will be granted more easily if the authority is found to have contributed to the delay, for example by misleading the plaintiff[334].

Lastly, the extension might depend on the prejudice that could be caused to the contracting authority as a result of the delay to bring proceedings. If the authority risks being harmed, the court might hesitate to grant the extension[335].

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[328] *R v. MAFF, ex parte Bostock* [1991] 1 CMLR 681.
[329] First stated in *Keymed* and recently reaffirmed by the Court of Appeal in *Jobsin.*
[330] However, ignorance of the law, as opposed to that facts, is not a good reason to extend the time limit, as held by the Court of Appeal in *Jobsin,* where the argument that the claimants did not know of the requirements of the regulations until they consulted their solicitors was rejected by the court, overturning on this the judge at first instance.
[331] *Resource Management Services v. Westminster City Council,* High Court [1999] 2 C.M.L.R. 849 (case brought under the Services Regulations).
[332] *Severn Trent*. See Arrowsmith, "A Note on the Judgment in the Severn Trent Case", (2001) 19 P.P.L.R. p.NA35-36.
[333] In *Clyde Solway* the Scottish Court of Session has indicated that the fact that the plaintiff has notified earlier the authority of his intention to bring proceedings may justify an extension, if appropriate.
[334] *Keymed* and *RMS.*
[335] In *RMS,* prejudice to the defendant was not deemed to outweigh the reason for granting an extension.

The prejudice to be caused depends to a certain extend to the type of claim. If the remedy sought is interim relief, there is always the risk of harm to the authority, due to delays in the award, and it is thus more difficult to be granted an extension. This does not apply to damages, because the time when the complaint is lodged is immaterial to the risk of financial harm caused to the authority. In *Keymed*, one of the reasons extension was awarded was because the claim was for damages. However, the High Court judge in *Matra* indicated that the decision to extend the time limit does not depend on the type of claim, since the Regulations apply the same time limit to all remedies. The Court of Appeal in *Matra* did not interfere with the judge's decision to extend the time limit, since it considered that he had committed no error of principle. It therefore seems to approve of the conclusion that the type of claim is irrelevant to the extension of time limit. Nevertheless, the Court of Appeal in the later *Luck* case indicated that extension may be more easily granted in actions for damages[336]. The point needs to be clarified by the courts.

Taking into account the possible harm to the purchaser, as far as it makes the decision to extend dependent on the type of claim, grants a better chance of success to remedies that do not interfere directly with the award process, like damages, as opposed to applications for set aside or for interim measures. It is submitted that this distinction disturbs the balance between the remedies, which are all equally important and must all be treated in the same way. It is also submitted that the possible disruptive effect of the remedy is a consideration that is irrelevant to the decision to extend the time limit. It is relevant only to the decision whether or not to grant relief. If the court does not wish to delay the award, it should state the reasons in its conclusion to refuse relief rather than avoid deciding on it by time barring the action[337].

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[336] Reaffirmed by the High Court in *Severn Trent*.

[337] It is however argued that the decision to extend the time limit in damages claims is in keeping with English law where, in general, longer time limits are allowed for damages claims than for challenges of administrative decisions, Arrowsmith "Time limits for bringing Proceedings in Public Procurement cases

The same criticisms apply to two factors that the judge in *Keymed* indicated might be relevant to extending the time limit: the strength of the case and the importance of the issues involved. The judge held that an arguable case was necessary to allow examination of preliminary issues such as the time limit. It is submitted that these are questions that belong to the examination of the merits of the case and not of its admissibility, unless the case is obviously unfounded or unarguable (and thus inadmissible).

2.5.4 Time limits in the UK in the light of the principles of non-discrimination and effectiveness

The three month limitation period under the Regulations is considerably shorter than the time limit for bringing an action in tort for damages (either an action for breach of statutory duty or the claim for damages under section 19 of the Local Government Act 1988), which is six years. This difference of time limits does not appear to be compatible with the principle of non-discrimination[338].

However, in *Matra*, the argument of the plaintiff to this effect was not accepted by either the High Court or the Court of Appeal, on the basis that the claims were not really comparable. The comparison with the action for breach of statutory duty was dismissed by the High Court as based on a false premise and by the Court of Appeal as being "simply too wide". The comparison with the damages claim under the Local Government Act was dismissed by both courts, as that claim refers to bid costs only and, besides, according to the Court of Appeal, the Act has different aims and

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in the United Kingdom: the High Court Judgment in *Matra Communications v. Home Office"* (1999) 8 P.P.L.R. p.CS55 at p.CS58.

[337] *Ibid.*

[338] For example, C-261/95 *Palsimani v. INPS* [1997] ECR I-4025: "... the conditions in particular time limits for reparation of loss or damage laid down by national law must not be less favourable than those relating to similar domestic claims". See section 1 of chapter 3.

provisions from the procurement Regulations[339]. It is submitted that, although the procurement remedies and the actions in tort are not identical, since the domestic actions are either more general (the action for breach of statutory duty) or more limited (actions under the Local Government Act 1988), they refer to the same type of relief and are similar. As such, they are arguably appropriate comparators[340], at least in relation to matters such as time limits where the comparison is easy and obvious. It is submitted that, as the situation now stands in the UK, compliance with the requirement of non-discrimination is not ensured.

Arguably, UK rules on time limits are also incompatible with the EC requirement of effectiveness. The rule that time begins to run when the breach occurs and not when the contractor is made aware of it is very strict on contractors, as it transfers the burden to police the application of the law on them and could, in some cases, bar them from seeking relief. This is especially so where the purchaser did not follow the procedure under the Regulations at all (as in *Keymed*). According to the case law, even in such cases, time is considered to start running when the breach occurs and the breach is said to occur when the purchaser decides to seek offers. Therefore, if the contractor knows nothing of the purchaser's intention to award a contract, by the time he finds out and lodges an action, he will very probably be outside the three-month limit.

Courts can, as we have seen, extend the time limit if there is a good reason and allow actions in cases where the plaintiff ignored the facts giving rise to a claim (*Keymed,* Court of Appeal in *Jobsin, RMS*). It is submitted, however, that it would be a better solution in terms of effectiveness (but also in terms of other EC law principles, namely those of access to justice, clarity and legal certainty) to adopt either by statute or through judicial interpretation a more generous

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[339] Arrowsmith mentions in "Time limits for bringing Proceedings …" *op. cit.* footnote 72, at p.CS61, that this argument is unconvincing as domestic law provisions will almost never have aims such as opening up the single market.
[340] *Ibid.* at p.CS58-59.

calculation of the start of the time limit (for example, to coincide with the contractor's knowledge of the breach) as a rule and not as an (even easily granted) exception. Such a rule would ensure that contractors stand a fair chance of challenging a breach as a matter of course and not depending on the court's assessment of what constitutes a good reason for extension.

2.6 Prior notification of the intention to bring proceedings

According to Works Regulation 31(5)(a), Supply Regulation 29(4)(a) and Services Regulation 32(4)(a), proceedings can be brought only after the complainant informs the contracting authority of the breach or apprehended breach and of its intention to bring proceedings under the Regulations. The authority is thereby given the opportunity to correct the irregularity. The Regulations are silent on the consequences of such a notification. It does not appear however that the complainant should wait for an answer by the authority but may proceed immediately before the court, if he so wishes.

In the *Portsmouth* case[341], the High Court ruled that the contractor should in the notification refer to the precise breach of duty which he is alleging. The point of the prior notification obligation is to allow the authority to correct the breach and, as the judge held, "a breach can only be remedied if it has first been identified with some specificity". The problem, however, with requiring a high degree of specificity is that, in practice, it might lead to bar the action, if the judge at trial does find a breach to have occurred but does not characterise it in the same terms as the complainant. In these cases, the notified breach is not technically the same as the breach that the judge

[341] *R. v. Portsmouth City Council ex parte Bonaco Builders and Others* High Court, judgment of 6 June 1995.

finds. Nonetheless, to bar a remedy on a technical issue concerning the pre-trial notification is arguably contrary to the principle of effectiveness[342].

The Court of Appeal in the *Portsmouth* case[343] interpreted the High Court decision to the effect that it is enough for the contractor to inform the authority that he intends to take legal action against a breach related "to the substance of the decision". It is not entirely clear what is meant by substance; it would probably be advisable for the contractor to try to identify as many breaches as possible in the notification. The Court of Appeal in *Luck* relaxed the condition, mentioning that the fact that there had been a number of letters concerning the complaint sent by the applicant before action (which however did not refer to breach of Regulations) seemed to satisfy the requirement of prior notification.

In cases of wholesale failure to comply with the Regulations, it was held in *Keymed* that it is sufficient to allege this in general terms without identifying any specific breach.

According to the Court of Appeal in *Ealing,* the fact that an authority is notified of intended proceedings does not mean that it cannot enter into a contract before the case is decided. The claimants' arguments that to allow the authority to proceed with the award after being notified would frustrate the purpose of the remedies and reward an authority that acts precipitately on receipt of an objection were rejected. According to the court, bidders cannot suspend procedures by writing a letter, especially given that their grounds may prove to be unsuccessful at trial. The authority is warned of an impending action and can enter into a contract at its own risk of eventually having to pay damages to aggrieved bidders. The argument of the court is not, it is submitted,

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[342] See Kunzlik, "Interpretation of the Procurement Directives and Regulations: a Note on the Court of Appeal judgment in R. v. Portsmouth City Council, ex p. Peter Coles and Colwick Builders Limited and ex p. George Austin Limited" (1997) 6 P.P.L.R. CS73 at CS82 footnote 28.

[343] *R. V. Portsmouth City Council ex parte Peter Coles and Colwick Builders Limited and ex parte George Austin Limited,* Court of Appeal, judgment of 8 November 1996, CO/3062/92, LEXIS. The name of the case changed after the High Court judgment because, prior to the Court of Appeal hearing, Bonaco Builders Ltd went into liquidation and withdrew its appeal. Only the appeals of Bonaco's fellow applicants proceeded to a hearing.

without foundation, considering in particular that it stated that it would control the authority's conduct in this respect, if bad faith were alleged.

2.7 Interim relief

According to Works Regulation 31(6)(a), Supply Regulation 29(5)(a) and Services Regulation 32(5)(a), the Court may "by interim order suspend the procedure leading to the award of the contract in relation to which the breach of duty owed ... is alleged, or suspend the implementation of any decision or action taken by the contracting authority in the course of following such procedure…". How quickly the application for interim relief is heard depends on its urgency - and how well this is argued before the judge. It could even be heard on the following day. If the situation is very urgent, for example, because the contract is likely to be awarded very soon, the judge can hear an *ex parte* application (i.e. without notice to the defendant) but normally proceedings are *inter partes*. The duration of the hearing may also be sped up, according to the urgency of the case.

As far as the suspension of the award decision is concerned, it was held unanimously by the Court of Appeal in *Ealing* that there is no room to order interim measures after the decision is taken, unless some form of bad faith could be shown (this was not alleged in the case). The Court referred to the Regulations, which state that suspension is possible against decisions of the "procedure leading to the award"; after the award, the procedure comes to an end and there is nothing to suspend. The Regulations have, in this sense, as May L.J. mentioned, an internal cut-off limit. This case law, however, is incompatible with EC law, as clarified by *Alcatel.* The UK needs to amend its legislation to fulfil its EC obligation to provide for interim measures against the award decision.

The Regulations do not offer any indication as to the criteria for the award of interim measures. These are left to the courts to decide, in principle on the basis of their previous practice. The requirements for granting interim measures are set out in *American Cyanamid*[344], a private law case, applied in the public law sphere by the House of Lords in *Factortame II* and include, essentially, the following four conditions.

2.7.1 An arguable case

The applicant will have to show an arguable case, basically demonstrate that the Regulations apply and invoke a breach of duty under them, which would entitle him to relief at trial. The breach does not have to be fully proven. However, the case must be shown to have some chances of success at trial. The court may briefly review the merits, if it is unable to decide whether the case should be decided for the applicant[345]. Establishing an arguable case is, as a general rule, not very difficult.

2.7.2 The adequacy of damages

The court will secondly examine whether damages can be deemed to provide an adequate remedy in the case. If not, the court proceeds to examine whether the other conditions of granting interim relief are fulfilled (examined below)[346]. If, on the other hand, the court considers that damages are adequate, then interim relief will normally be refused. For example, in *Burroughes,* a case brought prior to the adoption of the

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[344] *American Cyanamid v. Ethicon* [1975] AC 396.
[345] Bedford, "Remedies…" *op. cit.* footnote 32, p.227.
[346] Damages may be considered inadequate when the harm that the applicant risks to suffer is deemed to be irreparable, for example if he will be put out of business unless interim relief is granted, *Cutsforth v. Mansfield Inns* [1986] 1 C.M.L.R. 1; damages may also be considered inadequate when their amount is "wholly uncertain" or there are "insuperable difficulties of estimation", *Garden Cottage Foods Ltd v. Milk Marketing Board* [1984] AC 130 at 143 A-B. See Bedford, "Remedies…" *op. cit.* footnote 32 p.224. It is not clear whether in all other cases damages would be judged to be adequate.

Regulations, alleging, *inter alia,* breach of Directive 77/62[347] on public supplies contracts (now replaced by Directive 93/36), damages were held to be adequate, as, on the facts of the case, the applicant would, if it were not for the alleged breach, have been awarded the contract and so would have been able to prove loss (see below on damages) and be compensated[348].

As damages are not easily awarded in procurement, as we will see later, interim relief would probably not be excluded in most cases, depending on the court's assessment in each case. Notwithstanding that, we have seen in chapter 3 that taking into account the availability of damages to grant interim relief presents some problems from a legal and logical point of view. In short, these are that under the Remedies Directive, as complemented by the principle of effectiveness, all remedies should be effective in their own right and that, in any event, the two remedies do not refer to the same harm and thus reparation of one cannot constitute reparation of the other[349].

In *Harmon,* the judge, in an *obiter* about interim relief, commented that, because remedies for breaches of EC rules must be effective and because interim relief under the Regulations is a special remedy, it should not be limited by the strict general conditions and that, in his opinion, the condition of adequacy of damages did not apply.

2.7.3 The undertaking in damages

The court may require that, to be granted interim relief, the applicant should give an undertaking in damages, thereby agreeing to compensate the respondent for any losses he might suffer as a result of the interim measures, if the decision in the main action is

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[347] OJ [1977] L13/1.

[348] In *Burroughes Machines Ltd v. Oxford Area Health Authority* 21 July 1983 133 *New Law Journal* 764. The Court of Appeal upheld the judge's decision.

[349] For example, in *Burroughes,* the judge held that the possibility of loss of business with other similar authorities is too remote to affect the question of the adequacy of damages and is thus not sufficient to persuade the judge that damages are inadequate and interim relief should be granted. See also

against the applicant. The court considers whether the respondent's interests will be protected by an undertaking in damages and whether the damage risked by the respondent can be covered by the applicant. If yes, the applicant may be asked to give such an undertaking. If an undertaking is given, interim measures will be granted without any further assessment of the situation.

An undertaking in damages is sufficient for the award of interim relief only where the possible damage to the authority is solely financial. If the risks from the delay involve, for example, a tardy satisfaction of urgent public needs, then an undertaking cannot compensate them. The court will proceed to balance the interests involved.

If the applicant is not financially able to give an undertaking, interim relief will be refused[350]. It is argued however that the applicant's lack of financial means should not prevent interim relief but, on the contrary, should precisely be a factor justifying it[351]. Financial ability to give an undertaking will depend on the amount due to the authority if the claim fails. If that amount is very high, few firms will be able to undertake to pay it.

The requirement of an undertaking can be a serious deterrent to contractors wanting to ask for interim relief but not willing to take on the considerable risk of having to compensate the authority. It reduces the effectiveness of the remedy by making it unattractive to contractors and difficult to obtain.

In *Harmon*, the judge took the view that an undertaking in damages should not be required in relation to interim relief under the Regulations.

2.7.4 The balance of interests

Finally, the court balances the convenience of granting interim relief. The Regulations have not expressly implemented article 2(1)(4) of the Remedies Directive,

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Arrowsmith, *The Law.., op. cit*. footnote 3 of chapter 1, p.889. However, such loss could, in theory, exist and only interim relief would be able to prevent it.

[350] *Morning Star Co-operative Society v. Express Newspapers Ltd* [1979] FSR 113.

which provides that interim relief may be refused on the balance of all the interests likely to be harmed. This is probably due to the fact that it is assumed that UK courts would perform a balancing act between the needs, on the one hand, of not delaying awards unduly and, on the other, of preventing irreversible situations, which cannot be remedied if the claim is successful. A balance of convenience is already found in cases previous to the Regulations, for example in *Burroughes,* where the judge indicated that the need to avoid delays would be given considerable weight and that any significant inconvenience to the administration would lead to refusing interim relief.

The interests involved are those of the applicant, of the other bidders, who might wish the procedure to go ahead uninterrupted, of the authority, which may have to undergo hardship, if the procedure is suspended, and the public interest to fulfil, possibly urgently, the needs intended to be covered by the contract[352]. The court will award interim relief, if it finds that the applicant's interest in obtaining it is not outweighed by other interests.

The stage that the award procedure has reached is arguably relevant to the balance of interests: the earlier the easier the grant of interim relief[353]. It is submitted that if the court has proceeded with the balance of convenience on the assumption that damages are not adequate, it should weigh that at this stage as well, as a complementary argument in favour of granting interim relief[354].

2.7.5 Conclusions on interim relief

It is difficult to predict the approach of the courts, as case law before the Regulations seems to be at odds with the *obiter* in *Harmon*. Courts should arguably take

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[351] Bedford, "Remedies …" *op. cit.* footnote 32, at p.226.
[352] *Ibid.* p.227.
[353] *Films Rover International Ltd. v. Cannon Film Sales Ltd.* [1987] 1 WLR 670 at 680.
[354] In *Clyde Solway* the Scottish Court of Session stated that timeliness is relevant to the grant of interim relief and that it be refused if the applicant delays to proceed and during proceeding.

whichever course appears to carry the lower risk of injustice to the parties involved and to ensure compliance, at the same time, with the law, preventing, if possible, situations where the contract is concluded but the authority is found to be in breach[355]. The availability of interim relief will depend on the leniency of the courts and their willingness to follow the easier test proposed in *Harmon*.

2.8 Set aside

2.8.1 The Regulations

According to Works Regulation 31(6)(b), Supply Regulation 29(5)(b) and Services Regulation 32(5)(b), the court, if satisfied that a decision or action, taken by a contracting authority, was in breach of a duty owed, may "order the setting aside of that decision or action or order the contracting authority to amend any document".

A decision that has been set aside is devoid of legal effect. The authority will be unable to implement it, which, in practice, probably means that the authority will have to take the decision again, lawfully this time. The court may also set aside the whole procedure, if it is found to be completely flawed[356]. It has been argued that an unlawful decision or omission taints the legality of later decisions[357], but it is not clear how far this is accepted by the courts.

The court also has the power to order amendments to documents, for example order the authority to replace discriminatory specifications with non-discriminatory ones.

Judgments can take several months to be decided, which delays and may reduce their impact, by not enabling them to intervene before irreversible situations are created. However, if resolution of the dispute is considered urgent, the case may be heard very quickly. In *Severn Trent,* (where the remedy sought, alleging failure to

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[355] Bedford, "Remedies …" *op. cit.* footnote 32, p.227.
[356] Weatherill, "Enforcing…" *op. cit*. footnote 28 of chapter 3, p.296.
[357] Arrowsmith, *The Law…, op. cit*. footnote 3 of chapter 1, at p.904.

comply with the Utilities Regulations, was an injunction under the general rules), the parties requested that legal argument take place in a single day, due to urgency. This was done and the judgment was delivered shortly afterwards[358].

Courts in England and Wales review factual issues pertaining to discretionary decisions of public authorities only for unreasonableness or irrationality (the two terms are not distinguished). The courts test the impugned decision against a range of available options that could reasonably be followed and will only intervene if the authority's decision is one that no reasonable public body could have reached[359].

The unreasonableness or irrationality test was followed by the High Court in *Luck*, according to which, provided that the authority, when evaluating bids, takes into account the relevant criteria and leaves any irrelevant considerations out of its decision, the decision cannot be set aside.

"Unreasonableness" or "irrationality" are both very wide and imprecise notions and can be interpreted, at the discretion of the court, to mean that a stringent control of the decision making is either impossible or, alternatively, justified. *Luck* shows that the courts probably will probably not review factual issues of contracting decisions closely. This appears reasonable and does not, it is submitted, constitute a defect of the remedy in terms of its effectiveness. In procurement, authorities, first, often have a margin of discretion and, secondly, take highly technical decisions. In such circumstances, strict review of factual issues by the courts is technically difficult and probably inappropriate, since it would fetter the authority's discretion, probably reduce the efficiency of its decisions and lead to substituting the authority's appreciation of how the award should be conducted for that of the courts. This would

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[358] However, the judge stated that the speed meant that "…the hearing has been conducted in a manner which is far from ideal … not all the issues could possibly be dealt with …[the hearing was] unsatisfactorily prepared…". Arrowsmith comments in "A Note on the Judgment in the Severn Trent Case" *op. cit.* footnote 57, p.NA34 that "…the speed with which the case was conducted appears to have affected the quality… the reasoning…is less than complete".

[359] These grounds for review were adopted in *Associated Provincial Picture Houses v. Wednesday Corporation* [1948] 1 KB. 223. For a more recent statement, see *R. v. Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696, 757 *per* Lord Ackner. For a detailed analysis see Kane, *An Introduction.., op. cit*. footnote 10, p.208 *seq.*

usurp the primary decision-maker's prerogatives and arguably go beyond judicial authority[360].

The burden to prove that the authority's decision was unreasonable or irrational is on the applicant. To produce evidence to this effect is difficult and this makes it hard for contractors to successfully challenge the purchaser's decisions.

2.8.2 The discretion to refuse relief

The courts have discretion under the Regulations to refuse relief. The Regulations mention that the court *may* either set aside an act or just award damages (even if the challenged act is proven to be unlawful) or do both. Most public law remedies in the UK are discretionary. The courts may exercise their discretion to refuse relief in order to avoid public inconvenience and/or hardship to other contractors. If the breach is indeed proven, however, relief will probably be refused only in exceptional circumstances.

The discretion to refuse relief, although a breach is proven, reduces the effectiveness of the remedy, as it may, in certain cases, allow breaches to subsist. It is also arguable that such discretion was not envisaged by the Community legislator, though the Remedies Directive does not expressly disallow it. The Directive was based on a continental law model of remedies[361], where set aside is compulsory for the courts once the breach is established and, arguably, this is how set aside in the Directive was envisaged. Furthermore, the Directive contains only rules on what the Member States should do and does not list what they should not do, either as far as the remedy of set aside is concerned or in general. When it intends to introduce an exception to the

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[360] Bailey "The Relationship…" *op. cit.* footnote 33, p.CS77: "…[w]hile the line between matters where the court is in the position of a primary decision-maker and those where its role is only to review the decisions of others is notoriously imprecise, questions concerning the suitability of a person as a contractor seem particularly unsuitable for primary resolution by the court".

[361] Koutoupa-Rengakos, *Dimosies symvaseis kai koinotiko dikaio* (1993), p.251.

compulsory grant of a remedy, if the case is proven, it does so explicitly, as is the case with the irreversibility of concluded contracts and the discretion to refuse interim relief on the balance of interests.

In a recent case concerning the imposition of financial penalties under the Utilities Remedies Directive[362], the Court of Justice ruled that the fact that the French courts are allowed, in setting the amount of the penalty, to take into account the conduct of the utility and the difficulties encountered by it in complying with the law is not contrary to EC law. According to the Court, such power follows from the right to a fair trial[363]. This case seems to indicate that courts can be empowered to exercise discretion in awarding relief. This, if applied by analogy to remedies under Directive 89/665, would imply that the discretionary character of the set aside remedy in the UK is allowed and would not be struck down by the Court.

Notwithstanding, such discretion should be exercised sparingly[364], in order not to allow public bodies to breach the law unpunished and not to leave the bidders without protection, unless in rare occasions.

2.8.3 Concluded contracts and the challenge of the award decision

According to Works Regulation 31(7), Supply Regulation 29(6) and Services Regulation 32(6), "...the Court shall not have power to order any remedy other than the award of damages in respect of a breach of the duty owed ...if the contract in relation to which the breach occurred has been entered into".

It is important to know when a contract is deemed to be concluded for the purpose of defining the point after which a set aside remedy is barred and only damages for sustained harm may be claimed.

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[362] Directive 92/13 in article 2(1) allows Member States to empower the review bodies to order financial penalties for breaches instead of the remedies of interim measures and set aside.
[363] C-225/97 *Commission v. French Republic* [1999] E.C.R. I-3011.
[364] Bedford "Remedies …" *op. cit.* footnote 32, p.231.

The general rule in UK contract law is that no formalities are required for the formation of a contract. It may be written or oral and it may come into being when the offer is accepted or when the acceptance of the offer is notified or even later, when a written agreement is signed. Different rules and practices apply to different contracts and the time of the conclusion of the contract varies accordingly[365].

In procurement under the Regulations, it was held by the Court of Appeal in *Ealing* that the contract was concluded when the letter accepting the successful bid was posted. Sending the letter equalled unequivocal acceptance of the offer made by the bidder and thus constituted conclusion of a contract for the purposes of the Regulations, barring remedies other than damages.

Sedley L.J. dissenting maintained that regulation 32(6) of the Public Services Contracts Regulation 1993 (under which the case was brought) should be read to require that the contract be concluded subsequently to its award. This would be done by distinguishing in law and in time the award decision from the "entry into contract" under regulation 32(6), by analogy to the similar distinction made in the relevant article 2(6) of the Remedies Directive, on the basis of which regulation 32(6) was adopted, between the award decision and the "conclusion of the contract *following its award*" [emphasis added]. Sedley L.J. agreed with the applicants that the notion of contract "that has been entered into" in regulation 32(6) should be construed as referring not to just any binding agreement but to a formal signed and sealed contract and that only after such a deed exists can the available remedies be limited to damages. The court did not follow this view, but May L.J. mentioned that the award and the formal conclusion of the contract might, in some factual circumstances, be different things.

It is arguable that *Ealing,* which precludes the possibility to set aside the award decision, is not good law in the light of *Alcatel,* which was decided later that year.

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[365] Koffman/Macdonald, *The Law of Contract* (1992); A. May, *Keating on Building Contracts* 6th Edition, London (Sweet and Maxwell) 1995.

There appears to be no possibility to interpret the law in the UK to make it compatible with *Alcatel*. The law could conceivably be interpreted to require that an interval be left between the award decision and the conclusion of the contract, as proposed by Sedley L.J., considering that there is no national provision prohibiting this interpretation. It is, however, difficult to see how bidders would learn that such a decision is reached to be able to challenge it. There is no obligation on the part of the contracting authority to inform unsuccessful bidders of the award decision and no relevant rule that can be interpreted to this effect. The award decision is thus rendered immune before other participants learn of it and interpretation does not seem able to prevent this.

The Office of Government Commerce in 2001 initiated a consultation process to assist its decision on how to amend the law to provide for the challenge of the award decision. Two main options seem possible. One is to remove the current bar on setting aside concluded contracts. The other is to require entities to notify bidders of the award and delay concluding the contract for a number of days after notification.

2.8.4 Conclusions on set aside

The remedy of set aside in the UK seems in general satisfactory. We have seen that its discretionary character may reduce in some cases its impact but appears to be implicitly allowed by the Court. The only important flaw is that currently challenge of the award is not, in practice, possible, but steps are taken to amend the situation and bring the law into line with the EC requirements, as clarified by *Alcatel.*

2.9 Damages

2.9.1 The nature of the claim under the Regulations and its conditions

According to Works Regulation 31(6)(b), Supply Regulation 29(5)(b) and Services Regulation 32(5)(b), if there is a breach of a duty owed under them, the court may award damages to a contractor "who has suffered loss or damage as a consequence of the breach".

The provision would appear to leave the decision to compensate the bidder to the discretion of the court ("may award damages"), as in the case of set aside. However, the action in damages is not normally a discretionary remedy in English law and there is no reason why it should be construed as such here. "May" means, in this case, just "if the relevant conditions are met" and thus damages will be awarded, if loss is proven[366].

The Regulations do not specify the legal nature of the claim. It appears to be a claim in tort, since this is the typical claim arising in circumstances where harm is caused without any pre-existing legal relationship between two parties. It seems, more precisely, to be a claim in tort for breach of statutory duty, since the right to damages is conferred by legislation and serves to enforce duties owed under it[367].

The Regulations are silent both on the proof required in order for the loss of the contractor to be established and on the *quantum* of damages to be awarded.

The conditions for compensation in actions for breach of statutory duty could, however, provide some guidance as to what a court may require. In summary, they consist in the following. The plaintiff must prove breach of a duty owed to him by the defendant, for which the defendant is liable, that the breach resulted in damage and finally quantify the damage[368].

As regards the condition of breach of a duty owed, we have seen that almost all the rules in the Regulations are duties owed to contractors, who therefore can claim damages if one is breached. In relation to discretionary decisions, the judge in

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[366] Arrowsmith, "Enforcing the EC…", *op. cit.* footnote 2, p.107.
[367] *Ibid.* See also Weatherill, "Enforcing…" *op. cit.* footnote 28 of chapter 3, p.288.
[368] See Grubb (ed.), *The Law of Tort, op. cit.* footnote 18, p.672 *seq.*; von Bar, *The Common European Law of Torts, Volume Two* (2000), p.245 *seq.*; Horton Rogers "Damages under English Law" pp.53-76 in Magnus (ed.), *Unification of Tort Law: Damages* (2001).

Harmon appeared to use the irrationality test under *Luck* in damages, stating that courts would examine factual issues of contracting decisions as to their reasonableness, to establish whether they are in breach of the rules.

Regarding liability, the judge in *Harmon* held that fault is not relevant: the authority is liable for any breach, even if it is not intentional or even if the authority did not realise or could not have known that it was breaching the law.

The plaintiff must then establish a causal link between the breach and his loss, i.e. prove that the breach caused him harm. The onus is on him[369] and, in general law of tort (not procurement, as we will see), it is usually discharged on the balance of probabilities, which means that the claimant does not need to establish causation conclusively but only that it is more likely than not that the breach lead to the loss he is seeking to recover[370].

The damages will be then calculated under the usual tortious measure that the plaintiff should be put in the same position as he would have been had the tort had not occurred[371]. The *status quo ante* must be restored as far as possible. The quantification of damages is primarily a matter for the trial judge but the Court of Appeal will interfere if the judge seems to have overstepped his discretion[372].

2.9.2 The particularities of procurement

Due to the special characteristics of procurement, there are difficulties establishing harm. This is because, in reality, the only bidder who is clearly harmed is the one who would have won the contract, if it were not for the breach. Bidders who would not have been successful in any event, even if a breach had not occurred, would still have incurred the same costs to submit an offer and would have been unable to recoup them

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[369] For example, *Stringer v. Bedfordshire County Council,* Burton J., judgment of July 27, 1999.
[370] *Hotson v. East Berkshire AHA* [1987] AC 750. See also Weatherill, "Enforcing…" *op. cit.* footnote 28 of chapter 3, p.288.
[371] The classic statement of the tortious principle on calculation of damages is found in *Livingstone v. Rawyards Coal Co.* [1880] 5 App Cas 25 at 39.

or make profits. Thus, it could be argued that a damages claim could succeed only if the plaintiff managed to establish on the balance of probabilities that he would have won the contract, if the award had been run in compliance with the rules. The plaintiff would then have to be put in the position he would have been but for the breach, i.e. that of the successful bidder[373]. He would thus be entitled to recover what would have accrued to him under the contract[374].

It is clear that, if this were followed, the remedy of damages would have a very limited scope, protecting in each award only one bidder. Besides, because of the authority's discretion in deciding, proof that a bid would have been successful is almost impossible to produce, unless in cases where the bidder's chances were thwarted at the very last moment and he manages to show that his bid was clearly the best -or the lowest in a procedure where the criterion for the award is the lowest price- and that the authority would be bound to award the contract to the him[375]. In practice, this would lead to the failure of most damages claims. In cases where the contract was not advertised and consequently the plaintiff could not place a bid, proof that he would have been successful is impossible.

In the only successful damages case under the Regulations so far, *Harmon,* proof on the balance of probabilities was not required. The rule of loss of chance was followed instead. This is a rule first enunciated in a breach of contract case, *Chaplin v. Hicks*[376], which was then followed in a tort case, *Allied Maples*[377]. It applies to situations where a party was deprived of the chance of a benefit, the realisation of which depended on a hypothetical event, which did not occur as a result of the breach[378]. According to *Chaplin v. Hicks*, in cases of breach of contract whereby the plaintiff loses some

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[372] Horton Rogers "Damages…" *op. cit.* footnote 103, p.53.
[373] Weatherhill, "Enforcing…" *op. cit.* footnote 28 of chapter 3, p.289.
[374] *Ibid.* This a very atypical situation in tort law.
[375] *Ibid.* If the contract is to be awarded to the lowest bid, it would be easier to compare the bids, since the only criterion is the price. If, on the other hand, the contract is awarded to the most economically advantageous tender, the awarding authority has a wider discretion in deciding, which renders proof that a specific bid would have been successful more difficult.
[376] [1911] 2 K.B. 786. See Brazier, *Street on* Torts (1999).
[377] *Allied Maples v. Simmons and Simmons* [1995] 4 All ER 507.

speculative chance of obtaining a benefit, he can ask for recovery of the amount of the benefit that corresponds to the strength of his chance of receiving it. For example, he can ask for one quarter of the total loss that would have been suffered when his chances of the benefit are assessed at one quarter. In *Allied Maples* the court ruled that loss of chance may be invoked where there is a "real or substantial" chance for the party of obtaining the benefit.

2.9.4 *Harmon* on damages under the Regulations

As regards the award of damages under the Regulations, the judge in *Harmon* held that full lost profits (profits that would have been made under the contract) are recoverable in principle. However, this is only possible when there is a high probability, almost a certainty, that the bidder would have been successful, had the law been followed. This indicates that, under *Harmon*, likelihood of success needs to be established at a higher degree than under the balance of probabilities and makes the test of establishing loss for full compensation stricter.

The judge held that, if the plaintiff has not a quasi-certainty but a substantial chance of being awarded the contract (though the judge did not spell what a substantial chance was), the rule of loss of chance applies. The court will then work out the chance of success and award damages reflecting this chance. The judge stated that, if Harmon had 70% chance of being awarded the contract, it should recover 70% of the profits it would have made. This implies that though a 70% chance is substantial enough to justify proportionate damages it is not sufficiently high to attract full damages.

The endorsement of the loss of chance rule in *Harmon* is welcome, but difficulties in establishing harm may subsist. The plaintiff's probability or chances of success can

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[378] Arrowsmith "E.C. Procurement Rules in the U.K. Courts: An Analysis of the *Harmon* Case: Part II", (2000) 9 P.P.L.R. p.137; see also Horton Rogers "Damages.." *op. cit.* footnote 103, p.67.

(and generally will) be disputed by the authority. Though the unlawfulness of the plaintiff's exclusion may be established, the authority may be able to produce at trial a valid reason for excluding him in any event (in which case the plaintiff will not be entitled to damages at all) or for preferring other bids (in which case the plaintiff has first to establish that his chances were substantial and will, even so, not get full compensation). Especially in procedures where the contract is to be awarded to the most economically advantageous offer, damages, when granted, may often be severely discounted, to take into account the authority's discretion in choosing. In cases where the contract was not advertised, it is virtually impossible for the plaintiff to prove, first, that he would have submitted an offer, secondly, that this hypothetical offer would have ensured him any chances of success and, thirdly, show what his lost profits would have been.

The quantification of damages in *Harmon* was left by agreement for a later separate trial. It is submitted that often the plaintiff will find it difficult to establish the measure of his loss. This, as we have seen, would correspond to a percentage of what he would have won under the contract[379], which can be *a priori* calculated by deducing the performance costs from the performance fee (which is what the bidder would have been paid, as indicated by the price in his bid). The normal commercial practice would be to include in the fee for the contract the bid costs[380] and allow, in addition, for further profits to be made. However, it is open to the authority to argue that the bidder would not have made such profits or even recouped costs. For example, because Harmon went into liquidation after proceedings were instituted, the authority argued that, even if it had been awarded the contract, it would not have been able to perform it, thus would not have made any profit and therefore was not entitled to damages. The judge ruled that this was in principle relevant to the quantification of

[379] In tort claims, bid costs are in principle not recoverable as such, but as part of compensation for lost profits under the contract.

damages and that, if profits would have been reduced or eliminated because of the liquidation, compensation should be reduced accordingly. Nevertheless, as to bid costs, the judge concluded that, on the facts of the case, the liquidation had no relevance to their recovery, on the ground that the cause of action for costs incurred (as opposed to profits, which refer to future expectations) had already arisen before the appointment of a liquidator and is therefore not affected by it.

Calculation of the profits the contractor expected to make out of the contract is very difficult, especially as contracts in this field are complex and their performance takes often some time and/or covers a variety of activities. In Har*mon,* the uncertainties involved in construction were taken into account. Harmon had proposed to reduce its estimated profit by half, for the purposes of calculating damages, in order to reflect the possibility that it might not have made the estimated profit, due to the "risks and hazards inherent in construction work". The judge held this suggestion to be "realistic and conservative", consistent with his experience of the incidence of risk on such work, and accepted the proposal.

As regards recovery of bid costs, Harmon argued for applying the rule in article 2(7) of the Directive 92/13 (and Utilities Regulation 32(7) that implements it), for which there is no equivalent in the public works (and, in general, the public sector) rules. Under this provision, in order to recover bid costs, it is sufficient for bidders to prove the existence of a breach and that they had "a real chance of winning the contract", which was adversely affected as a result of the breach. Proof that they would have recovered bid costs under the contract is therefore not required[381]. The judge remarked that the absence of such a provision in the public works rules does not mean that it does not apply. The judge did not clearly state if he considers that it does apply. However, the very

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[380] Weatherhill, "Enforcing…" *op. cit.* footnote 28 of chapter 3, p.288.

[381] It is often commented in literature that the provision should apply in the public sector as well, usually on the argument that it is a development or clarification of the Community approach to remedies in relation to the earlier Remedies Directive. See for example, Clerc, *L'ouverture*, *op. cit.* footnote 20 of

fact that the possibility was discussed in the judgment separately and at length seems to imply so[382].

Harmon sought an interim payment of damages (payment of a reasonable proportion of the damages likely to be granted in final judgment) under Rule 25.7 of the Civil Procedure Rules[383] and obtained it by judgment of the High Court, *Harmon 2*[384]. The final damages were left to be determined at a later date. In the interim judgment, the judge stated that damages can be awarded for tender costs, for lost profits or for loss of chance, but that only one base can be applied in a particular case. He considered that Harmon should be compensated for lost profits (thus rejecting the argument that Harmon could not have made profits, because it had gone into liquidation) and ordered an interim payment of £1,848,456.

2.9.5 *Harmon* on damages under the doctrine of implied contract

Harmon argued that the House of Commons' conduct was in breach of the implied contract doctrine enunciated in *Blackpool*. The judge held that, where competitive tenders are sought and sent and there is legislation, such as the Works Regulations, which sets out a tendering procedure and imposes obligations of fairness and equality towards bidders, the procuring entity is under an implied contract not only to consider all bids but also to do so fairly[385]. For procurement not governed by such legislation, however, where there is no legislative obligation of fairness and equality, the only duty imposed under the doctrine of implied contract on the authority is to give consideration to the bid, as already held in *Blackpool.* The judge found a breach of

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chapter 2, pp.200-1; Geddes, *Public and Utilities Procurement…, op. cit.* footnote 31, which was relied on by Harmon.

[382] Arrowsmith "E.C. Procurement Rules in the U.K. Courts…" *op. cit.* footnote 113, p.139.

[383] Available at www.lcd.gov.uk/procrules_fin.

[384] *Harmon CFEM Facades (UK) Ltd v. The Corporate Officer of the House of Commons (Harmon 2),* High Court, judgment of June 29, 2000.

[385] "In other words, the obligations of fairness and equality imposed by this regime can be regarded as being undertaken contractually also", Arrowsmith "E.C. Procurement Rules in the U.K. Courts…" *op. cit.* footnote 113, p.143.

implied contract in this case, stating that the House of Commons failed to "be transparent, fair and open and to treat Harmon fairly".

The judge held that damages would be assessed in the same way as for the damages action under the Regulations. Such assessment should probably be limited to applications of the doctrine of implied contract to awards under the Regulations, as the judge based his conclusions on damages to the EC principle of effectiveness, which does not have to apply to purely domestic cases[386].

The judgment is an illustration of the way implied contract can be used in the context of awards under the Regulations and, as such, is useful. However, it is not very explicit or clear on its implications. First of all, it does not define the scope of the authority's obligations under the implied contract, apart from that of fair consideration of bids. It is not clear whether all breaches of the regulations will be considered as breaches of an implied contract to abide by them or not. Secondly, the judgment does not clarify whether the doctrine applies only to procedures where there is a limited number of bids (in *Harmon,* the House of Commons used the restricted procedure and the final bids were two) or to open procedures as well.

2.9.6 *Harmon* on damages under the tort of misfeasance

Harmon argued that the main official of the House of Commons was liable for misfeasance. The judge found that procurement decisions constitute conduct by an official in the exercise of public power, as required for the tort to apply. This means that procurement officials can be controlled for their conduct under this tort. The judge also found that the main official's conduct was deliberate and that he was aware of the unlawfulness of his behaviour; his actions were not those "of an honest and reasonable man". He therefore concluded that misfeasance applied.

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[386] *Ibid.* p.144.

The judge held that damages would be assessed in the same way as under the Regulations. As was argued in connection to implied contract, such assessment may be appropriate when misfeasance is alleged in the context of EC procurement awards but, arguably, not in purely domestic procedures[387].

The case is a useful precedent, as it provides an example of how misfeasance can be construed in procurement. However, the special circumstances giving rise to it will be found with difficulty. *Harmon* was special, in the sense that evidence against the House of Commons was abundant and conclusive.

2.9.5 Conclusions on damages

The law as regards damages for breaches of the rules in procedures under the Regulations has been greatly clarified by *Harmon 1* and *2*. The judgments are valuable precedents. The applicability of the rule of loss of chance is established and the possibility of applying the easier test under the Utilities Remedies Directives for the recovery of bid costs in public sector award procedures is implicitly acknowledged. However, the degree of likelihood of wining the contract required to recover full lost profits seems to have been increased. In brief, the greater advantage of this case law is that it indicates a willingness to enforce the EC rules and ensure that those who have been harmed by breaches are offered an effective possibility of being compensated.

However, *Harmon* is the only successful damages case. The case does not seem to have opened the way to more litigation and it has been suggested that its facts are unique, because of the wide public coverage of the case and the flagrancy of the breaches[388]. It remains to be seen if litigation will increase in the future.

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[387] *Ibid.* p.145. See for a contrary view, Marsh/Griffiths "Tender situation" in Supply Management, 27 July 2000, p.43.

[388] Pigott, "The Case for the Plaintiff", Building, 19 November 1999, p.84, Minogue, "The Public Sector's Story", Building, 19 November 1999, p.85.

2.10 The legal costs

In the UK, the legal costs are very high. It has been maintained that is, in fact, one of the major problems of the UK legal system[389].

Costs are mainly due basically to lawyers' fees, which are expensive[390].

Bidders usually seek legal advice of solicitors specialised in procurement, even when they are firms with in-house legal departments, since such departments deal mostly with general corporate and labour law matters. For specific problems, such as procurement disputes, specialised legal advice is usually sought.

The actual amount of fees depends on the lawyers' expertise and professional reputation: the more specialised and experienced the lawyer, the higher the fees he will charge. Also, London-based lawyers charge as a rule more than lawyers based in other parts of the country.

Fees will also vary depending on the case. They are determined by the type of remedy sought, the stage the award is at, the difficulty of the case and the authority's reaction, in the sense that, if it disputes (as it normally would) the firm's allegations, strong(er) arguments and increased evidence will be needed to win the case.

It is therefore impossible to give an average amount of fees. In very rough figures, interim measures cost between £50,000 and £100,000, whereas a final case (tried, with both solicitors and barristers employed) could cost up to £3-4

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[389] Lord Woolf in his interim report "Access to Justice" (Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales, June 1995, available at www.lcd.gov.uk/procrules_fin) mentions that "[t]he problem of cost is the most serious problem besetting our litigation system" at p.159 and that "[f]or individual litigants the unaffordable cost of litigation constitutes a denial of access to justice" at p.9. Also Schmidt-Assmann and Harrings, "Access to Justice and Fundamental Rights", (1997) 9 European Review of Public Law (3), pp.529-549, suggest that litigation costs in the UK can be problematic as regards, first, the burden they lay on the complainants, secondly, the disproportionality of expenses and returns and, thirdly, their unpredictability. We will discuss in the empirical study the incidence and impact of these problems in practice.

[390] The information on costs has been obtained in the empirical study.

million. Cases that were brought and were consequently abandoned can cost any amount in between. Pre-trial advice from a solicitor will cost at least £10,000, if the case is relatively complex. Even asking for an *ex parte* injunction is costly.

The high level of legal costs in the UK can partly be attributed to the fact that, on top of the solicitors' fees, there are the barristers' fees to be paid. In other jurisdictions, there is no distinction between barristers and solicitors; all qualified lawyers can provide legal advice, write lawsuits and plead before the courts. Therefore, there is only one (team of) lawyer(s) in charge of one case. In the UK, on the contrary, solicitors cannot plead in the High Court, therefore a barrister has to be employed to write the action and plead the case. This increases the fees, since there are two separate -though, naturally, collaborating with each other- (teams of) legal advisers on the case and there are certain overlaps between their tasks, meaning in practice that a firm may be paying twice for the same things. For example, after the solicitor prepares the file of the case, stating the facts, the applicable law and any relevant background information, the barrister has to study it in order to write the action and the pleadings. This "study time" corresponds to several hours of barristers' fees and is not necessary (and is not charged for) in jurisdictions where the person who prepares the file also writes the lawsuit and pleads.

The distinction between barristers and solicitors means also that firms would have to employ barristers to write, lodge and plead the case, if they wish to proceed, even when they use their in-house lawyers for legal advice to minimise costs.

In procurement, where success at trial is considered to be unlikely, practitioners do not normally accept conditional fee arrangements, i.e. arrangements whereby the payment of the lawyer depends on success at trial or is sometimes calculated on a percentage of the sum granted as compensation to the plaintiff in damages actions.

We have seen that in applications for interim measures, applicants can be asked to give an undertaking in damages, which adds to the financial burden of litigation- though it remains to be seen if the *obiter* in *Harmon* that the requirement to give such a security does not apply to cases under the Regulations will be followed. An undertaking may be asked even in an action for damages; Harmon had to give £650,000 by way of bond as security for the defendant's costs.

Legal costs can be further added to, if the action fails and the court orders the plaintiff to pay the defendant's legal costs[391]. If the case is successful, the plaintiff may be able to recover his costs.

3 Conclusions of chapter 5

The impact, from a legal point of view, of the Remedies Directive in the UK is considerable. It is probably greater than in other Member States, because it establishes a new legal situation, which is, by UK standards, original. Before the implementing Regulations, in the majority of cases, contract awards were unregulated and free from judicial scrutiny. The Regulations have brought about a big change in this respect, transforming the law and considerably improving the legal position of the contractors, at least from a formal point of view.

However, the improvement came not only through the introduction of remedies in the UK legal system but also and principally through the introduction in general of formal precise rules governing award procedures in a field hitherto almost unregulated. There is now a set of provisions to which contractors can refer to test the lawfulness of the contracting authority's conduct and on which they can rely, if they wish to start proceedings. Thus, the improvement of the position of contractors is a

[391] Part 44.3 of the Civil Procedure Rules provides for the court's powers to order one party to pay costs to the other. The court has discretion to decide whether costs are payable (indications on what the court must take into account are given in 44.3(4)), their amount and the time when they should be paid. The

combined effect of the (enforceable) restraints the new procurement rules place on contracting authorities and of the introduction of remedies to ensure the application of these rules.

The UK implementing legislation is not irreproachable. It includes only very basic rules on remedies and leaves regulation of the details to the courts. This cannot be said to achieve a very high standard of clarity, certainty and provision of adequate information to the interested persons, which, as we have argued in chapter 3 section 2, is required for the correct national implementation of EC law. Moreover, we have seen that detailed rules may be indispensable in some cases to achieve the effect intended by the Directive, for example, rules ensuring that there exists a real possibility of challenging award decisions before the conclusion of the contract.

There has been some case law on remedies under the Regulations, though not sufficient to draw definite conclusions on the approach of the courts and probabilities of winning a case. The adoption of the Regulations is relatively recent, so we must wait to see if more cases will filter through and whether these cases will take into account the EC requirements, for example, the principle of effectiveness, which was referred to in *Harmon*. In the meantime, any assessment is necessarily to some extent speculative. We have seen, however, that the case law on judicial review may provide some guidance on the direction likely to be followed by the courts, for example on issues such as time limits.

The problem with a system where there is not sufficient case law or statutory rules to make what can be obtained under reach remedy predictable is that its use by the persons it is destined to protect may be thereby diminished. Aggrieved contractors would usually take action when they know if and what they may win[392]. In this sense, uncertainty may be a strong disincentive.

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general rule is that the unsuccessful party will be ordered to pay the costs of the successful one but the court may make a different order (44.3 (2)).

[392] Arrowsmith, "Enforcing the EC…" op. *cit.* footnote 2, p.117.

Even allowing for the relatively recent adoption of the Regulations, the number of cases under them is remarkably small –less than 20 in July 2002. There may be several reasons for this phenomenon and they will be examined in detail in the empirical study.

Chapter 6

The remedies system in Greece

This chapter examines the remedies available in Greece for the enforcement of the public sector procurement rules. We shall look at remedies before and after the adoption of a law implementing Directive 89/665 and their respective advantages and disadvantages. We shall focus our discussion on remedies under the implementing legislation and their compatibility with Directive 89/665 and EC principles.

1 The legal background

1.1 Domestic procurement law and the EC substantive directives

Public procurement award procedures have traditionally been heavily regulated in Greece, in all sectors. The relevant rules are, however, dispersed in numerous legal instruments, repealing, complementing or amending each other, thus creating an ill-defined set of obligations and rights.

Rules on procedures for public works contracts are found principally in law 1428/84, as amended by various legal instruments, the most important of which are Presidential Decree 609/85 and law 2229/94. Rules on public supplies contracts awards are found mainly in law 2286/95 and Presidential Decree 394/96. Public services contracts awards are regulated mainly by law 716/77 and Presidential Decree 194/79.

There was, as a rule, no exceptional legal regime for utilities; the general procurement rules and the award procedures set out in them were compulsory for utilities as well[393].

The EC substantive directives were implemented in separate legal instruments for each sector. The choice of implementing instruments will be discussed later, in relation to the implementation of the Remedies Directive. Directive 93/37/EC on public works was implemented by Presidential Decree 23/93, as amended by Presidential Decrees 85/95 and 92/95 and law 2576/98. Directive 93/36/EC on public supplies was implemented by Presidential Decree 370/95 and, additionally, by law 2286/95. Directive 92/50/EC on public services was implemented by Presidential Decree 346/98, after Greece was condemned by the Court of Justice for failure to implement[394]. Directive 93/38/EC on utilities was implemented by Presidential Decree 57/2000.

The domestic procurement legislation applies to award procedures above the thresholds to the extent that it is compatible with the implementing provisions; any incompatible domestic rule is inapplicable[395].

1.2 The public-private law distinction, the notion of administrative contracts and the jurisdiction of the courts

The Greek legal system distinguishes between the areas of public and private law and between administrative and civil courts. According to article 94 of the Constitution, administrative courts hear administrative disputes. Civil courts hear, accordingly, civil disputes. The distinction between the two types of disputes is made though defining administrative disputes and distinguishing them from civil ones. A dispute is deemed to be administrative, thus heard by

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[393] For example, according to article 1(3) of law 1418/84 on public works, the law applies to all contracting bodies without distinction.
[394] C-311/95 *Commission v. Greece,* [1996] E.C.R. I-2433.

administrative courts, when it is based on an action by a public body[396] and the situation it refers to is governed by administrative law rules[397].

The conduct of public bodies is always governed by public law when they act as *imperius,* regulating situations independently of the concerned persons and even against their will. The acts of the authorities are called in this case "administrative acts" and administrative courts have jurisdiction to review them, applying administrative procedural law.

The contractual conduct of public authorities can be subject to either private or public law rules, depending on whether the contract is, respectively, "private" or "administrative". The distinction between the two types of contract is a very controversial and often debated issue in Greece, principally, and independently of any theoretical legal interest the question may present, because the nature of the contract determines which branch of law will apply and which courts will hear the disputes that may arise. Civil courts have jurisdiction on private contracts and administrative courts on administrative contracts. The two branches of jurisdiction hear similar but different types of remedies, as we shall see below, apply distinct procedural rules and have a different tradition, ideology, case law and expertise[398]. The classification of a contract under either category determines to a large extent, allowing of course for the particularities of each case, the protection that the contractor will receive and this is why this distinction is so important.

The relevance of the distinction between private and administrative contracts to procurement awards is that the nature of the acts taken during the pre-contractual stage (the award procedure in procurement) follows that of the contract. If the contract is administrative, acts leading to its conclusion are

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[395] Gerontas, *Dikaio Dimosion Ergon* (2000), pp.178-9, footnote 17. The inapplicability of incompatible national rules is expressly stated, for example, in article 38 of Presidential Decree 23/93 on public works.
[396] Council of State, decision 105/1991.
[397] Council of State, decision 4288/90, Supreme Civil Court, decision 490/1982.
[398] Spiliotopoulos, *Egheiridio dioikitikou dikaiou* (1993), pp.378-9.

administrative acts and the administrative courts have jurisdiction, while civil courts review acts taken to conclude a private law contract.

Greek case law on the concept of administrative contracts was developed mostly in relation to public works contracts and on the basis of purely domestic rules. It is however applicable and has been applied by the courts to all procurement contracts, including those concluded under the EC rules.

The Greek supreme administrative court, the Council of State, has given a definition of what is an "administrative contract" to distinguish it from a private law one, following essentially the case law of its French counterpart, the *Conseil d'État*. The Council of State requires three cumulative conditions to be fulfilled for a contract to be considered administrative.

First of all, at least one of the contracting parties must be the state, a local authority or any other public body governed by public law[399]. In procurement, this condition has been argued against, as it means that bodies set up by the state but governed by private law, often taking the form of a commercial law company -and almost all utilities belong to this category, would conclude private contracts, while other public bodies would conclude administrative contracts. Most commentators and some courts[400] took the view that it is not wise to split the jurisdiction of the courts for contracts concluded under the same rules. Decision 10/1987 of the Special Supreme Court, a special court that hears, *inter alia*, cases where the Civil and Administrative Supreme Courts have reached conflicting judgments, put an end to the controversy. The Special Supreme Court followed the Council of the State and ruled that only the contracts concluded by the state, the local authorities and the bodies governed by public law are administrative, provided that the other two conditions (examined below) are met. Thus, bodies governed by private law conclude private contracts,

[399] Council of State, decision 2655/87.
[400] For example, the Administrative Court of Appeal of Athens, in decision 312/86, held that all works contracts are administrative.

even when they do so in the field of public procurement subject to the specific relevant legislation.

The second condition of administrative contracts is that they must aim to serve the public interest. The aim must be precise and concrete[401] and be in close and direct relation to the subject-matter of the contract[402]. If the contract does not aim to serve the public interest, the action of the public authority can be challenged on the grounds of misuse of power[403]. The case law indicates that the aim will be found in the vast majority of contracts concluded by public bodies[404] but that contracts which do not have a direct public interest purpose will not be deemed to be administrative, even if they may be indirectly beneficial to the public[405].

The third condition of administrative contracts is that they must contain provisions derogating from the general rules[406] or conferring on the public body special obligations or powers[407], for example, the power to modify unilaterally the contract clauses, thus creating an exceptional legal regime[408]. It was never questioned that this condition is satisfied in procurement, as it is considered that procurement rules (including, where applicable, the EC procurement rules) are administrative law rules that create an exceptional regime by either imposing obligations or conferring a predominant position on contracting authorities.

Thus, in Greek law, jurisdiction of the courts is split for procurement contracts concluded under the same substantive law, depending on the nature of the contracting authority, meaning that different remedies and procedural rules will be applied to disputes based on the same provisions and often the same facts. This is unreasonable, for various reasons. First of all, jurisdiction should follow and be determined by the

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[401] Council of State, decision 2272/86.
[402] Remelis, *I Aitisi Asfalistikon Metron Enopion tou StE,* (2000), p.125 *seq.*
[403] Pavlopoulos, *I Symvasi Ektelesis Dimosiou* Ergou (1997), p.318.
[404] Gerontas, *Dikaio..., op. cit.* footnote 3, pp.49-50.
[405] The relation is indirect, when, for example, the contract concerns the use of the private property of the public body, Special Supreme Court, decisions 15-17/1992, Administrative Court of Appeal of Athens, decisions 2488/90, 3120/91, 2078/91, 1493/87.
[406] Special Supreme Court, decision 10/92.
[407] The term used by the French *Conseil d'État* is "clauses exorbitantes du droit commun".
[408] Council of State, decision 898/93.

substance of the case[409]*. Secondly, there is a risk of unequal or conflicting judgments between the two branches of courts in identical cases. Moreover, application of this criterion means that the qualification of the contract will depend on the existence and number of bodies governed by private law and therefore on political choices of different governments that might or might not consider it opportune to create them*[410]*.*

Many commentators continue to argue for a unique jurisdiction for public procurement contracts, eventually through a case law development. According to most of the literature, it is implied in procurement legislation that all procurement contracts are administrative[411]*. Other commentators*[412] *have argued that all contracts, by their very nature, belong to the realm of civil law and, thus, even those concluded by public bodies should be subject to civil law rules and procedures; cases would be thus heard by civil judges, which have more experience and expertise in disputes over the conclusion of contracts than administrative judges.*

1.3 Domestic procurement remedies

Greece, as most EU countries with a civil law tradition, had a relatively developed system of remedies against acts, including contracting decisions, of public authorities, even before the implementation of the Remedies Directive. These remedies, which remain available to bidders for procedures below the thresholds, are not dissimilar to the ones in the Directive. Their precise form and procedure change according to the branch of courts before which the action is brought.

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[409] Remelis, *I Aitisi..., op. cit.* footnote 10, p.111.
[410] Vlachopoulos., *Opseis tis dikastikis prostasias enopion tou Symvouliou tis Epikrateias- to paradeigma tou nomou 2522/1997 gia ta dimosia erga* (1998), p.72.
[411] For example, Remelis, *I Aitisi..., op. cit.* footnote 10, p.110 footnote 62. For an older reference, see Grigoriou, "I Nomiki Fysi ton Symvaseon Ekteleseos Dimosion Ergon pou Synaptontai apo Dimosies Epiheiriseis", (1986) Nomiko Vima, p.1216 *seq.*
[412] For example, Hasapis, "Dimosia Erga. Sygrousi Armodiotiton Politikon kai Dioikitikon Dikastirion stin Ekdikasi ton Shetikon Diaforon", (1985) Nomiko Vima, p.1344; Hasapis, "Dimosia Erga. Simeio Aihmis sti Sygrousi Armodiotiton Politikis kai Dioikitikis Dikaiosynis", (198) Nomiko Vima, p.1170.

The remedies before the administrative courts are the following. Bidders may apply for the annulment[413] of harmful contracting decisions before the Council of State, which decides at first and final instance. The grounds for annulment are exhaustively determined by law. Bidders may also apply for the suspension of application of the contested decision, until a judgment is reached in the main proceedings[414]. The application for suspension is heard by the Suspensions Committee, a special three-judge formation of the Council of State. Applications for suspension are inadmissible, unless an application to annul the decision has been lodged before or is lodged at the same time. Until recently, no interim measure other than suspension could be sought, as we will see. Bidders may, finally, introduce actions for damages[415] before the three-member Administrative Court of First Instance[416] of the area where the authority that issued the harmful act is based[417]. Decisions taken at first instance may be appealed before the Administrative Court of Appeal[418] of the same area of the court of first instance[419]. The Council of State may review decisions taken on appeal[420].

The respective remedies before the civil courts are actions for interim relief[421], for declaration of nullity (to have contracting decisions declared void)[422] and for damages[423]. These are all brought before the Civil Court of First Instance[424] of the area where the contracting authority is based[425] or where the contract was or would be concluded or the undertaken obligation was or would be delivered[426]. Decisions on interim measures are usually taken by a single judge formation of the court. Any

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[413] Article 52 of Presidential Decree 18/89.
[414] Presidential Decree 18/89 as amended by article 35 of law 2721/99.
[415] Articles 105-6 of the Law Introducing the Civil Code.
[416] Article 6(1) of law 2717/99.
[417] Article 7(1) of law 2717/99.
[418] Article 6(6) of law 2717/99.
[419] Article 7(4) of law 2717/99.
[420] Article 56 of Presidential Decree 18/89.
[421] Articles 682 *seq.* of the Code of Civil Procedure.
[422] Articles 174 of the Civil Code and 70 of the Code of Civil Procedure.
[423] Article 914 of the Civil Code.
[424] Articles 14, 18 and 683-684 (for applications for interim measures) of the Code of Civil Procedure.
[425] Article 22 of the Code of Civil Procedure.
[426] Article 33 of the Code of Civil Procedure.

interim measure can be sought and ordered[427]. There is no obligation to lodge an action for declaration of nullity before asking for interim relief[428]. There is no restriction as to the grounds that may be invoked for an act to be declared null. All decisions taken at first instance, apart from decisions on interim measures, may be appealed before the Civil Court of Appeal[429] of the same area of the court of first instance[430]. The Supreme Civil Court may review decisions taken on appeal[431].

There are several procedural differences at trial before the two branches of courts.

First of all, the Council of State and the Suspensions Committee only review the contested act as to its lawfulness and do not examine in principle the facts on which it is based[432]. Civil courts, on the other hand, may review both law and facts. Thus, they can find and quash breaches that the Council of State might not be able to, since, in procurement, allegations are often based on technical matters, which the Council does not review[433], and cannot be proven unless such matters are looked into, eventually with the help of an expert[434].

Secondly, no witnesses may be examined and no statements under oath may be taken into account before the Council of State and its Suspensions Committee[435], though in practice the Committee may allow witnesses in exceptional circumstances[436]. The only evidence allowed is documentary and basically consists of documents relating to the award procedure that the applicant has adduced. Civil courts, on the other hand, may examine witnesses[437] and consider statements given under oath[438]. The wider range of allowed means of evidence helps civil judges to

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[427] Articles 682, 692 and 732 of the Code of Civil Procedure.
[428] Article 682 of the Code of Civil Procedure.
[429] Articles 511 *seq.* of the Code of Civil Procedure.
[430] Article 19 of the Code of Civil Procedure.
[431] Articles 20 and 552 *seq.* of the Code of Civil Procedure.
[432] This does not apply to administrative courts of first instance.
[433] For example, Council of State, 4360/97.
[434] Civil courts can ask for expert opinions, according to articles 368 *seq.* of the Code of Civil Procedure.
[435] This does not apply to administrative courts of first instance where, under article 179 *seq.* of law 2717/99, witness examination and statements are allowed.
[436] Synodinos, *Apotelesmatiki Dikastiki Prostasia kata tin Synapsi Symvaseon tis Dioikiseos* (2001), p.212, footnote 882.
[437] Articles 393 *seq.* of the Code of Civil Procedure.
[438] Article 270(2) of the Code of Civil Procedure.

form a clearer and more accurate view of the situation, to detect irregularities, if any, and to understand the interests involved, which (and in conjunction with their power to review the merits) can lead to judgments that correspond better to the reality of the case. The exclusion of all kinds of evidence other than documentary has been condemned by the Court of Justice, as reducing the effectiveness of judicial protection and thus being incompatible with EC law[439].

In the third place, the Council of State's judgment on an application for annulment is not reviewable by another court, while the corresponding judgment of the civil courts of first instance can be reviewed by the Court of Appeal and the Supreme Civil Court. This means that if the Council of State's decision is wrong, there is no possibility to challenge it –though this has arguably the advantage of settling uncertainties about the validity of an act early on.

In the fourth place, applications for suspension are heard by the Suspensions Committee, comprised by three supreme court judges, while applications for interim measures before the civil courts are heard by only one first instance judge. In the latter case, because of the sometimes lesser expertise of the civil judge in administrative law matters and the fact that he has to take the decision on his own, the possibility of overlooks and mistakes is increased[440].

Any procedural and case law differences between administrative and civil courts specific to one remedy only will be discussed in the section on this remedy.

On the basis of these differences, it could be argued that protection offered by the civil courts is in principle fuller and more adequate. This is due to the higher level of scrutiny and wider range of evidence allowed, as well as to the possibility of appeal in applications for declaration of nullity. The only downside in civil court proceedings is that the decision on interim relief (which is not subject to

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[439] C-199/82 *Amministrazione delle Finanze dello Stato v. San Giorgio* [1983] E.C.R. 3595, where it was held that any requirement of proof that has the effect of making relief "virtually impossible or excessively difficult…is incompatible with Community law". That is so "particularly in the case … of special limitations concerning the form of the evidence to be adduced, such as the exclusion of any kind of evidence other than documentary evidence".

appeal in either jurisdiction) is taken by only one judge, which creates a risk of mistakes. It has been suggested that, although the Council of State does not normally review the merits of cases, it should do so in procurement, especially as regards interim relief, in order to fulfil its EC obligation of providing full and effective judicial protection[441].

1.4 Case C-236/95[442]

Greece initially refrained from adopting legislation to implement Directive 89/665, because it took the view that the existing remedies met the Directive's requirements. Only Presidential Decree 23/93 on public works contained a provision implementing article 3 of the Directive on the corrective mechanism.

Upon non notification of any implementing measures[443], the Commission made inquiries. Greece informed the Commission that no measure had been taken as regards remedies in public supplies awards but that Presidential Decree 23/93 had partially implemented the Directive in the field of public works. Greece indicated that its existing rules in conjunction with the case law of the Council of State, which referred to the Directive and interpreted national law in accordance to it, provided adequate protection to aggrieved contractors. Greece also invoked internal procedural difficulties that had held up an effort to implement the Directive.

The Commission was not satisfied with the answers and started an infringement procedure concerning remedies in the field of public supplies, which culminated on September 19, 1996, with the Court of Justice's condemnation of Greece for failure to implement. At that time, another infringement procedure concerning public works had already started.

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[440] Synodinos, *Apotelesmatiki..., op. cit.* footnote 44, p.213 at footnote 886.
[441] *Ibid.*, p.215.
[442] Case C-236/95 *Commission v Greece* [1996] E.C.R. I-4459.
[443] Implementation had to take place until March 1, 1992, for Greece, Spain and Portugal. For the other Member States the earlier date of December 21, 1991, was set.

The Court dismissed the Greek arguments that effective judicial protection was available, mainly as far as interim relief was concerned.

The fact that interim relief before the Council of State could only be sought after the annulment of the contested act had been applied for and that the only interim measure possible was the suspension of the act was found to be incompatible with the requirements of article 2 of the Directive[444]. This article, according to the Court, imposed on the Member States the duty

"to empower their review bodies to take, *independently of any prior action, any* interim measures *including* measures to suspend or to ensure the suspension of the procedure for the award of a public contract" [emphasis added].

The Court's apparent conviction that Member States are required to allow an application for interim relief without need for a prior application to set aside the act is surprising, considering that there is no such obligation in the Directive and that interim relief before the Court itself may be sought only after proceedings in the main have been brought[445]. However, to the extent that the disassociation of interim from final relief facilitates and speeds up the available protection, it is a requirement adding to the effectiveness of the system and is, as such, welcome.

Furthermore, the Court, though acknowledging that the Council of State interpreted national legislation on remedies in conformity with the Directive, held that it was necessary to adopt express implementing measures, for the sake of legal certainty, clarity and better information of contractors. The Court referred to its well established case law in this respect[446] and reminded that

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[444] The Commission brought recently an action against Spain for incorrect implementation of the Directive, arguing, *inter alia,* that the Spanish implementing measures were incompatible with the Directive's requirements, because they restricted the right to seek interim relief by requiring a prior application for annulment of the act, C-212/00 *Commission v. Spain,* not yet decided.

[445] Borchardt, "The Award of Interim Measures by the ECJ" (1985) 22 C.M.L.Rev. p.203.

[446] The Court referred to cases C-29/84 *Commission v. Germany* [1985] E.C.R. 1661; C-363/85 *Commission v. Italy* [1978] E.C.R. 1733 and C-59/89 *Commission v. Germany* [1991] E.C.R. I-2607.

"individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and, where appropriate, to rely on them before national courts".

The Court also condemned Greece for failure to implement article 2(1)(c) of the Directive on damages.

As regards the Greek allegations of internal difficulties impeding implementation, the Court recalled its case law[447] that "a Member State may not plead provisions, practices or circumstances existing in their internal legal system to justify a failure to comply with … a directive".

The judgment is interesting in that the Court condemned a Member State while accepting that, in reality, the application of EC law was *de facto* ensured by the national courts[448]. The Court took the view that certainty and publicity, which are indispensable to safeguard individual rights, are not guaranteed where there are no clear measures, even if compliance is ensured in substance.

2 Law 2522/97

2.1 The implementation of the Remedies Directive

In Greece, EC directives are usually implemented by decrees issued by the President of the Republic (called Presidential Decrees), according to article 43 of the Constitution, which provides for the possibility to empower by law the President of the Republic to adopt such decrees, and the empowering law 1338/1983 concerning the implementation of EC legislation.

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[447] The Court referred to cases C-147/94 *Commission v. Spain* [1995] E.C.R. I-1015; C-259/94 *Commission v. Greece* [1995] E.C.R. I-947 and C-253/96 *Commission v. Germany* [1996] E.C.R. I-2423.

[448] Fernández-Martín, "Greek Non-Implementation of the Remedies Directive: a Note on Case C-236/95", (1997) 1 P.P.L.R. CS1 at CS3.

Following the Court's judgment against Greece, an *ad hoc* Committee was constituted to prepare a law implementing the Remedies Directive. This was adopted on September 4, 1997; it is law 2522/1997 entitled "Judicial protection during the stage prior to the conclusion of public works, supplies and services contracts in compliance with Directive 89/665/EEC"[449]. The law is not limited to remedies in the field of public supplies, which were the subject matter of the judgment. The Commission considered the implementation satisfactory and decided not to pursue further the second infringement procedure concerning public works.

Thus, the Directive was implemented by formal legislation passed by the Parliament in a departure from the usual practice of implementing EC law by presidential decrees[450]. This is useful, since it increases the publicity of the adopted measures and keeps with the Court's request of ensuring certainty and clarity[451]. It is also useful in view of the extent and degree of modifications that, as we will see, law 2522/97 introduced into the national legal order; formal legislation is a more appropriate vehicle for such changes[452].

Three years later, on November 11, 2000, law 2854/2000 implementing the Utilities Remedies Directive was adopted.

2.2 Scope and distinction from other remedies

Article 1 of law 2522/97 defines its scope as follows:

"Disputes occurring during the stage prior to the conclusion of public works, supplies and services contracts are governed by the provisions of this law, provided

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[449] The translation of Greek legislation and case law referred to in this study is author's own.

[450] Originally, implementation by decree was contemplated, but that was abandoned: Advisory Committee on Public Procurement, *Study of national jurisprudence regarding public procurement* (study prepared for the Commission, led by Garretts, Leeds, and Archibald Andersen, Paris, Greek collaborator Kyriakides-Georgopoulos), Final Report, Volume 2 at Chapter 7, Brussels 12.10.1998, CC/98/32-EN.

[451] Georgopoulos, "The System of Remedies for Enforcing the Public Procurement Rules in Greece: A Critical Overview", (2000) 9 P.P.L.R., p.75 at p.85.

[452] Synodinos, *Apotelesmatiki..., op. cit.* footnote 44, p.159 at footnote 591.

that the contract falls under directives 93/36, 93/37 and 92/50 EC…or under national provisions implementing said directives …".

The law goes further than the Directive. According to its article 2(1), the remedies it provides for are available against breaches of every applicable rule and not only of EC or implementing national rules.

Law 2522/97 is a special law, excluding the application of general laws applicable in the area[453]. This means that, for disputes falling inside the scope of law 2522/97, whether of private or of public law nature, aggrieved bidders may bring actions only on the basis of this law and following its requirements and may not use remedies available under the general provisions mentioned above. Besides, the level of protection offered by law 2522/97 is higher than that under the general rules[454]. The pre-existing remedies remain naturally available for cases falling outside the scope of the law. The rules and case law on them apply to the new procurement remedies for procedural matters not regulated by law 2522/97[455].

2.3 Forum

The law contains no provision on the forum before which cases will be brought; it relies on the existing rules. The distinction between administrative and civil courts is therefore maintained, their respective jurisdiction depending, as we have seen, on the nature of the contracting authority. Thus, each branch of courts will apply law 2522/97 for cases falling under it, resorting to their own different procedural rules for matters not regulated by the law and following their own distinct tradition and case law.

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[453] Mouzourakis, "Prosorini Prostasia kata to Stadio pou Proigeitai tis Symvaseos Dimosion Ergon, Kratikon Promitheion kai Ypiresion symfona me tin Odigia 89/665", (1997) 9 Dioikitiki Diki, p.1115.
[454] Suspensions Committee, decisions 6/98, 16/98, 17/98, 54/98, 79/98, 83/98, 90/98, 112/98.
[455] Suspensions Committee, decisions 6/98, 16/98, 17/98, 49/98, 54/98, 79/98, 83/98, 90/98, 112/98, 508/98, 656/98.

Law 2522/97 is a very unusual case of procedural legislation referring and applying to two different branches of courts. It is perhaps unfortunate that the legislator followed the distinction drawn in case law and did not take the opportunity to entrust the review of procurement decisions to only one branch of courts, administrative courts being, in principle, better placed to hear such cases, since procurement belongs, as we have said, to administrative law[456].

2.4 Locus standi

Article 2(1) of law 2522/97 provides that

"any person who has or has had an interest in obtaining a particular contract and has been or risks being harmed by an infringement of Community or national law can apply for interim relief, the annulment or declaration of the nullity of the unlawful act of the awarding authority and for the grant of damages".

The provision is identical to article 1(3) of the Directive.

The remedies are then available to anyone wanting to *win* a contract. Third parties, such as environmental organisations, residents of the area or contractors' associations are not granted standing. Such third parties have standing to bring the general procurement remedies, applicable to cases falling outside the scope of law 2522/97[457] and may still apply for them[458], as law 2522/97 does not concern and cannot affect their rights. The fact that access to the remedies of law 2522/97 is limited in relation to access to the general remedies may, however, be incompatible with the principle of non-discrimination.

The conditions of standing are discussed in more detail later, in relation to each remedy separately, since the case law for each varies.

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[456] Synodinos, *Apotelesmatiki…., op. cit.* footnote 44, p.309.
[457] For example, Suspensions Committee, decisions 39/91, 160/95; Council of State, decisions 2589/91 (application for annulment by residents), 2137/93 (application for annulment by contractors' associations).
[458] Vlachopoulos, *Opseis…, op. cit.* footnote 18, p.83.

2.5 The preliminary administrative stage

Contractors may ask for interim relief only after lodging a so-called "recourse"[459] before the awarding authority. This is a strict application of the requirement of prior notification of the intention to seek review, as allowed in article 1(3) of the Directive.

According to article 3(2)a of law 2522/97

"[b]efore lodging the application for interim relief, the interested party must, within a time limit of five days from the day he was informed in any way of the unlawful action or omission, bring a recourse before the awarding authority, defining precisely the legal and factual arguments that justify his claim. … The awarding authority must issue a reasoned decision within a time limit of ten days from the lodging of the recourse and, if it considers that it has merit, must take all necessary measures. If the deadline passes without any action on the part of the authority, the complaint is presumed to have been rejected".

According to article 3(3)(β), while the time limit for the recourse is running and, if it lodged, until a decision is reached (or the recourse is tacitly rejected) the contract cannot be concluded. This means that the authority can go ahead with the award but cannot terminate it by concluding the contract[460].

2.5.1 The nature of the recourse

[459] "Recourse" is the exact translation of the Greek term and corresponds to the French "*recours*", which served as its model. The terms "recourse" and "complaint" will be used in the context of this study alternatively.
[460] Gerontas, *Dikaio…, op. cit.* footnote 3, p.466.

In domestic procurement law, compulsory[461] pre-trial recourses such as the one under law 2522/97 are not unusual[462]. According to the procedural rules applicable to the Council of State, their prior exhaustion is a condition for the admissibility of the application for annulment[463]. However, this is the first time that a recourse of this type is introduced as a condition not of annulment but of interim relief.

In civil procedural law, there is no rule that the prior exhaustion of compulsory pre-trial recourses is a condition for the admissibility of legal actions. On this basis and even though such recourses are provided for in the substantive procurement rules and should be complied with, civil courts do not examine their exhaustion. This is clearly irregular and is probably due to the civil judges' lack of expertise in administrative law matters and the absence of a relevant tradition and case law[464]. Civil courts have continued this practice even under law 2522/97[465].

Typically, such recourses consist in bringing a formal complaint before the authority that is appointed by law to receive it. This is, in general, either the awarding body or the body supervising it (usually the Ministry of Public Works)[466]. The competent authority will review law and facts, within a deadline set by the law. If the deadline passes without a response from the authority, the complaint is deemed to have been rejected[467]. Anyone participating in an award procedure or who has been excluded from it can bring this recourse against any of the adopted acts and must do so, if he wishes to proceed before the courts.

Thus, the provision of law 2522/97 is within an established tradition, though slightly unusual in requiring that such a recourse be sought before applying for interim measures, not final relief, and introducing it as a pre-requisite for civil proceedings.

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[461] There are also other administrative complaints, which are, however, optional, and therefore their omission does not have any effect on the admissibility of action before the courts. These will not be examined here.
[462] For example, such a recourse is provided for in article 11(16) of law 716/77 on design award procedures.
[463] According to article 45(2) of Presidential Decree 18/89.
[464] Synodinos, *Apotelesmatiki…,op. cit.* footnote 44, p.183.
[465] For example, Single Member Court of First Instance of Athens, decisions 376/98 and 621/98.
[466] Synodinos, *Apotelesmatiki…,op. cit.* footnote 44, p.134.
[467] Spiliotopoulos, *Egheiridio .., op. cit.* footnote 6, p.241-2.

We will now examine how this new recourse is approached by the Council of State and the Suspensions Committee, since, as we have seen, civil courts do not examine its exhaustion as a condition of the admissibility of actions brought before them.

According to the case law of the Council of State on mandatory recourses under the general provisions, the authority must inform, when issuing every act[468], all concerned parties of the existence of a recourse, its conditions (for example, the authority before which it is lodged and the time limit for it) and the fact that it is a prerequisite for judicial proceedings[469]. If the authority does not inform the parties on the availability and terms of this recourse or on the foreclosing effect of the omission to lodge it, the application for annulment will be admissible, even if the recourse was not lodged.

The Suspensions Committee has not applied this case law in relation to the new recourse of law 2522/97 and has rejected as inadmissible applications for interim relief brought before it on the ground that the recourse had not been lodged, without examining whether the authority has informed the bidders of it[470]. It is submitted that the Committee should uphold the authority's obligation to inform the concerned parties of the recourse, as this increases the transparency of the system.

The recourse must refer to the act against which interim measures are sought[471]. As in all such recourses, the authority examines both the lawfulness of the act and the facts on which it is based and assesses whether the authority's decision was correct. Review is restricted to only those parts of the act that are being challenged by the complaint. The decision must stay within the limits of the complaint and be based on an assessment of the legal and factual arguments invoked by the complainant, otherwise the authority would exceed its material competence and be judging *ultra*

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[468] Council of State, decisions 5709/1995, 1626-1627/96.
[469] Council of State, decisions 2892/93, 2892/97.
[470] Remelis, *I Aitisi..., op. cit.* footnote 10, p.215.
[471] Suspensions Committee, decision 176/1998.

petita[472]. The decision can under no circumstances worsen the situation of the complainant[473].

The recourse has essentially two objectives[474], the first being to allow for an amicable solving of the dispute and the second to help clarify the dispute for the parties and, eventually, for the judge who will hear the case if no solution is found and the complaint proceeds before the courts.

As to the first objective, the fact that the same authority that issues the act also reviews it, apart from any objections concerning the objectivity of the eventual decision, means that the first decision will often be upheld. Recourses are rarely successful in Greece and are, in fact, commonly considered as only a procedural step prior to the more effective judicial proceedings[475].

In view of that, the importance of the recourse lies in its input in clarifying the case. The complaint itself, the documents attached to it and the answer of the authority, if one is given, help all concerned to have a clearer idea of what the case involves. This is especially important for the judge, since, in applications for interim measures, he must decide in a very short time on very complex matters.

2.5.2 The relation of the recourse of law 2522/97 to other pre-trial recourses

The major problem of this new recourse consists in defining its relation to other recourses, which may be provided for in the domestic procurement legislation as a prerequisite to the application for annulment and which in principle continue to apply, since, according to article 3(2)στ, "[t]he provisions of this paragraph [on the new recourse] apply without prejudice to existing provisions on administrative recourses for public procurement awards". Consequently, if

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[472] Pavlopoulos, *I Symvasi…, op. cit.* footnote 11, p.180 *seq.*

[473] The Council of State has a long established case law on the prohibition of *reformatio in peius*, for example, Council of State, decision 19/62.

[474] Introductory report on law proposal "Judicial protection during the stage prior to the conclusion of public works, supplies and services contracts in compliance with Directive 89/665/EEC".

there is provision for an administrative recourse under the general rules, the contractor should in principle lodge both that one as a condition of the application for annulment as well as the one under law 2522/97 as a condition of the application for interim measures.

The Suspensions Committee, in one of its first decisions applying the new law, stated that the recourse of the law 2522/97 must be introduced against the express or tacit rejection of any other recourse provided under the general rules[476]. The prior lodging of any general law recourse is then a condition for the admissibility of the recourse of law 2522/97 and thus of the application for interim relief under that law[477].

This requirement means in practice that the new recourse is deprived of any use. As regards the first of its aforementioned objectives, that of allowing for an amicable out-of-court settlement of the dispute, the new recourse is a waste of time, since the authority has already had the opportunity to review its decision on the basis of other complaints. The only perhaps possibility of this new procedure having any effect is when the authority that decides on the other recourse is not the awarding authority, which is competent for the recourse of law 2522/97, but another, for example, its supervising authority. As regards the second objective of clarification, this is already attempted by the complaint prior to the one under law 2522/97. Thus, the new recourse would only add complexity and delays to review, probably lead to confusions for the applicants, as the recourses are provided for in different laws, and unjustifiably impair the effectiveness of the review system.

Commentators had identified the problem[478] and asked for a case law or legislative solution of the problem, through eventually the provision for only one recourse as a

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[475] Vlachopoulos, *Opseis..., op. cit.* footnote 18, p.109 at footnote 169.
[476] Suspensions Committee, decision 83/98.
[477] Suspensions Committee, decision 176/98.
[478] In fact, the Committee that drafted the law was aware of the problem, but, as it was constituted *ad hoc* only to implement the Directive, it could not amend all the relevant applicable provisions without exceeding the limits of its mandate and, thus, left the solution of the problem to the judge, Geraris, *I Prosorini Prostasia sta Dimosia Erga, tis Promitheies kai tis Ypiresies (n. 2522.97)* (1999), p.28.

condition of both the application for interim measures and the application for annulment[479]. This solution would create legal certainty and comply with EC law.

As a result of the debate on this issue and on the basis of the Council of State's own judges acknowledging the problem[480], the case law of the Suspensions Committee has relatively relaxed the requirement for successive recourses, at least as far as the application for interim relief is concerned. The Committee ruled that the provision of law 2522/97 that its recourse applies without prejudice to other recourses means that these are not abolished but does not otherwise render compulsory their exhaustion before lodging the recourse under law 2522/97 or applying for interim relief. The only compulsory recourse to apply for interim relief is the one of law 2522/97 itself[481].

As we have seen, the recourses under the general provisions are a prerequisite for the application for annulment, while the one under law 2522/97 is a prerequisite for the application for interim relief. It is, therefore, necessary to specify whether the general law recourses are still a condition for annulment. In this respect, the Suspensions Committee ruled that when interim measures are granted, no other recourse is compulsory. This is because annulment is then applied for directly on the basis of article 3(7) of law 2522/97, which provides that the application for annulment must be sought within 30 days from the award of interim measures. However, if interim measures are not granted and since law 2522/97, in this case, has no relevant provision to substitute the general provisions applicable, other recourses remain compulsory for annulment but can be lodged at any point, before or after applying for interim measures[482] -as long as the deadlines of the applicable general provisions are met.

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[479] Vlachopoulos, *Opseis..., op. cit.* footnote 18, p.105 at footnote 163.
[480] Hristos Geraris, the current President of the Council of State had acknowledged the problem and the need for a solution, poster presented at the conference "Public Contracts and Community Law. Rules of Award Procedures and Judicial Protection", which took place in the Chamber of Trade and Commerce of Athens on December, 18 and 19, 1998.
[481] Suspensions Committee, decisions 75 and 76/99.
[482] *Ibid.*

It is submitted that the system remains complex and can lead to confusions, resulting eventually in the inadmissibility of applications for interim relief or annulment because the case law is misunderstood. The relation between recourses should be simplified, by providing for strictly one recourse for both interim relief and annulment, without qualifications. The best vehicle for this would be legislation and not case law, which is always less public and more facts-bound, thus less easily extendable to all cases.

2.5.3 The time limit

The time limit for lodging the recourse is only five days after the person harmed by the act is informed in any way of it. Within these five days the complainant must find, research and write his specific legal and factual arguments, which will also define the content of the application for interim relief, since according to article 3(3)a

"the application for interim relief ... must not contain arguments different from those of the administrative recourse".

Thus, the 5 days constitute, in essence, also the time limit for the application for interim relief –with some exceptions as to newly discovered facts, as we will see.

Because of the shortness of the time limit, the Suspensions Committee follows a lenient approach on its start, which is deemed to be the moment when the concerned person is fully informed of the act[483]. This means that while the person is not fully informed, the time limit for the recourse cannot expire and that its suspensive effect as regards the conclusion of the contract is maintained[484].

[483] Suspensions Committee, decisions 83/98, 90/98, 176/98, 181/98, 182/98, 589/98, 623/98.
[484] Suspensions Committee, decision 181/98.

Notification of the act is taken to equal full information[485]. The authority, upon receiving a recourse, has arguably the obligation to disclose all relevant information in its possession[486]. It has been suggested that the deadline should start after the harmed person has had access to the files and other data supporting it[487], but there is no case law on this.

According to the Suspensions Committee, the requirement of full information provides sufficient protection against unfair foreclosure, since the harmed bidder has the option of either waiting to be fully informed or, if he does not wait, lodging the recourse at his own risk[488]. The Suspensions Committee seems to consider that the narrowness of the time limit is justified by the need for a speedy resolution of problems and the continuation of the procedure in the interest of all concerned[489].

In relation to the provision that the legal and factual arguments of the application for interim relief cannot be different from those of the recourse, it is argued by most commentators that any new information disclosed in the authority's eventual answer to the recourse should be allowed in the application for interim measures[490]. It is furthermore argued that reference to events that took place after the recourse (*nova producta*) or events that had taken place but only became known to the complainant after lodging the recourse (*nova reperta*) should also be allowed[491]. However, there is not yet any administrative case law basis for these arguments. In civil procedural law (where, as we have seen, recourses are not taken into account), newly produced or discovered facts can justify new applications for interim relief[492].

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[485] Remelis, *I Aitisi..., op. cit*. footnote 10, p.200.
[486] Geraris, *I Prosorini…, op. cit.* footnote 86*,* p.34.
[487] Vlachopoulos, *Opseis.., op. cit.* footnote 18, p.113.
[488] Suspensions Committee, decisions 181/98, 228/98, 53/99.
[489] Suspensions Committee, decisions 75-76/99.
[490] Kanava, "Prosorini Dikastiki Prostasia sto Dikaio ton Symvaseon Dimosion Ergon, Kratikon Promitheio kai Ypiresion", (1998) 29 Diki, p.1401 at p.1416.
[491] Synodinos, *Apotelesmatiki…, op. cit.* footnote 44*,* p.192.
[492] For example, Single Member Court of First Instance of Athens, decisions 4129/96 and 33612/96.

We will see later that the applicant can ask for the decision on interim measures to be revoked, if new events take place after the decision was taken (*nova producta*) –though it is not clear that he can base an application for revocation on *nova reperta*. It is not clear how the possibility of revocation fits with the impossibility to invoke new facts in the application for interim relief. It is submitted that, for reasons of coherence, it would be best to accept that facts taking place after the recourse may be included in the application.

It is submitted that the time limit is too short and that this is not compensated by the lenient case law on its start. The reasonableness of the time limit does not only concern whether the harmful act is known, but also has to do with whether the concerned person has sufficient time, after having become acquainted with the act and even, eventually, after having been informed of the procedure and time limit to challenge it, to prepare the complaint. It is not easy to draft a detailed and coherent complaint in such a short time. Arguably, the five days period is incompatible with the Court of Justice's case law on reasonable time limits[493].

It has been argued that, in procurement, harmed parties are not individuals who are suddenly faced with a harmful act totally unprepared but are willing participants to a known procedure, often receiving constant legal advice throughout it, and, as such, can be expected to be acquainted with the problems that might arise and be ready to react promptly[494]. However, this is not necessarily true of all firms and the experience of the firms is often outweighed by the particularity and complexity of each procedure and the difficulty of access to documents related to the complaint, which renders the time limit too short even for well-prepared firms.

2.5.4 Notification of other parties

[493] Remelis, *I Aitisi…, op. cit.* footnote 10, p.199. Dingel argues that a time limit for bringing procurement related complaints of less than 10 days "probably conflicts with the principle of effectiveness", in *Public Procurement…, op. cit.* footnote 1 of chapter 3, p.185.

Article 3(2)γ provides that the complainant should inform of the recourse every person that may be harmed, if the complaint is in part or entirely successful. The provision does not give a definition of who is considered to be a "harmed person" or when the notification should take place, though arguably it should be on the same day that the recourse is lodged[495].

The Suspensions Committee seems to accept that only bidders who may be directly affected, if the recourse succeeds, should be notified. The Committee has ruled that when the recourse is lodged by a bidder against the act excluding him from the procedure, it cannot affect others directly and therefore no notification is necessary[496]. It would be otherwise if, for example, the challenge aimed to exclude another bidder, in which case he would have to be notified. This argument is not entirely correct: other bidders are harmed if an exclusion decision is revoked, since the participation of one more bidder in the procedure lessens their chances of winning the contract.

There is no case law on whether lack of notification means that the recourse and later the application for interim relief will be inadmissible for failure to comply with procedural requirements. It is best if the complainant notifies all other bidders not to run any risk of its recourse being dismissed. It is submitted that this provision needs either to be clarified or, in the meantime, not to be construed as a mandatory prerequisite on which admissibility is dependent, since otherwise the effectiveness of the recourse and the interim relief remedy are jeopardised by the uncertainty of their conditions.

2.5.5 Conclusions on the preliminary administrative stage

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[494] Vlachopoulos, *Opseis..., op. cit.* footnote 18, p.112.
[495] Geraris, *I Prosorini…, op. cit.* footnote 86, p.25.
[496] Suspensions Committee, decisions 54/98, 50/99.

The pre-trial administrative stage, though in principle useful, is currently subject to procedural requirements that are too tight (such as the time limits), burdensome (such as the co-existence of more than one recourses) or unclear (such as the conditions and effects of notification of the recourse). Legislative or clear case law is necessary to reshape the pre-trial stage, principally to rectify the aforementioned defects. As it is, it is not compatible in all its aspects with the EC requirements of effectiveness and clarity.

2.6 Interim relief

Law 2522/97 is almost entirely dedicated to interim relief, which was the weakest point of the previous system and essentially that on which Greece was condemned by the Court of Justice, in spite of the fact the Council of State's case law was compatible with the Directive.

Law 2522/97 introduces for the first time the notion of "interim measures" in Greek procedural administrative law, where, until its adoption, measures other than suspension of the harmful act were deemed to be an anti-constitutional intervention of the judiciary in the exercise of the functions of the executive. Interim measures used to be a strictly civil law concept.

2.6.1 Procedural conditions for interim relief; the admissibility

In administrative procedural law, before the adoption of law 2522/97, the admissibility of the application for interim relief (then only suspension) was dependent on that for annulment, which would be examined first. The Suspensions Committee would only proceed with the application for suspension, if the application for annulment was found to be admissible.

Law 2522/97 made the application for interim relief independent of that for annulment, as was required by the Court of Justice. Interim relief can now be sought on its own directly before the Suspensions Committee and is thus transformed from a dependent remedy into a *sui generis* semi-independent one –in the sense that it precedes, but retains a connection with, the main proceedings, which will finally determine the outcome of the case.

In civil courts, an application for interim measures could be lodged, as we have seen, before an action for declaration of nullity and any interim measure thought appropriate could be sought and granted. Law 2522/97 did not, therefore, bring about any significant change in civil proceedings in this area, apart from imposing specific time limits and conditions.

2.6.1.1 The nature of the act

Interim relief, and all the remedies of law 2522/97, can in principle be sought for all acts that form part of the chain of contracting decisions leading to the award of the contract[497]. The remedies are not available for acts taken as a result of the award procedure but which do not form part of it, such as a financial penalty imposed to a bidder for irregularities of the bid[498].

There are some exceptions to the availability of interim relief for all contracting acts. According to administrative law theory, as exemplified in a long case law of the Council of State before law 2522/97, only "enforceable" acts of public bodies could be challenged in an application for annulment and, consequently, in an application for suspension. Enforceable acts are unilateral acts, by which an action or omission is imposed on the persons to whom they are addressed or for whom they are intended and which are self-executing, without need to adopt further measures for them to

[497] Suspensions Committee, decision 493-495/98. See K. Remelis, *I Aitisi..., op. cit.,* pp.147-8.

apply[499]. Non-enforceable acts, i.e. acts that do not produce legal effects *per se*, for example, non-binding advisory opinions given in the course of the award, cannot be challenged[500].

Suspension, in particular, was initially not available either for acts excluding a bidder from the award procedure -though their annulment could be sought. The Suspension Committee had qualified exclusion as a "negative administrative act", i.e. one refusing a petition, which it considered that it had no power to suspend, as suspension would, in this case, amount to ordering the administration to act, which would contravene the constitutional distinction between judicial and administrative powers.

In 1995 and after the Commission had contacted Greek authorities in relation to the implementation of the Directive, the Suspensions Committee amended its case law to bring it more in line with the Directive's requirements in *Intrasoft*[501]. This decision will be mentioned in relation to several aspects of interim relief. As regards the suspension of exclusion acts, the Committee ruled that an exclusion is a "non-genuine negative administrative act", equalling a positive act, as it changes a lawfully established situation, as regards the bidder's position, and "creates a new legal and material situation" for him. A suspension would only maintain the *status quo* and should be therefore allowed. Thus, after *Intrasoft*, the exclusion of a bidder can be suspended. The decision to terminate the procedure, however, is still considered a negative act, against which interim relief is unavailable[502].

The distinction between negative and non-genuine negative acts is not explained by the Committee and it is submitted that it is unclear and unconvincing. The suspension of any act equals an order to the administration to act in a certain

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[498] Suspensions Committee, decision 405/96.
[499] Spiliotopoulos, *Egheiridio.., op. cit.* footnote 6, p.455 *seq.*
[500] *Ibid.,* p.461-2.
[501] Suspensions Committee, decision 355/95.
[502] Suspensions Committee, decision 770/97.

way[503]. Besides, judicial protection should be available against all acts independently of their qualification. Otherwise, protection will depend on how the authority formulates the act, something that might lead to abuse.

Article 3(6) of law 2522/97 seems to prohibit the limitation of interim relief depending on the nature (enforceable, positive, negative or non-genuine negative) of the acts. It empowers the Suspensions Committee to order any interim measure, not only the suspension of the act, including positive measures, by which the Committee imposes a new obligation on the authority. No distinction concerning the enforceability of that act is made or appears to be allowed.

However, even under law 2522/97, the Suspensions Committee continues to consider that interim relief is only available to maintain an established situation and not against negative acts, such as the termination of the procedure[504]. Also, the Committee seems not to accept the availability of relief for non-enforceable acts[505]. This case law contravenes the law and, arguably, the relevant article 2(1)(a) of the Directive, which does not list the possible interim measures exhaustively or limits the contracting acts against which relief is possible. The limitation of the range of available interim relief considerably reduces its effectiveness.

The distinctions between enforceable and non-enforceable acts and between negative and positive acts are administrative law concepts. The civil courts do not follow them and there is, therefore, no restriction before them as to the types of acts against which interim measures may be ordered.

2.6.1.2 Standing

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[503] Koutoupa-Rengakos, "I Prosorini Prostasia kata tin Diadikasia Anathesis Dimosion Symvaseon meta to N. 2522/97", (1999) 47 Nomiko Vima (April), p.537 at pp.540-1.

[504] Suspensions Committee, decisions 151/98 and 723/98. The dissenting opinion in 151/98 stated, however, that interim measures should be granted, ordering the authority to keep the documents related to the award procedure, in order to allow the procedure to be restarted from the point where it stopped, in case the annulment of the decision to terminate is sought and obtained.

[505] Suspensions Committee, decision 176/98.

In administrative courts, the dependence of the admissibility of the application for interim relief on that for annulment included standing. Thus, the conditions for standing laid down by the Council of State are pertinent here. The Suspensions Committee case law under law 2522/97 followed and built on the case law of the Council of State.

Standing in annulment proceedings is granted to natural or legal persons that have a legitimate interest in seeking judicial protection. Such a legitimate interest exists when an act or omission of a public body causes a material or moral prejudice to any legal or real situation protected by the law, from which a person draws a benefit[506].

The existence of legitimate interest depends therefore on a previous beneficial situation. The interest must be personal, direct and present. "Personal" means that the person must be harmed in the context of a special legal bond connecting him to the contested act. "Present" refers to the existence of the interest, first when the act is issued or omitted, secondly when proceedings are brought and thirdly when the case is heard. The interest must be present at all three points. "Direct" means that the applicant himself, and not any other person connected in any way to him, must be harmed by the act in question[507]. An indirect or conditional interest, which is to come or is hoped or passed, renders the application for annulment inadmissible[508].

The Council of State and the Suspensions Committee accept that all participants in an award procedure have standing to challenge the acts taken in its course. Persons who can prove that they would have participated, had the authority acted in a lawful way, have also standing[509]. When the bidder is a consortium, if one of its members applies for interim relief, the other members cannot lodge a second application against the same act[510].

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[506] Article 47 of Presidential Decree 18/89.
[507] Spiliotopoulos, *Egheiridio.., op. cit.* footnote 6, p.440 *seq.*
[508] Council of State 3564/77, 2398/80, 2973/89.
[509] Suspensions Committee, decisions 493-495/98.
[510] Suspensions Committee, decision 436/98.

Persons who might fulfil the requirements to participate but have not indicated that they were interested in the procedure are considered to lack sufficient interest[511]. This is compatible with article 2(1) of the law and the relevant article 1(3) of the Directive, where interest is a requirement for standing to be granted.

According to the case law of the Suspensions Committee under law 2522/97, the requirement of present interest is fulfilled, even when there is only a risk of harm[512]. This is a much less strict approach than the one under the old regime, where the Suspensions Committee required the existence of actual and not eventual prejudice[513].

Besides the existence of personal, present and direct interest, the application must prove that there is a link between his prejudice and the act and that no posterior events have severed that link, which is, for example, the case when the person accepts tacitly or expressly the act[514]. The notion of tacit acceptance and its implications are very important here, in view of the particular characteristics of award procedures.

The award procedure constitutes what is called a complex administrative action, comprised by several stages (for example, the publication of the notice, the pre-selection) at the end of each of which a separate act is issued[515]. Each successive separate act depends for its legality on the prior acts and the final act (in procurement, the award decision) incorporates all of them. Each act can be challenged on its own. After the final act is adopted, the previous ones lose their independence and only the last one can be challenged.

Generally, when the validity of the final act is contested, the defects of all prior acts can be reviewed by the judge. However, in procurement, according to a long case law of the Council of State, anyone who has participated in the procedure without

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[511] Council of State 1872/47, Suspensions Committee, decision 762/99.
[512] For example, in decision 247/98, the Suspensions Committee stated that a bidder had standing to apply for the suspension of the act allowing the participation of other companies in the procedure, as there is the risk that these companies may win the contract instead.
[513] Suspensions Committee, decision 247/98.
[514] Pavlopoulos, *I symvasi..., op. cit.* footnote 11, p.91. Tacit acceptance must be deduced from conclusive facts and must be certain, precise, without conditions or time limits, and the result of free will.
[515] This separate act is defined in literature and by the Council of State as a "detachable administrative act", translating the term "*actes détachables"* used by the French *Conseil d'Etat,* which first developed the theory.

objecting to the terms of the notice is considered to tacitly accept it and is foreclosed from invoking grounds concerning its legality when applying for the annulment of any subsequent act, including that of the final act, the award decision. Thus, "....even though the right of every participant to the award procedure to apply for the annulment of the notice is preserved, grounds for annulment concerning the notice and its conditions are not admissible in an application concerning other acts of the procedure…"[516].

This is a result of the principle *non venire contra factum proprium,* an aspect of the general interdiction of abuse of rights transcending administrative procedural law, shaped here to satisfy the need to speed up award procedures and avoid dilatory actions. It is sufficient however, in order to avoid the foreclosure, for the participant to declare in any way its objection to the notice[517].

The Suspensions Committee has applied and developed this case law in the context of applications for interim relief under law 2522/97 and rejects as inadmissible applications based on allegations of irregularities of any act (and not just the notice) previous to the act against which interim relief is sought. The case law does not apply to annulment, where it is still possible to challenge the award decision for irregularities occurred in earlier decisions other than the notice[518].

The reasoning given by the Committee in the first case where this approach was followed (where it was ruled that an excluded firm could challenge the award decision only if it had already challenged the exclusion act) was the following:

"Because both directive 89/665 and law 2522/97.... aim at providing interlocutory relief at the appropriate in every case moment, so that, on the one hand, the appropriate interim measures are ordered in time to prevent situations capable of

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[516] Council of State, decision 1754/96; followed in decisions 432/83, 4607/86, 3547/87, 2836/87, 3306/91, 204/96, 964-5/98.
[517] Vlachopoulos *Opseis..., op. cit.* footnote 18, p.87.
[518] *Ibid*., p.76, footnote 99.

harming the legitimate interests of the bidders and that, on the other, the progress and completion of the procedure is not impeded in a way exceeding what is necessary....This is the reason why, in the context of the system of interlocutory judicial protection introduced by law 2522/97, the deadlines are extremely short for every stage (administrative and judicial) of the procedure. In view of the above, a bidder who, in spite of the fact that he was excluded from further participating in the procedure, did not apply, at the appropriate moment, for interim relief, is deprived of his right to ask for interim measures against the act completing the procedure....."[519]

This approach was applied in other cases and is now an established case law[520].

It is submitted that the approach of the Suspensions Committee is reasonable and that its particular application and modification of the case law on annulment to suit interim relief is justified and coherent. Standing can be more restricted in the case of interim relief than in the case of annulment, because of the different nature of these two remedies. Interim relief is a provisional type of protection destined to intervene quickly to prevent that serious damage occurs before the decision at trial. As such, it should be sought at the earliest possible moment, to maximise its preventive power and avoid it being used in a dilatory way to obstruct the progress of the procedure. Furthermore, interim relief is granted on the basis of an alleged and not a proven irregularity and should not, as such, hinder the procedure unduly, in an unnecessarily belated way.

Standing before the civil courts is granted to everyone with an interest in seeking judicial protection[521]. However, for a long time, civil courts refused to accept the interest of bidders in asking for interim measures in procurement, on the ground that the awarding authority was free to conclude the contract with the bidder of its choice and a bidder could not coerce it to award the contract to them. Under this view,

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[519] Suspensions Committee, decision 161/98.
[520] For example, Suspensions Committee, decisions 197/98, 493-5/98.
[521] According to articles 68 and 682 *seq.* of the Code of Civil Procedure.

bidders did not have a right worthy of protection, other than a right in damages for harm suffered[522]. This case law is due to confusion between the type of interim measures that may be granted and the bidders' interest to make sure that the award procedure is run according the applicable rules. There are some cases acknowledging the possibility of granting interim relief[523], some of which mention the Directive. However, this case law is sporadic, unclear and undecided.

2.6.1.3 The time-limit

The deadline for the application for interim relief is ten days after the express or tacit rejection of the administrative recourse (article 3(3)(α)).

The case must be heard within fifteen days from its lodging (article 3(3)(δ)) and the decision must be issued within fifteen days from the hearing (article 3(6)(δ)).

These deadlines are indicative and not mandatory for the judges, who should however endeavour to meet them.

This means that the whole procedure should take less than two months to be completed -starting from the moment where the contested act is brought to the knowledge of the applicant. This is indeed adhered to on average by the Suspensions Committee. The civil courts usually take slightly longer to issue a decision, approximately two months from the day the application for interim relief is lodged[524].

2.6.1.4 Concluded contracts

Article 4(2) of law 2522/97 provides that

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[522] For example, Single Member Court of First Instance of Athens, decisions 12778/98, 21411/98, 22962/98, 23393/98, 5217/99, 6674/2000.

[523] For example, Single Member Court of First Instance of Athens, decisions 10986/90, 13924/93, 23/95, 17239/98; Single Member Court of First Instance of Patra, decisions 1534/95.

"if the court annuls or declares the nullity of the act or omission of the awarding authority after the conclusion of the contract, this is not affected, unless, before the conclusion, the award procedure was suspended by interim measures or a provisional order".

Thus, law 2522/97 makes use of the option provided in article 2(6) of the Directive to let concluded contracts stand. Because of that, authorities often hasten to conclude the contract to render their procedures immune to challenge[525].

Before law 2522/97, suspension (though not, as we will see, annulment) was refused after the contract was concluded, on the ground that suspension of the act would in this case be equivalent to suspension of the contract and the Suspensions Committee does not have jurisdiction to do that[526]. Suspension was also refused, if the contract was concluded after the application was lodged but before it was heard[527].

It is thus important to know when the contract is deemed to be concluded to know the point after which the choice of remedies is limited.

Greek theory and case law on conclusion of procurement contracts are based on article 199 of the Civil Code on conclusion of contracts resulting from bid procedures[528]. The Civil Code is in principle applicable to private contracts but, in this case, it is deemed to also apply to administrative ones[529]. Under article 199, contracts resulting from bid procedures are concluded when the award decision is taken, unless otherwise provided -for example, in the contract notice. The rules on conclusion in the public works[530] and public supplies[531] legislation follow in essence this approach and provide that the contract is concluded when the award decision is notified to the contractor -no such specific rule is found in the public services legislation. Based on

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[524] Synodinos, *Apotelesmatiki …,op. cit.* footnote 44, p.234.
[525] Kanava, "Prosorini Dikastiki…", *op. cit.* footnote 98, p.1404.
[526] For example, Suspensions Committee, decisions 471/95, 586/95, 525/97, 630/97, 756/97.
[527] For example, Suspensions Committee, decisions 166/94, 74/95, 157/95.
[528] Synodinos, *Apotelesmatiki …, op. cit.* footnote 44, p.223.
[529] Papaioannou, "Remedies in Greece", in *Public procurement in Europe: Enforcement and Remedies,* Alan Tyrell and Becket Bedford (eds.), 1997, p.167.
[530] Article 26(1) of Presidential Decree 609/85.
[531] Article 23(2) of presidential Decree 394/96.

these rules, the Council of State accepts that signature of the contract follows and does not equal conclusion, i.e. it is not the act by which the contract comes into being (*ad substantiam*) but only a proof of its conclusion (*ad probationem*)[532]. As we have seen when discussing *Alcatel*, in such situations, bidders have no means of learning of the award decision before the contract is concluded.

It has been argued that, since national legislation should be interpreted in the light of the Directive, the rules on conclusion should now be interpreted to mean that the award decision concludes the contract on condition that interim relief will not be applied for or awarded[533]. Thus, if interim relief is sought or granted, the condition is not fulfilled and the contract is deemed not to be concluded. This approach, though tenuous, could guarantee that interim relief is always possible, subject naturally to the other conditions, such as time limits. However, considering that the aim of the rules on conclusion is to mark the exact point after which the validity of the contract cannot be challenged, thus ensuring legal certainty and allowing performance to start[534], independently of any claims in damages that bidders might have, the interpretation put forward above would defeat this purpose, in the sense that there would be no precise moment of conclusion, as this would be conditional. In any event, this approach has not, until now, been followed in case law.

It has also been argued that, to comply with the Directive and the principle of effectiveness, authorities should leave a reasonable delay between the award and its notification to the successful bidder[535]. As we have argued when discussing the implications of *Alcatel*, however, in order for the challenge of the award decision to be realistically possible, all bidders should be notified of it and there is no provision for that in Greek law.

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[532] Council of State, decision 4467/95.
[533] Nikos Antoniou, legal adviser of the State in the Ministry of Public Works and one of the draftsmen of law 2522/97, in a discussion with the author on April 12,1999. Also, Geraris, *I Aitisi.., op. cit.* footnote 86, p.38.
[534] Kanava, "Prosorini…", *op. cit.* footnote 98, p.1406.

Article 4(2) provides that the validity of the contract is affected, if interim relief or a provisional order were granted before the conclusion. This is not very clear. If the procedure was suspended, then the contract would not be concluded. Therefore, this provision is superfluous, unless it refers to the eventuality that the contracting authority ignores the suspension and proceeds to conclude the contract. In these cases, then, the contract could, arguably, be set aside. In order for this to be possible, the bidder would have to ask, first, for the annulment of the contested act (since, as we will see, this is compulsory after interim measures are awarded) and then bring an action for the contract to be declared null before the competent Administrative[536] or Civil[537] Court of First Instance. Which branch of courts has jurisdiction to hear the action to declare the contract null depends on the nature of the contract; which court within each branch is competent will be decided in the same way as for the action in damages, as explained above. By the time a decision on the nullity of the contract is taken, however, performance will have been largely or entirely completed[538]. There are no judgments to clarify the possible application of article 4(2).

Article 3(3)(β) provides that the time limit for the application for interim relief prevents the conclusion of the contract. The same effect is provided for the administrative recourse, as we have seen. However, while for the recourse the suspensive effect is maintained after it is lodged and until a decision is reached or the recourse is tacitly rejected, this is not the case for the application for interim relief, where the suspensive effect ceases after it has been lodged. This gap was remarked upon when the Parliament discussed the project of the law but was not dealt with[539].

According to the case law of the Suspensions Committee, the principle of fair administration requires that authorities refrain from taking any action endangering the

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[535] Synodinos, *Apotelesmatiki…, op. cit.* footnote 44, p.219. It has been also suggested that, unless there is a reasonable delay between the award and the signature of the contract, then the conclusion should not prevent the grant of interim relief, Vlachopoulos, *Opseis..., op. cit.* footnote 18, p.26.
[536] According to article 73(2)(β) of law 2717/99.
[537] According to article 70 of the Code of Civil Procedure.
[538] Synodinos, *Apotelesmatiki…, op. cit.* footnote 44, p.237.
[539] Minutes of Parliament, Session ΚΖ′ of August 26, 1997, pp.844 and 852.

outcome of a judicial procedure, from the moment that they are notified that there is a procedure pending[540]. This implies that authorities may not conclude the contract before the court decides, as this would deprive the trial of its object. This case law would fill the gap in the law, if complied with, but authorities often disregard it[541], while civil courts do not follow it[542]. The Suspensions Committee mentions that interim relief may still be granted if a contract is concluded under such circumstances, however, it is not clear what that implies, for example, if it means that the contract may be set aside. Law 2522/97 provides for a provisional order until the decision on interim relief is reached, which, as we will see, does not entirely solve the problem.

2.6.1.5 Notification of others and addition of parties to the proceedings

According to article 3(3)(ε), the applicant must notify the awarding authority and other affected parties of the application for interim relief. The judge decides who the affected parties are. If notification does not take place, the application will be dismissed as inadmissible[543].

Any third bidder, either after being notified or not, may ask, under article 3(3)(στ), to be added as a party to the proceedings, if his interests are affected by the application[544].

2.6.2 Substantive conditions for interim relief; the merits

The application for interim relief must contain specific allegations and expose clearly the facts, to enable the judge to assess the arguments and take a decision[545].

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[540] Suspensions Committee, decisions 473/95, 474/95, 557/95, 558/95, 405/96.
[541] Vlachopoulos, *Opseis..., op. cit.* footnote 18, pp.25-6.
[542] Single Member Court of First Instance of Athens, decisions 14579/95, 22169/95; Single Member Court of First Instance of Patra, decisions 2136/95.
[543] Suspensions Committee, decision 260/98.
[544] Suspensions Committee, decisions 267/98, 493-5/98. Single Member Court of First Instance of Athens, decision 21411/98.

The Suspensions Committee has ruled that it can also consider arguments *ex officio,* independently of the applicant's allegations[546].

Before the Council of State, the grounds on which the act is challenged in an application for interim relief are essentially the same as in the application for annulment[547] and are discussed below, in the part on annulment. It is the criteria that the judge applies that are not the same. In civil courts, the grounds are not limited by law.

Article 3(2)(α) provides that

"the affected party can ask for interlocutory judicial protection in order to correct the alleged infringement or to prevent further damage to his interests".

This is similar to article 2(1)(a) of the Directive.

Article 3(5)(α,β) provide that

> **"[t]he application for interim relief is accepted, if there is a serious probability of infringement of a Community or national rule and the measure is necessary to eliminate the harmful results of the infringement or to prevent harm to the interests of the applicant. The application can nevertheless be rejected if, after balancing the harm of the applicant, the interests of third parties and the public interest, it is decided that the negative consequences of the award [of relief] are more serious than the benefit to the applicant".**

There appear to be three conditions for the grant of interim measures: the existence of serious probability of infringement, the necessity of the measure and a balance of interests test in favour of the applicant.

2.6.2.1 Serious probability of infringement

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[545] Suspensions Committee, decisions 79/98, 114/98, 486/98, 656/98, 50/99. Single Member Court of First Instance of Athens, decisions 29396/95, 5217/99.
[546] Suspensions Committee, decision 226/98.
[547] Vlachopoulos, *Opseis tis dikastikis..., op. cit.* footnote 18, p.144 at footnote 240.

The infringement of any rules connected with the award procedure may be alleged.

In the case law of the Suspensions Committee before 2522/97, the unlawfulness of the act was almost never considered, unless in very extreme cases[548]. Only the seriousness of the applicant's harm and the balance of interests were examined. Under law 2522/97, the harm of the applicant is examined to decide whether he has a legitimate interest to bring proceedings and is, thus, a condition for standing and not for the grant of interim relief, though it continues to play a role in the balance of interests, as we will see below.

The Suspensions Committee started examining whether there is a *prima facie* evidence of infringement first in *Intrasoft*[549] and in later cases[550]. This was construed to be a test of obvious unlawfulness; the Committee did not examine the contested act in depth[551].

This continues to be the approach of the Suspensions Committee under law 2522/97. It requires a "flagrant" infringement, a "very strong, certain" probability of breach, i.e. almost a certainty. If the act appears no more illegal than legal, interim relief will not be granted[552]. The requirement of a very strong probability of breach is very restrictive, in view of the limited time that the Suspensions Committee has to decide and of the fact that there may not be enough time for parties to collect and submit all the necessary evidence, and has lead to the rejection of many applications for interim relief[553]. Even when the solution does not depend on deciding on complex legal

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[548] Mouzourakis, "Prosorini dikastiki.." *op. cit*. footnote 61, p.1112.

[549] *Intrasoft* was also the first case that accepted that the harm caused to the applicant, if he lost the contract, was not only financial and could not be adequately repaired by the award of damages and that interim relief should be available. Before that, the Suspensions Committee had systematically refused interim relief on this ground. Suspension was granted in exceptional circumstances, where the professional survival of the firm was at risk, for example Suspensions Committee, decisions 325/91 and 300/94.

[550] Suspensions Committee, decisions 557/95,405/96, 53/97.

[551] The first suspension under the new approach was granted after *Intrasoft,* by decision 557/95.

[552] Suspensions Committee, decisions 1/97, 306/97, 457/97 and under the new law, for example, 6/98, 16/98, 114/98, 223/98, 224/98, 50/99.

[553] Vlachopoulos, *Opseis..., op. cit.* footnote 18, p.159 at footnote 268. Decisions of the Suspensions Committee refusing interim relief because the illegality was not obvious are, for example, 6/98, 16/98, 54/98, 180/98, 182/98, 204/98, 223/98, 224/98, 226/98, 247/98, 248/98, 528/98, 649/98, 34/99, 35/99.

notions but clear facts pointing to a breach, the Suspensions Committee seems reluctant to admit that there is sufficient evidence[554]. In some cases, the Suspensions Committee is stricter than the Council of State that has annuled acts in relation to which interim measures have been refused[555]. If interim relief is not granted in the first place, by the time the act is annulled, the contract will often have been awarded and performance under it begun, thus limiting *de facto* the applicant to a claim in damages.

It has been argued that the virtual certainty test is justified by the need not to obstruct excessively the award procedures for mere allegations[556]. However, this does not seem to be compatible with either law 2522/97, which requires a serious probability but not a virtual certainty, or EC law requirements. The Directive refers to "alleged infringement". The higher degree of probability the judge asks for, the further away will the jurisprudence be from the spirit of the Directive[557] and from ensuring the full effect of interim relief. The remedy should not only be available in extreme cases of infringement obvious beyond any doubt but also when there appears to be serious (but not certain) evidence of it. Lack of certainty is a natural characteristic of provisional judicial protection, which must prevent the creation of irreversible situations, even when there is no conclusive evidence; such evidence will be added to and then thoroughly examined at the main proceedings.

Civil courts require only a simple probability of breach[558] and thus are more lenient than law 2522/97.

2.6.2.2 The necessity of interim measures

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[554] Suspensions Committee, decision 1/97, where, though the breach seemed clear, the application was rejected, as there were "interpretative difficulties" and the solution was not deemed to be "manifestly obvious".

[555] Vlachopoulos, *Opseis...*, *op. cit.* footnote 18, p.154. For example, in decisions 2854/97 and 964-5/98 the Council of State annulled acts for which suspension was refused in decisions 1/97and 405/96, accordingly, of the Suspensions Committee.

[556] Geraris, *I Prosorini…, op. cit.* footnote 86*,* p.41.

[557] Lazaratos, "Anastoli Ekteleseos Dioikitikon Praxeon sto Dikaio ton Dimosion Ergon kai Promitheion", (1996) Diki, p.687.

[558] According to articles 347 and 690(1) of the Code of Civil Procedure.

The Suspensions Committee almost never examines this condition[559], which arguably requires that interim measures be granted, only if they are urgent[560].

2.6.2.3 The balance of interests

The Suspensions Committee usually decides first if there is a flagrant infringement and then examines the balance of interests[561], though this is not always the order it follows[562]. As most of the applications are rejected on procedural grounds or for lack of serious probability of infringement, the Committee often does not reach the stage of the balance of interests[563].

The balance of interests requires an assessment of the effects of the act on all concerned (applicant, other bidders and the contracting authority) in a cost-benefit analysis[564]. The assessment is based on facts and does not involve a legal appreciation of the act –this is examined under the condition of serious probability of breach.

Usually, the Suspensions Committee fails to give details on what determines its decisions on the balance of interests. However, judgments seem to revolve around the concept of an overriding public interest, which is usually (though not in the case of suspension of exclusion, as we will see) interpreted to require interim relief to be refused and the award to go ahead without delays. Here it is relevant to consider what is primarily meant by or protected under public interest: speed, efficiency, legality?

If public interest is considered to focus on the quickest possible completion of the procedure, then most applications for interim relief would be refused. If it is

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[559] Suspensions Committee has referred to the necessity of the measure in decision 496/98.
[560] Synodinos, *Apotelesmatiki…, op. cit.* footnote 44, p.197.
[561] For example, Suspensions Committee, decision 470/95.
[562] Suspensions Committee, decisions 478/98, 702/98, 32/99.
[563] Vlachopoulos, *Opseis...*, *op. cit.* footnote 18, p.159 at footnote 268.
[564] Koutoupa-Rengakos, "I Prosorini…", *op. cit.* footnote 111, p.545.

considered to aim at choosing the best candidate, then the more competition the better and thus the public interest cannot be harmed, if, for example, an exclusion act is suspended and the procedure goes on with more participants, though the opposite would be true if the award decision, containing the authority's bid of choice, is suspended. If, in the interest of legality, public interest is interpreted to require that infringements be corrected promptly and individuals protected adequately, then a generous approach to the grant of interim relief would be followed.

In practice, there is no standard definition of public interest. The courts decide on its meaning and application and define it according to the particularities of each case, not following any predetermined specific method or criteria. This approach is flexible but lacks certainty and clarity and may lead to unequal treatment of the applicants.

Generally, the public interest is considered to override other interests, when the contract is destined to cover basic needs of the public, for example, when the procedure concerns the construction of a hospital or irrigation works or biological cleansing or the prevention of accidents[565]. Also pertinent are the stage of the procedure (the closer to the award, the less probable the grant of relief) and the emergency of the contract[566]. However, the case law is not stable or clear.

The Suspension Committee requires that the alleged public interest be specific and concrete. A vague allegation that any delay in the procedure is detrimental to the public interest and has severe economic and social repercussions does not suffice[567].

Often, authorities argue that interim relief would lead to the cancellation of the procedure, due to the long delay involved for the annulment decision. This argument

[565] Suspensions Committee, decisions 803/96, 671/97, 115/98, 702/98, 758/98, 32/99.
[566] Synodinos, *Apotelesmatiki…, op. cit.* footnote 44, p.200.
[567] Suspensions Committee, decision 354/98.

is not accepted by the Committee, on the ground that the authority has the option to correct the irregularity and proceed[568].

The Committee may examine the public interest *ex officio,* though this is unusual[569].

The interests of other bidders are assessed sometimes separately[570] and sometimes in conjunction with the public interest[571], as they often aim at the same result, i.e. refusal of relief. However, the interests of other bidders sometimes coincide with those of the applicant, as, for example, when the applicant contests a specification that is detrimental to them as well.

It is interesting to consider the case of harm to the applicant. This consists, in every case, at least in the risk of losing the contract[572]. Precisely because this risk is invoked in all applications for interim relief, it is not, from a practical point of view, a good criterion on which to decide which application should be accepted and which should be refused, since it would not differentiate between cases. Also, from a legal point of view, granting relief on that ground would ignore the fact that the risk is inherent by definition to any award procedure, has been accepted and is faced by the bidders. For these reasons, risk of harm is not a criterion for granting interim relief, but, under law 2522/97, a condition for standing.

Sometimes, the extent of risked damage is alleged to be unusually great, for example, when applicants contend that their business survival depends on the contract. The Suspensions Committee, however, does not consider that the eventuality of financial destruction of a firm is sufficient to justify relief, as firms run the risk of losing the contract in all procedures[573].

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[568] Suspensions Committee, decision 496/98. The authority also argued that the delay would result in an impossibility to use Community funds put at the authority's disposal for the contract, increasing the costs and, thus, harming the public interest. This argument was not accepted either.
[569] Suspensions Committee, decisions 226/98 and 506/98.
[570] Suspensions Committee, decision 478/98.
[571] Suspensions Committee, decision 589/96.
[572] Vlachopoulos, *Opseis...*, *op. cit.* footnote 18, p.160.
[573] "[I]n view of the fact that the firms that participate in public works awards are subject, by the very nature of this activity, to the risk of their exclusion and the choice of another candidate, the risk of the eventual financial destruction of the applicant firm cannot be linked to its unsuccessful participation to the award procedure at issue", Suspensions Committee, decision 558/95, followed in 777/97 and 97/98.

The case law on exclusion is particular. Applications to reinstate the applicant in the procedure are not considered to clash with public interest. This is because suspension of the exclusion would mean that the procedure would go ahead without delay but only with increased competition[574]. This is beneficial to the public interest, as it improves the conditions and range of choice of the best candidate; thus, in this case, public interest is not opposed to interim relief. The interests of other bidders, on the other hand, are not considered to be sufficiently harmed by the reinstatement of the applicant to justify the refusal of interim relief[575]. This case law, though particular in the sense the interests of the applicant and the public coincide, is a reaffirmation that it is the content given to the public interest that will determine the outcome of the balance of interests –under the aforementioned condition of specific and concrete public interest.

It has been argued that if the breach seems clear, the public interest should never justify the rejection of interim relief, since the act will certainly be annulled[576]. The contrary has also been argued, that is, that if there is an overriding public interest, then the interim relief should not be granted, even though the breach appears very likely[577].

It is submitted that the likelihood of the breach and the interests involved should be considered together[578]. Thus, the greater the likelihood of breach, the more serious the interests against the grant of relief should be, while the absence of overriding interests against relief should result in the grant of relief, even if the breach is not manifest but probable. In the case that the breach appears to be certain, then relief should always be granted, since the subsequent annulment, which should follow, will be without an object, if the procedure has not been suspended in the meantime[579]. The Suspensions Committee, however, examines the two factors (breach and interests) separately.

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[574] See below on the award of the contract, if the exclusion is suspended.
[575] Suspensions Committee, decisions 54/98, 478/98. The Suspensions Committee had also ruled in *Intrasoft* that an increase in competition would ultimately serve the public interest.
[576] Vlachopoulos, *Opseis…, op. cit.* footnote 18, p.170.
[577] Geraris, *I Prosorini…, op. cit.* footnote 86, p.42.
[578] *Inter ales,* Synodinos, *Apotelesmatiki…, op. cit.* footnote 44, p.204.
[579] Vlachopoulos, *Opseis…, op. cit.* footnote 18, p.171.

Civil courts do not decide on one factor only[580] but assess them together.

2.6.3 The measures that can be taken

According to article 3(6)(α, β)), the court orders any measure deemed appropriate, without being limited by the measures proposed by the applicant. It may, in particular, suspend acts, documents or the conclusion of the contract, prohibit the authority from taking legal or material acts and order the authority to take positive action, such as keeping documents related to the award procedure. This list is not exhaustive.

The court may also order the suspension of the procedure as a whole, if the court finds that there are several serious breaches, which cannot be corrected by less restrictive measures (like the suspension of a specific act or the change of the terms of the notice) and which render the continuation of the award inadmissible[581].

Any measure can be granted, as long as it does not create a situation that could not be reversed, in the event that the application for annulment is rejected. Interim relief is by definition provisional and cannot be a vehicle for final relief.

This is particularly relevant to the suspension of the act excluding a bidder, who is thus allowed to continue in the procedure. The Suspensions Committee has ruled that the authority cannot award the contract before the decision on annulment is taken[582]. This condition serves to avoid situations where the contract is awarded to the excluded but provisionally reinstated bidder and performance under it starts and then annulment is refused, thereby confirming the initial exclusion decision.

According to article 3(6)(γ) of law 2522/97, the application of article 692(4) of the Code of Civil Procedure (which provides that interim measures cannot

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[580] Single Member Court of First Instance of Thessaloniki, decision 32150/97.
[581] Vlachopoulos, *Opseis..., op. cit.* footnote 18, p.180 at footnote 313.
[582] Suspensions Committee, decision 54/98.

consist in full protection of the right) should not prevent the court from ordering any interim measure deemed appropriate. It is submitted that, in view of what has been said above, article 3(6)(γ) cannot be interpreted to mean that full protection is in order, as this would mean that interlocutory relief would equal final relief. Rather, the article attempts to stress that all appropriate (but provisional) measures should be ordered and article 692(4) of the Code of Civil Procedure should not be used to refuse interim relief[583].

Law 2522/97 is the first instance in Greek administrative procedural legislation providing that the applicant can ask for and the judge has the power to order interim measures other than the suspension of the act. However, even before the adoption of the law, the Suspensions Committee had shaped suspension to make it more flexible and adaptable to the particularities of each case, by ordering, for example, partial or conditional suspension of an act. Notwithstanding, this formal extension of the concept of interim relief is welcome, since the courts do not have to rely on tenuous interpretations of the meaning of suspension to order different measures and may take more adequate measures with greater ease. Suspension would still normally be the measure most commonly used[584].

In civil procedural law, as we have mentioned, any interim measure could be sought and ordered. In fact, the measures listed in article 3(6)(β) of law 2522/97 resemble the measures provided for in the Code of Civil Procedure[585].

However, the provision that the choice of measures belongs to the judge, who is not limited by the application, is a novel concept in civil proceedings, where judicial protection depended traditionally solely on the petitions of the plaintiffs.

Interim measures have effect until the decision on annulment is reached or until a point specified in the decision; for example, the decision can set a deadline within

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[583] This had happened, for example, in decision 10986/90 of the Single Member Court of First Instance of Athens.
[584] Vlachopoulos, *Opseis...*, *op. cit.* footnote 18, p.181.
[585] Articles 682 *seq.* of the Code of Civil Procedure.

which the applicant must produce or amend documents, otherwise the measures are revoked[586]. The authority must comply with the decision ordering interim measures and must not issue new acts aiming to counteract their effect[587].

The measures are revoked, if the application for annulment or action for declaration of nullity is not lodged within thirty days following the award of interim measures, according to article 3(7)(γ).

2.6.4 Provisional order

Article 3(4) provides that the judge can provisionally order any measures he deems necessary, until the decision on interim relief is taken. The judge may decide to grant an order either of his own accord or after being asked by the applicant.

Administrative courts had ordered provisional measures before law 2522/97, in cases of emergency or when the authority delayed to transmit the relevant documents to the judge, thus delaying the decision on interim relief[588]. However, this is the first time that it is provided for in legislation with clear conditions.

The authority has to be notified that there will be a hearing for a provisional order, which takes place 24 hours after the notification. The decision is taken immediately and specifies the measures to be taken until the decision on interim relief is reached.

Provisional orders are easily granted, unless the application for interim relief is manifestly inadmissible or without merit. The measure usually ordered is the suspension of the conclusion of the contract (though not of the award procedure) until the decision on interim relief is issued[589].

We have seen that, after interim relief is sought, the award procedure is no longer automatically suspended. There is a period of at least 24 hours between

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[586] Suspensions Committee, decision 53/97.
[587] Council of State, decision 2044/88.
[588] Spiliotopoulos, *Egheiridio…, op. cit.* footnote 6, p.529, footnote 25.

lodging the application for interim relief and deciding on a provisional order, in which, the authority, when in bad faith, may conclude the contract, if it can. It would have been better if, to prevent irregular awards, the law provided that the contract cannot be concluded, until the decision on the provisional order is reached. The delay would be minimal, often only 24 hours, while the judge would have the opportunity to take measures safeguarding the legality of procedures.

According to article 3(4)(β), the authority can ask, at any time before the decision on interim measures, for the provisional order to be revoked. The bidder must be notified 24 hours before a hearing on the revocation takes place.

2.6.5 Revocation of interim measures and third parties

While the possibility to revoke the provisional order is provided for in the law, there is no such provision as regards interim measures. However, this does not seem to be prohibitive for the judge[590], first, because the law does not forbid it, secondly, because the law provides for it in the case of the provisional order and, thirdly, because such a possibility exists in general procedural law[591]. Both the civil courts and the Suspensions Committee accept applications to revoke interim measures.

If the person applying for the revocation was a party in the original proceedings (for example, the applicant, the defendant or any party added to the proceedings), then he must invoke events that either took place after the hearing on the application for interim relief or that were discovered afterwards (*nova producta* or *reperta*). The party may not ask for the same facts or evidence to be reassessed or allege faults of the challenged decision which he had forgotten to invoke[592] or, *a fortiori,* re-invoke

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[589] Geraris, *I Prosorini…, op. cit.* footnote 86*,* p.40.
[590] *Ibid.,* p.44; also, Synodinos, *Apotelesmatiki…, op. cit.* footnote 44*,* p.233.
[591] Article 696 of the Code of Civil Procedure for the civil courts and article 35 of law 2721/99 for the administrative courts.
[592] Suspensions Committee, decision 53/99.

arguments that have been rejected by the court[593], as it would constitute a second application for interim relief in relation to the same act and this is not allowed. When the party asking for the revocation is the original applicant for relief, the Suspensions Committee is likely to refuse to revoke the measures, if he alleges facts that are not posterior to the decision on interim relief but that were just not known to him when he started the procedure by lodging the pre-trial recourse, on the ground that he should have waited to be fully informed[594]. This condition is not imposed by the civil courts.

If the revocation is asked by someone who was not a party, the judge must examine whether that person was notified of the proceedings, according to article 3(3)(ε). If he was duly notified, he could have asked, under article 3(3)(στ), to be added as a party to the proceedings. If he did not do so, he is barred from asking for the revocation of the measures afterwards. If, however, he was not notified or if he was notified but was prevented from asking to be added as a party due to *force majeure*[595], then he may ask for the interim measures to be revoked, if he shows that the decision affects his interests[596]. Such applications for revocation can be based on facts either posterior or prior to the decision granting interim relief, i.e. there is no limitation regarding the invocable facts as for parties in the proceedings.

The court, upon receiving an application for revocation, re-examines the case and may repeal or amend its original decision.

The possibility of revocation is of limited use to the original applicant due to the strictness of the case law. However, this is a useful option for the authority or a third party to the proceedings, if new facts take place or become known, and especially for bidders that did not know of and were not parties in the original application for relief, who have thus an opportunity to protect their interests.

[593] Suspensions Committee, decision 73/99.
[594] Suspensions Committee, decision 53/99.
[595] Suspensions Committee, decision 717/98.
[596] Suspensions Committee, decision 13/99.

2.6.6 Conclusions on interim relief

An average of 12-15 applications for interim relief are lodged every month before the Council of State, which was the annual rate of applications before the adoption of law 2522/97[597]. On average, 15%-20% of applications are successful[598]. Even though most applications are rejected, the new regime is an improvement on the old one. Some suspensions were granted before law 2522/97, but only after 1995[599].

The new interim relief system as a whole, with its shorter deadlines for the court to decide, non-exhaustive range of interim measures, automatic suspensive effect before interim relief is sought and the possibility of a provisional order after the application is lodged is a positive and welcome development. It has however some shortcomings.

First of all, the independence of the application for interim relief from that for annulment, which was specifically requested by the Court of Justice, does not constitute in practice a significant change. The applicant is relieved from the obligation of a prior application for annulment, but this is lodged before the same court and contains essentially the same arguments as interim relief, since no new arguments may be added[600].

Secondly, the 5-day time limit for the recourse is too short, considering that the application for interim relief must contain the same legal and material arguments. It is not clear why, while there are only 5 days left for the recourse, 10 days after its tacit or express rejection are allowed to lodge the application for interim relief, in which the applicant cannot, in any event, raise new points. If the short deadlines are justified by a need for speedy proceedings, at least the deadlines should be reversed, leaving therefore 10 days for the recourse and 5 for the application for interim relief[601].

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[597] Geraris, *I Prosorini…, op. cit.* footnote 86, p.45. The data concern the period until April, 30, 1999.
[598] Synodinos, *Apotelesmatiki…, op. cit.* footnote 44, p.193.
[599] Suspensions Committee, decisions 557-9/95, 172/96, 405/96, 507/96, 803/96, 59/97.
[600] Vlachopoulos, *Opseis..., op. cit.* footnote 18, p.128.
[601] Remelis, *I Aitisi..., op. cit.* footnote 10, p.199.

2.7 The application for annulment and the action for declaration of nullity

Law 2522/97 is focused on interim measures. Nevertheless, it also introduces some changes to the application for annulment (the set aside remedy before the Council of State) and the action for declaration of nullity (its equivalent before the civil courts).

2.7.1 Time limits

Under the general administrative procedural rules, the time limit for the application for annulment is sixty days from the publication or notification of the contested act or, if there is no publication or notification, from the moment that the applicant has become acquainted with the act[602]. There is a thirty days extension of the time limit for applicants living or based abroad[603]. In cases where a compulsory pre-trial recourse is provided for, the application for annulment is introduced against its express or tacit rejection. The sixty or ninety days time limit starts to run after the rejection. The application can be lodged before the time limit for the authority's response to the recourse has elapsed, provided that, by the time that the application is heard, the recourse has been tacitly[604] or expressly[605] rejected.

The time limit for the action for declaration of nullity is 20 years[606], starting from when it became possible to lodge the action[607]. The difference in the time limit between the two branches of courts is substantial but, in practice, bidders start proceedings as soon as possible, otherwise they run the risk of the contract being completed before the courts have a chance of ruling on the award procedure.

Law 2522/97 introduces some changes in time limits.

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[602] Article 46(1) of Presidential Decree 18/89.
[603] Article 41(3) and 46(3) of Presidential Decree 18/89.
[604] Council of State, decision 757/88.
[605] Council of State, decision 3742/88.
[606] According to article 249 of the Civil Code.
[607] According to article 251 of the Civil Code.

First of all, since now, in both branches of courts, interim relief is applied for before the main action, article 3(7)(β) provides that the time limit to seek annulment or nullity is suspended when interim relief is asked for and starts again on the day that the decision on interim relief is issued. The time limit for compulsory pre-action administrative recourses is also suspended.

Secondly, as we have seen, article 3(7)(γ) provides that, if interim relief is granted, annulment or nullity of the act should be sought within thirty days.

In the third place, article 3(7)(δ) provides that, if interim relief is granted, the application for annulment or the action for declaration of nullity should be heard within three months from the date that they were lodged. This is an indicative (non-compulsory) deadline[608].

The last two changes aim at the prompt final solution of disputes so that uncertainties are resolved and awards are not held up, which is particularly important after interim relief has been granted. The changes are also useful in partially unifying the very different provisions on time limits between the two branches of courts.

The Council of State does not issue annulment decisions quickly, due to its backlog of pending cases[609]. The average time for annulment decisions is two years and, although the Council tries to be quicker when interim measures have been ordered, the indicative deadline is not met by far.

2.7.2 Grounds for annulment and extent of review

The grounds on which an act may be annulled are limited and determined by law[610]. They are four: lack of competence of the authority that issued the contested act, infringement of a formal requirement, infringement of substantive law and misuse of power. The grounds usually invoked in the field of public contracts are infringement

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[608] Geraris, at the conference "Public Contracts…", *op. cit*. footnote 88.
[609] Synodinos, *Apotelesmatiki..., op. cit.* footnote 44, p.250.

of a formal requirement and infringement of substantive law[611]. Formal requirements are, first, the rules related to the procedure to be followed for an act to be issued, for example, the necessary notifications or deadlines, and, secondly, the rules related to the form the act must take, for example, if it needs to be signed[612]. Infringement of substantive law would be the breach of any applicable national or EC rule or principle or the breach of the terms of the contract notice, which are binding for both the contractors and the contracting authority[613]. The annulment may concern action or failure to act, when the authority is under an obligation to do so.

As we have seen, in the application for annulment, only matters of law and not of fact may be raised and reviewed. The Council of State examines whether the act or omission complies with the applicable rules but not the soundness of the authorities' decisions. It reviews the facts that lead to the decision only when misuse of power is alleged, to check whether the authority has overstepped the limits of its discretion.

Civil courts can examine both matters of law and fact and are not restricted as regards the grounds for nullity. The declaration of nullity for failure to act is not provided for in civil procedural law. Arguably, this should be possible for actions under 2522/97, in order to unify the judicial protection offered by the two branches of courts[614].

2.7.3 The measures taken and the case law of the courts

The Council of State may annul the act or omission but has no power to take positive corrective measures, such as order the authority to keep or amend documents. This is not changed by law 2522/97, though arguably the Council of State should be

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[610] Article 48 of Presidential Decree 18/89.
[611] Vlachopoulos, *Opseis tis dikastikis...*, *op. cit.* footnote 18, p.205.
[612] Spiliotopoulos, *Egheiridio..., op. cit.* footnote 6, pp. 476-9.
[613] Council of State, decision 3760/92.
[614] Synodinos, *Apotelesmatiki..., op. cit.* footnote 44, p.252.

able to take positive measures in cases under it, to match its power to do so as regards interim relief.

If an act or omission is annulled, it is considered to never have existed and decisions subsequent to it are deemed to be tainted and invalid. The administration must, according to article 95(5) of the Constitution, not only refrain from implementing the annulled act but also take measures to correct its effects, in order to restore things to how they would be, had the annulled act not been issued[615]. In procurement, the annulment of an act or omission means that either the award procedure must restart from the point where the breach occurred or, if possible, the result of the procedure must be adapted to comply with the annulment decision.

According to the case law of the Council of State before law 2522/97, if the contract had been concluded, the annulment of an act leading to its conclusion rendered it legally non-existent. The authority should not proceed to execute it. The bidder could lodge an action for the contract to be declared null before the competent courts[616], though if the work was to a large extent completed, the bidder would *de facto* be limited to damages[617]. This was not unusual, due to the length of proceedings. In some cases, though, the procedure was repeated from the stage where the breach occurred, in spite of the fact that the contract had been concluded[618].

We have seen that, according to article 4(2) of law 2522/97, concluded contracts are not affected by the subsequent annulment or nullity of contracting decisions. This provision weakens the position of contractors. This is unfortunate, especially as the other remedies are not particularly effective: interim relief is not easily granted and, as we will see later, there are virtually no decisions on damages. Since in cases under the general provisions it is still possible to ask for

[615] Council of State, decision 2909/94.
[616] Synodinos, *Apotelesmatiki…, op. cit.* footnote 44, p.235.
[617] Council of State, 209/30.
[618] For example, Council of State, decision 2854/97.

the contract to be declared null, the limitation of article 4(2) may be incompatible with the principle of non-discrimination.

There is, in general, no extensive case law on annulment. Before law 2522/97, applications for annulment were usually only lodged because they constituted a prerequisite for the application for suspension. If the suspension, which was the real aim, was not granted, most applications for annulment were abandoned[619], as they would be decided too late to be of any use. After law 2522/97, this continues to be the case: the applications for annulment are 20% of those for interim relief[620], which more or less corresponds to the percentage of cases where interim relief is granted.

If the application for annulment goes ahead and is heard, the Council of State usually follows the decision of the Suspensions Committee, especially when the Committee has found a breach. This is because, first of all, the Committee requires "a very strong probability" of breach, which means that, if it finds a breach, this will, in all probability, be flagrant enough for the Council of State to confirm it. Also, it is difficult for the Council to depart from the Committee's decision, because sometimes the same judges sit in both formations of the court and because the Council often forms a presumption on the case, based on the outcome of the interim relief application[621]. We have seen, however, that sometimes the Council is less strict than the Committee, annulling acts in cases where the Committee refused relief on the ground that the breach was not sufficiently flagrant.

It seems inappropriate that the decision in the main and the protection bidders will ultimately receive is determined in a quasi definite way by the decision on interim relief, which should by definition be a temporary settlement of the situation. This puts the Suspensions Committee under a lot of pressure to decide correctly in a very short

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[619] Geraris, at the conference "Public Contracts…", *op. cit*. footnote 88.
[620] Geraris, *I Prosorini…, op. cit.* footnote 86*,* p.45. The data concern the period until April, 30, 1999.
[621] Vlachopoulos, *Opseis...*, *op. cit.* footnote 18, pp.236-7.

time, without always having all necessary evidence[622]. Moreover, if the outcome of one remedy determines that of the other, the remedies are not separately effective and of separate assistance to the bidder. However, to the extent that such disproportionate reliance on the outcome of interim relief is the result of the Committee's case law, it can be remedied if the Committee adopts a more lenient approach regarding the level of probability of breach it requires.

According to the case law of the civil courts before 2522/97, the nullity of a contracting decision (even of the award decision) did not affect the validity of the contract[623]; thus, law 2522/97 did not introduce any change in this respect. In general, the remedy was rarely used, since, if interim relief was refused (which was usually the case, since, as we have seen, it was considered that bidders did not have a right worthy of protection), bidders were not interested to seek the nullity of the act.

2.7.4 Conclusions on annulment/nullity

Annulment and nullity are not interesting for bidders as such. They are usually applied for either to allow applying for interim relief (as with annulment before law 2522/97) or after interim relief is granted. This is because proceedings are too slow to be able to offer protection to bidders on their own.

2.8 Damages

The compensation of persons who suffered loss as a result of an unlawful action or omission by a public body was always possible in Greek law[624]. Law 2522/97 introduces few changes.

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[622] *Ibid.*, p.214.
[623] Single Member Court of First Instance of Athens, decision 14759/95.
[624] Spiliotopoulos, *Egheiridio..., op. cit.* footnote 6, p. 208 *seq.*

2.8.1 Procedural conditions for damages

2.8.1.1 Time limits

The time limit for lodging an action for damages is in principle five years after the plaintiff has been informed of the damage and of the identity of the person liable for compensation[625], for both administrative and civil courts.

2.8.1.2 Prior annulment or declaration of nullity of the act

Before law 2522/97, the action for damages could be brought independently of the prior annulment or declaration of nullity of the harmful act. The legality of the act was controlled incidentally by the court that heard the action for damages, which, however, had to comply with any previous judgment on the validity of the act, because of the *res iudicata* effect of judgments. If the bidder wished (though he was not obliged) to apply for annulment or declaration of nullity as well as for damages, he could lodge both actions at the same time or one after the other. The only restriction was that, if an application for annulment was pending before the Council of State, damages proceedings for harm caused by the same act were suspended, until the Council of Sate decided.

Article 5(2)(α) of law 2522/97 provides that, for the award of damages, the prior annulment or declaration of nullity of the act is required. Article 5(2)(β) provides that, before the civil courts, the action for declaration of nullity and the action in damages may be joined, since the competent court will be the same. In the case of annulment, where the two remedies cannot be joined, it is not necessary for the plaintiff to wait for the annulment to be decided before he lodges the action in damages; both remedies

may be lodged at the same time, each before the competent court. The proceedings on damages will then be suspended, until the annulment is (eventually) decided. The prompt lodging of the action in damages is important, since interests on the principal amount awarded as compensation are calculated from the moment that the action is lodged, as we will see.

It is submitted that the requirement of prior annulment/declaration of nullity is based on a misreading of the Directive. We have seen that, according to article 4(2) of law 2522/97, remedies are limited to damages after the contract is concluded.

Article 2(6)(β) of the Directive provides that "…*except where* a decision must be set aside prior to the award of damages", a Member State may provide that, after the conclusion of the contract, remedies shall be limited to damages [emphasis added]. The article clearly allows for only one of the two options to be used by a Member State, i.e. a State *can either* limit remedies to damages after conclusion of the contract *or* require that the harmful act should be set aside before damages are awarded.

The error in the law 2522/97 is arguably due to the incorrect translation of article 2(6) of the Directive in the Greek version of the text[626]. The Greek version of article 2(6) says that "*apart from the case* where a decision must be set aside prior to the award of damages, a Member State *may also* provide that, after the conclusion of the contract…" [emphasis added], remedies are limited to damages. Thus, in the Greek translation, the Directive appears to allow both options to be used. This is, however, wrong and law 2522/97 should be amended to be made to comply with the Directive, choosing only one alternative.

2.8.2 Substantive conditions for damages

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[625] According to article 937(1) of the Civil Code.
[626] Georgopoulos, "The System…", *op. cit*. footnote 59, p.89.

There are various legal bases on which damages may be sought. Independently of their legal basis, in damages actions matters of both law and fact may be raised and are reviewed.

2.8.2.1 Tort

Compensation may be sought under the tort rules for non-contractual liability. The relevant provisions are articles 105 and 106 of the Law Introducing the Civil Code for bodies governed by public law and articles 914 *seq.* of the Civil Code for bodies governed by private law.

Article 105 provides that the administration is liable for the unlawful actions or omissions of its organs during the exercise of powers that have been entrusted to them, unless the act or omission infringes a provision, which protects the general interest. Article 106 applies article 105 to local authorities and other legal entities governed by public law for actions or omissions of the persons in their service. Article 914 provides that whoever causes harm unlawfully and through his fault is liable for compensation.

The conditions for compensation under articles 105-6 and 914 *seq.* are almost identical. We will therefore examine them together, noting however the rare cases where a difference exists.

First, there must be an unlawful action or omission, i.e. a conduct infringing law provisions or principles. The action must occur in the context of tasks undertaken by the authority; the authority is not liable for actions of persons employed by it, which are completely unrelated to the authority's function[627].

Article 105 provides that it is not possible to seek compensation when the action or omission infringes a rule that was enacted to protect the general (in the sense of

public) interest, the reason being that, in these cases, no individual right worthy of protection is considered to be created under that rule[628]. Liability is excluded even if an individual right is indirectly harmed[629]. There is no equivalent provision in article 914. It is submitted that the limitation under article 105 should be interpreted in the light of the relevant case law of the Court of Justice, which ruled in *Dillenkofer*[630] that the fact that a provision is enacted in favour of the public interest does not mean that it cannot protect an individual interest as well. Arguably, article 105 should be interpreted to limit liability only when the rule is adopted *exclusively* to protect a general interest[631]. This interpretation appears to be followed by the courts[632].

The second condition of damages under article 914 is fault (negligent or intentional) of the wrongdoer. The degree of fault is irrelevant. Any kind of fault is at the same time required and sufficient[633]. Articles 105-6, however, establish a system of so-called objective liability, meaning that fault of the public authority is not required. Because negligence is easily established, liability under article 914 would rarely be excluded due to absence of fault, for example, where the applicable rules are vague and the authority fails to interpret and apply them correctly, in spite of having tried to do so with due diligence and care[634]. Thus, in practice, the difference between articles 105-6 and 914 would be very small in this respect.

Thirdly, compensation is due only when the act has caused damage to the plaintiff. The damage can be either patrimonial, when it can be evaluated in money, or non-patrimonial, when monetary evaluation is not possible, for example, when the harmed person's professional reputation is prejudiced. Compensation for patrimonial and non-patrimonial damage can be sought together in the same action.

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[627] Spiliotopoulos, *Egheiridio..., op. cit.* footnote 6, p. 221.
[628] I. Mathioudakis, "I Koinotikou Dikaiou Axiosi Astikis Eythinis tou Dimosiou" in Dioikitiki Diki (10) 1998, p.329.
[629] Supreme Civil Court, decision 210/71.
[630] Joined cases C-178/94, 179/94, 188/94, 189/94 and 190/94 *Dillenkofer v. Germany* [1996] E.C.R. I-4845; [1996] 3 C.M.L.R. 469.
[631] Koutoupa-Rengakos, *Dimosies Symvaseis...*, *op, cit.* footnote 96 of chapter 5, p.303.
[632] Supreme Civil Court, decision 106/69.
[633] K. Kerameus, "Damages under Greek Law", p.110 in U. Magnus (ed.), *Unification of Tort Law: Damages* (2001).

Damage is calculated by comparing the harmed person's actual financial situation (after the breach) with what it would have been, had the tort not taken place[635]. The difference between the two constitutes the sustained damage.

Damage is considered to include both sunk costs and lost profits. According to article 298(α) of the Civil Code, "compensation covers the decrease in the existing assets of the creditor (positive damage) as well as any loss of profit". Article 298(β) defines lost profits as those "that can be anticipated as probable in the usual course of events or by reference to the specific circumstances and in particular to the preparatory steps taken". The anticipation of profit is measured according to objective criteria, based on what the average reasonable man would have expected[636]. The plaintiff must mention in the action all the circumstances that may have given rise to such anticipation of profit (including any preparatory measures taken) in detail[637], otherwise his claim might be rejected under article 216 of the Code of Civil Procedure as not sufficiently specific.

In award procedures, sunk costs are the resources sent to prepare and present the bid, including, for example, travel expenses. Lost profits are those that the plaintiff would have earned, if he had not taken part in the contested procedure, because it is considered that, if he had known that the procedure would be irregular, he would not have placed a bid. Such lost profits would be, for example, profits under another contract, which the plaintiff could have concluded but refused because of his participation in the procedure, or profits that would have been earned, if the bidder employed the resources used for participating in the procedure elsewhere. It is, however, very difficult to prove such lost profits. Profits that the plaintiff would have accrued under the contract cannot usually be claimed by way of lost profits in tort actions. They may only be claimed in exceptional or particular circumstances, for

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[634] Spiliotopoulos, *Egheiridio .., op. cit.* footnote 6, p.228.
[635] Supreme Civil Court, decision 807/73.
[636] Stathopoulos, *Geniko Enohiko Dikaio I* (1979), p.257.
[637] Supreme Civil Court, decisions 20/92, 698/92, 154/94, 289/97, 1409/98.

example, if the authority assured the plaintiff that it would award the contract to him[638] but did not, though it would be very difficult for the plaintiff to adduce conclusive proof of that. Generally, unless the contracting party is under an obligation to award the contract to the plaintiff (and this would be unusual), lost profits under the contract may not be sought[639].

Finally, the plaintiff must prove that his damage is caused by the unlawful behaviour of the authority, i.e. establish a causal link between the two. Causation is established according to the theory of the "adequate cause", (*causa adequata):* there is liability only when, according to common knowledge and reasonable prediction of the probable course of events, the action is by its nature likely to produce the damage, i.e. the damage is not a freak or unusual consequence. It is not sufficient that the action is one of the conditions of the damage; it has to be a condition likely in itself to produce it. The element of reasonable prediction is measured by reference to the average man and not according to the faculty of prediction of the plaintiff.

The causal link can be broken if a lawful act, which follows the unlawful one, would have produced the same harmful result[640]. The link can also be broken, if there are subsequent fortuitous events, which would have produced the result[641]. Compensation is accordingly reduced or refused.

The establishment of causation is not easy in procurement, because the authority can claim that the bid would have been rejected on grounds other than the contested ones and thus break the causal link between the action and the damage. Proving that a bidder has actually been harmed by an irregularity is difficult.

2.8.2.2 Pre-contractual liability

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[638] Supreme Civil Court, decisions 756/81, 1303/84, 15105/88.
[639] Stathopoulos, *Geniko…, op. cit.* footnote 244*,* pp.237-8; also, Supreme Civil Court, decisions 33/87 and 324/89.
[640] Supreme Civil Court, decision 475/65.
[641] Spiliotopoulos, *Egheiridio .., op. cit.* footnote 6*,* p.216.

Compensation may also be sought under the pre-contractual liability provisions of articles 197-198 of the Civil Code. The Civil Code rules, though in principle belonging to private law, are considered, in this case, to express legal principles of general application and thus apply to all awarding authorities[642]. In the case of authorities governed by public law, articles 197-8 apply in conjunction with articles 105-6[643], as a sort of specific expression of the latter in the pre-contractual stage.

Article 197 provides that during the pre-contractual stage of contact between two parties in order to conclude a contract, the parties must act in good faith and according to negotiation usages. There should be a relation of mutual trust and co-operation between the parties, a sort of solidarity, which creates liability, when it is violated.

The pre-contractual stage in procurement starts when the notice is published and ends with the conclusion of the contract or the cancellation of the procedure[644].

The elements of good faith and negotiation usages are defined according to objective criteria, by reference to the average reasonable man. Good faith refers to the requirement that the parties behave in an honest and open way. Negotiations usages are the usual ways of proceeding in order to conclude a contract[645]. The specific obligations that article 197 entails in each case are defined by the judge, who decides within the limits of the Constitution, the legislation and the general legal principles, taking also into account the generally accepted social perceptions[646].

Pre-contractual obligations under article 197 encompass the duty to take certain positive steps, including the contracting authority's duty of keeping confidential information secret and of providing information to bidders on the procedure. The latter duty consists in an obligation to give "information and clarifications on the

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[642] Soleintakis, "I Prosymvatiki Eythini sto Dioikitiko Dikaio", (1998) 10 Dioikitiki Diki p.2.
[643] Spiliotopoulos, *Egheiridio…, op. cit.* footnote 6, p. 218.
[644] Supreme Civil Court, decision 1303/84.
[645] Stathopoulos, *Geniko…, op. cit.* footnote 244, p.103.
[646] *Ibid.,* p.106.

terms of the contract including those that may affect the contractor's decision"[647], to ensure that parties negotiate and eventually enter into the contract as a result of their free will, knowing all the conditions attached to it. The obligation covers all factual and legal conditions related to the contract; however, the contracting party is not liable for terms or conditions that bidders could have found out by themselves. The obligation of information has been interpreted to establish the authority's liability for mistakes or omissions in the notice documents[648]. The obligation has also been interpreted to hold the authority liable when it omits to inform the bidder of his chances and prevent damage in the form of costs, which the bidder incurs in preparation for performance, believing that he will be awarded the contract[649]. Also, the successful contractor, who has to perform the contract under less favourable conditions than those he would have agreed to, had he been aware of its true dimensions, can claim compensation. The most usual case is an underestimate of the performance cost resulting from inaccurate information given by the authority[650].

Article 197 requires that parties do not abuse the legitimate expectations that the other party has built up during the negotiations. Thus, since bidders reasonably rely on authorities to abide by the law, compensation is due when the awarding authority does not comply with the procurement rules. Therefore, an authority is liable if, for example, excludes unjustifiably a bidder or does not comply with the selection criteria and awards the contract to a bidder that does not fulfil them or cancels unjustifiably the procedure[651].

The party that breaches its obligations under article 197 is liable, according to article 198, for any damage caused to the other party. The concepts of liability, harm and causation are the same in pre-contractual liability as in tort. However, in the case of authorities governed by public law, no fault is required, as the regime of objective

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[647] Administrative Court of Appeal of Athens, decisions 247/47, 2403/62, 1669/67, 1837/87, 922/88, Administrative Court of Appeal of Komotini, decision 45/88.
[648] Administrative Court of Appeal of Athens, decision 2892/87.
[649] Court of Appeal of Thessaloniki, decision 1556/70; Court of Appeal of Athens, decision 4265/83.
[650] Papaioannou, "Remedies in Greece", *op. cit.* footnote 137, p.171.

liability established by articles 105-6 applies. Compensation is owed without regard to whether the contract is eventually concluded, according to article 198.

Articles 197-8 and 105-6 or 914 can be invoked in the same action for damages as alternative legal bases, when the conduct of the authority falls under both sets of rules[652]. This may be the case when the act or omission is both infringes the law and is contrary to good faith and negotiation usages. Compensation will be awarded on one basis only.

2.8.3 The amount of compensation

As a rule, in Greek law compensation is complete, aiming to cover the totality of loss and restore the injured party to the *status quo ante,* i.e. the position it would have been had the wrong not been committed. This is compatible with the requirements of EC law, which, as we have seen, requires full compensation, commensurate with the sustained harm. The degree of the defendant's fault does not influence the extent of compensation[653].

In the exceptional cases where the recovery of lost profits under the contract is ordered, the courts face the difficult task of calculating their amount. Greek courts calculate it on the basis of a fixed percentage of the value of the presumed performance cost. The Court of First Instance of Athens in its decision 1508/87 ordered 10% of the performance cost by way of damages for lost profits. However, the decision was quashed on appeal[654] and only 5% of the performance cost was ordered. The decision of the Court of Appeal was upheld by the Supreme Civil Court[655] on the ground that, in the usual course of events and according to common knowledge, public works contracts are often not profitable for contractors and sometimes cause them to be liquidated. However, in a later case of the Court of

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[651] Court of Appeal of Athens, decision 1563/95.
[652] Supreme Civil Court, decision 1127/86.
[653] Kerameus, "Damages…", *op. cit.* footnote 241, p.110.
[654] Court of Appeal of Athens, decision 12577/87.

Appeal of Crete[656], 10% of the performance costs were ordered by way of compensation. The court based its decision mainly on the fact that the profit of contractors was calculated for tax purposes to 10% of the value of the contract. Thus, the applicable tax provisions on calculation of profit may be used as indications for the purpose of calculating lost profits in damages actions.

It is argued that if the net profit of the bidder is specified in the bid, this amount should be awarded as compensation for lost profits[657]; this view appears to have been followed by the Supreme Civil Court in a relatively old decision[658].

In the case of moral loss, article 932 of the Civil Code provides that compensation is equitable and assessed by the court, according to the particularities of each case.

The court may refuse damages or reduce their amount when the plaintiff has through his own fault created or contributed to the damage or omitted to prevent or minimise it, according to article 300 of the Civil Code. The circumstances of each case and, exceptionally, the degree of fault of either party may be taken into account by the court in determining the final amount of compensation[659].

The requirement of complete compensation entails the obligation to award interests on the principal amount of damages. It is provided that compensation owed by public bodies is subject to a 6% yearly interest rate[660], starting from the moment when the action in damages is lodged. It is, therefore, in the plaintiff's best interest to lodge the action as soon as possible, so that the time for the calculation of interest starts running. The equivalent interest rate for compensation owed by individuals or by public bodies governed by private law is 25%. This does not appear to be compatible with the requirement of non-discrimination for equivalent remedies and the two interest rates should, it is submitted, be aligned.

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[655] Decision 1941/88.
[656] Decision 97/93.
[657] Synodinos, *Apotelesmatiki..., op. cit.* footnote 44, p.279.
[658] Decision 1132/77.
[659] Stathopoulos, *Geniko..., op. cit.* footnote 244, p.326.
[660] Article 21 of Decree 26.6/10.7.1944 together with article 109 of the Law Introducing the Civil Code for the state; article 7 of Decree 496/74 as amended by law 250/76 for bodies governed by public law.

There are, as yet, no final damages cases under law 2522/97. This is because the duration of the whole procedure from when the damages action is lodged until a final (i.e. issued by a supreme court) decision is issued is between 12 and 19 years for the administrative courts, added to the 2 years needed for the annulment, and between 9 and 11 years for the civil courts[661], where, at least, the action for damages may be joined to that of declaration of nullity. This is extremely slow and hardly effective, especially considering the reduced interest rate applying to bodies governed by public law.

In damages cases under the general rules, the amount finally granted is usually small and, in the case of compensation for moral prejudice, only minimal[662]. The aforementioned cases where compensation was awarded for lost profits are exceptional. This is affects negatively the effectiveness of the remedy in damages, with regard to its corrective as well as its preventive power.

2.8.4 Limitation of compensation

Article 5(1)(β) of law 2522/97 states that

"[a]ny provision excluding or restricting this claim ([for damages] does not apply".

There are many instances where, with various justifications, special provisions exclude compensation in public procurement awards[663], in spite of the EC law obligation of compensation for unlawful state action and the general principle of Greek law that exclusion of state liability is not allowed[664]. Article 5(1)(β) reaffirms the principle and renders any provisions that limit compensation inapplicable.

Law 2522/97 could appear to restrict damages actions itself. Article 5(1)(α) states that compensation may be sought under articles 197-8, without citing other legal bases for liability or mentioning that alternative legal bases are possible. Thus, it seems to

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[661] Synodinos, *Apotelesmatiki..., op. cit.* footnote 44, pp.267-8.
[662] *Ibid.* p.262.
[663] *Ibid.* pp.256-7 at footnote 1172.

render the grant of compensation more difficult, since, if this were followed strictly by the courts, compensation would only be granted when the conditions of articles 197-8 are met but not in other cases, for example, under the tort rules.

Nevertheless, if such a restriction of compensation were envisaged, arguably law 2522/97 would state that articles 197-8 are the *only* possible legal bases. The mention of articles 197-8 seems to be only indicative and if the conditions of other bases for liability are met, their application should not be excluded[665]. In any event, since the use of alternative legal bases is allowed in national law, to disallow it for claims stemming from EC law would contravene the principle of non-discrimination.

2.8.5 Conclusions on damages

The situation regarding damages is disappointing: proceedings are very slow, proof is difficult and compensation is usually minimal, unless in exceptional cases. It remains to be seen whether the conditions for compensation will be made easier for cases brought under law 2522/97, because of the corrective impact of the EC principles, especially that of effectiveness.

2.9 Enforcement

Article 6(1) of law 2522/97 provides that judgments issued under this law must be enforced, after they can no longer be subject to any appeal (i.e. either when appeals have already been sought or when the deadline for them has passed). Article 6(2) provides that when the judgment imposes a monetary sum on a public body, enforcement may take place against its private property.

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[664] Spiliotopoulos, *Egheiridio..., op. cit.* footnote 6, p.210.
[665] This was confirmed by Nikos Antoniou, legal counsellor of the State in the Ministry of Public Works and one of the draftsmen of law 2522/9, in a discussion with the author on April 12,1999.

This provision aims to remedy the not unusual phenomenon of public bodies not complying voluntarily with judgments[666]. It is the first provision of its kind; enforcement of judgments against public bodies is not allowed under the general rules[667], though lately the courts have started to require it[668].

According to articles 946(1) and 947 of the Code of Civil Procedure for the enforcement of decisions on interim measures, civil courts may, either in the judgment itself or as a result of a later trial, impose a fine and order the imprisonment (up to one year) of the party against whom the judgment is issued, in case the party does not comply with the conditions or measures ordered therein. In the case of legal persons, imprisonment is ordered against their legal representatives[669]. These provisions do not apply to provisional orders[670].

Administrative courts do not have such powers. It is argued that, in order to ensure compliance with the EC principles of effectiveness and non-discrimination regarding the effective enforcement of judgments, articles 946-7 should apply before administrative courts as well.

2.10 Legal costs

By legal costs, we mean both the lawyers' fees and the trial costs[671]. First of all, independently of any fees charged for pre-trial advice or any agreement on fees for actions in court between lawyer and client (which we will examine below), the law determines the minimum lawyers' fee for bringing each remedy. This minimum fee is called "pre-payment", as it is paid by the client to

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[666] Bouloukos, "Symmorfosi tis Dioikisis stis Dikastikes Apofaseis", (2002) 2 Nomikos Fakellos (May-July), p.27.
[667] According to article 8 of law 2097/52 and Decree 496/74.
[668] Single Member Court of First Instance of Thiva, decision 360/98, Single Member Court of First Instance of Pireas, decision 1212/99, Single Member Administrative Court of First Instance of Athens, decision 4446/99.
[669] This applies to public bodies as well, Single Member Court of First Instance of Pireas, decision 1346/83, Single Member Court of First Instance of Mytilene, decision 291/89.
[670] Synodinos, *Apotelesmatiki..., op. cit.* footnote 44, p.240.
[671] The information on costs has been obtained in the empirical study.

the lawyer before the action is heard, and it is a fixed compulsory sum corresponding to what the law considers that a lawyer should be paid for that action. This system aims to ensure that some relatively adequate payment will be ensured for the lawyer of the case.

Payment is arranged as follows. The client advances the required amount to the lawyer, who then must pay the amount of the pre-payment at the bar of which he is a member, before the action is heard. The bar keeps a percentage of the amount[672] and issues a receipt that payment has been effected, which the lawyer attaches to the action. In the absence of such a receipt, the remedy will not be heard.

The pre-payment is approximately 1,175 Euro for the application for annulment and half of this, i.e. approximately 590 Euro, for the application for interim measures before the Council of State. The pre-payment for actions in damages before the Administrative Court of First Instance amounts to approximately 675 Euro. In the Civil Courts of First Instance, the pre-payment is approximately 2,200 Euro for each the action for declaration of nullity and for the action in damages and approximately 295 Euro for the application for interim measures[673].

Notwithstanding, there may be an agreement between the lawyer and the client to pay more than the minimum fee for the action in court. There are also the fees for general or pre-trial legal advice.

The ultimate amount paid to the lawyer depends, first of all, on whether he works in-house for the bidder. In these cases, no extra fee is charged for legal advice, other than the lawyer's salary and the compulsory pre-payment, in cases where an action is eventually lodged. In Greece, it is usually big firms that have own legal departments, because only they have the means to maintain them and also have a number and

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[672] The bar of Athens keeps 15%, according to their list of pre-payments published in October 2001.

[673] These amounts were published by the bar of Athens in October 2001 and apply as of January 1, 2001. Most of the procurement related litigation takes place in Athens, due to the fact that the Council of State and most the defendants (all government departments and the municipal authorities of the boroughs of Athens, which are all large and likely to award contracts above the thresholds) are based in Athens.

variety of cases requiring the existence of such a department, due to their more extended, in comparison to a smaller firm, professional activity. However, as in-house lawyers are often not procurement specialists, external legal advice may be sought in any case.

External lawyers are paid either by a fixed monthly salary, by the hour or by a lump sum for each case they handle; the most usual system is payment for each remedy separately. There are differences in fees, depending on the lawyer's expertise and reputation, better known and experienced lawyers charging generally more.

When a lawyer is paid by the month, the arrangement usually is that the fixed salary covers an agreed number of hours of legal work for the client. If that number of hours is exceeded, the lawyer will be paid for any extra work he has done, either on an hourly rate or by a special *ad hoc* agreement. The compulsory pre-payment for any remedy eventually lodged is owed. This is taken into account when the salary is agreed. The system of monthly payment is usually followed by firms that have a sufficiently big number of procurement queries or cases to justify this expense. Small and medium sized firms usually prefer to pay for each remedy separately. In any case, firms revert from one system (monthly salary) to the other (case by case payment) when the number of their procurement related queries or disputes changes and they decide accordingly that it is, or not, worthwhile to pay a salary.

External lawyers, who are not paid by a fixed salary, are paid by either the hour or, usually, by a lump sum for each remedy they prepare and lodge. It is not easy to give an accurate estimate of lawyers' fees and only a rough approximation is possible.

An average hourly rate for specialised practitioners is between 150 and 200 Euro. However, agreements for the lawyer to be paid by an hourly rate usually concern general legal advice. When an action in court is envisaged, there are *ad hoc* agreements.

For an application for annulment or for interim relief before the Council of State, lawyers' fees often do not exceed the pre-payment by much and range roughly

between 1,200 (i.e. roughly equivalent to the minimum fee) and 2,400 (at the top of the scale) Euro for annulment and half of that for interim relief.

For damages actions, lawyers and clients often agree that, apart from the pre-payment, the lawyer will also receive a percentage on the amount eventually awarded as compensation -rather than a fixed sum independent of the outcome of the case. This percentage varies and is usually agreed upon *ad hoc*, according to the lawyer and the difficulty of the case. Such arrangements are convenient for firms, which will not have to pay more than the pre-payment, unless the case is won, but not for lawyers, who will often not receive anything, as the conditions for the award of damages are difficult to fulfil and cases may fail. However, as conditional fee agreements are not unusual for damages actions, lawyers often agree to such arrangements in procurement, especially when the firm is otherwise a good client.

Apart from the lawyers' fees, in order for any remedy to be lodged, there are the so-called trial costs, the costs of lodging the action, to be paid. As in the case of the pre-payment, they are compulsory and their amount is decided by law, but they are generally negligible.

The costs of lodging the applications for annulment and for interim relief before the Council of State are approximately 16 Euro for each, for the so-called 'stamps', which are attached to the application. On top of this, approximately 4,5 Euro are paid for the so-called "deposit", which the applicant recovers if he wins at trial. The aim of the deposit is to limit the bringing of unmeritorious actions[674], though the amount is too small to have any effect at all.

The stamps for lodging an action in damages before the Administrative Courts for First instance amount to approximately 6 Euro. The deposit is the same as at the Council of State.

The stamps for actions before the civil courts are approximately 4 Euro. No deposit is paid to the civil courts.

On top of the other costs, and for damages actions only, an additional compulsory sum, the so-called "judicial stamp" is paid to the court. The judicial stamp is 6.5‰ of the amount sought by way of damages and it is the same before both civil and administrative courts. Therefore, the amount of the judicial stamp varies in each case, depending on the claimed amount. However, since, in general, the claimed amount is relatively high, the judicial stamp will not be negligible. No such stamp is required for interim relief and annulment/nullity applications. To the extent that one can compare the trial costs of interim measures and set aside applications and those of actions in damages, the judicial stamp means that the latter will cost a lot more.

The trial costs (stamps and deposit) are paid at the court where the action is lodged by the lawyer. They are, as in the case of the pre-payment, advanced by the client to the lawyer, either in-house or external, and, again, if they are not paid, the action is rejected as inadmissible[675].

Both civil and administrative courts often order the losing party to pay the legal costs of the successful party[676]. The Council of State may order that the losing party will also pay the legal costs of any party that has been added to the proceedings[677]. It may, however, decide that parties will bear their own costs, for example, when the parties win or lose only in part[678]. In the courts' usual calculations, legal costs are small. Nevertheless, added to the party's own costs, they are not insignificant.

3 Conclusions of chapter 6

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[674] Spiliotopoulos, *Egheiridio..., op. cit.* footnote 6, p.525 at footnote 15.
[675] *Ibid.,* p.525 at footnote 16.
[676] Herbert Smith (Brussels), *Study on the Remedies applied in the Member States in the Field of Public Procurement,* (study prepared for the Commission by Herbert Smith, Greek collaborator Zepos & Zepos, Athens) at Chapter 8 "Greece", p.8, Brussels, May 1997, unpublished.
[677] Council of State, decisions 4708/87 and 4458/87.
[678] Spiliotopoulos, *Egheiridio..., op. cit.* . footnote 6, p.542.

The weakest point of the old review system was interim relief before the administrative courts, which was very limited (no interim measures other than the suspension of the act could be sought) and very difficult to obtain. Law 2522/97 was adopted mostly to remedy this situation, which it attempted to achieve by introducing new conditions for the grant of interim relief or by formally confirming solutions that were already developed in the case law of the Suspensions Committee.

Thus, law 2522/97 introduced, for the first time in Greek administrative procedural law, the temporary disassociation of the remedy of interim relief from that of annulment and the automatic suspensive effect of the deadline for the application for interim relief. It also confirmed the emerging case law on the possibility to apply for any interim measure, including positive ones, on the possibility to challenge any action of the awarding authority, independently of whether it is negative or positive, and the provisional order. General administrative procedural reform was inspired by[679] and partly followed law 2522/97; two years after law 2522/97 was adopted, the procedure before the Council of State was amended by law 2721/99, which provides, *inter alia*, that any interim measure, and not only the suspension of the contested act, may be ordered and that the Suspensions Committee may issue a provisional order, where appropriate.

We have seen, however, that in applications for interim measures under law 2522/97 the Suspensions Committee is often reluctant to depart from its previous case law and does not make good use of its new powers, for example by continuing to draw a distinction between genuine and non-genuine negative acts or enforceable and non-enforceable acts.

In civil courts, the provisions of law 2522/97 on interim relief did not make a difference, since the courts had such powers under the general civil procedural rules, before the law was adopted.

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[679] Remelis, *I Aitisi..., op. cit.* . footnote 10, p.356.

Other aspects of the law are also innovative, for example the provision on enforcement of judgments against public bodies.

Law 2522/97 diminished in some ways the effectiveness of the old review system. For example, whereas previously annulment of an act meant that the contract, if concluded, could be declared null and void, under law 2522/97 concluded contracts are not affected. Thus, annulment is prevented from having any legal effect other than serving as a compulsory condition for the action in damages, which requirement constitutes, as we have seen, a faulty implementation of the Directive.

In practice, the application of the remedies under law 2522/97 so far shows that interim relief is the remedy that is more likely to protect the interests of bidders, not only because of its inherent capacity for prompt intervention, but also because of the slowness of the other remedies and unlikely success of the action in damages.

The new review system is an improvement on the previous one, as regards its rules, its use by bidders and its application by the courts. Nevertheless, it is not an unmitigated success. There are points which prevent it from being effective, either as a whole or as regards each remedy separately.

This is due sometimes to the fact that some of the provisions of the law are obscure (for example, the provision that the contact may only be reversed if interim measures have been granted is unclear), unnecessarily complex (for example, the requirement that the recourse of law 2522/97 would not change the system of general recourses had to be simplified in case law), incomplete (for example, the provision on damages mentions only one of the possible legal bases) or faulty (for example, the Directive does not allow Member States to require that the harmful act is set aside prior to the grant of damages if the irreversibility of concluded contracts is provided as well, but law 2522/97 requires both). The defects of the law are probably due to its hasty adoption following the condemnation of Greece by the Court for failure to implement

the Directive[680]. However, since, in the course of the application of the law, they have become apparent, they could be corrected through the adoption of amending legislation.

Apart from any faults in the law, the courts are often reluctant to grant relief. It is hoped that the courts, especially the administrative ones, for which several aspects of law of the review system under law 2522/97 are new, will gradually become more willing to make use of their powers.

Chapter 7

Collection of empirical data on the function of the procurement review systems; purpose, premises and method.

This study, as stated in the introduction, aims to examine to what extent a system of legal remedies for aggrieved bidders is an appropriate mechanism for enforcing the EC procurement rules.

We have already examined the conditions for an effective review system and how, in the public sector, defects in the Remedies Directive and in its implementation and application in the UK and Greece impair effectiveness and diminish the success of remedies in correcting and, possibly, preventing breaches.

However, such research as was possible, and already conducted, on the basis of existing data yields only incomplete information on the operation and effectiveness of remedies as enforcement mechanisms. The data we have -the Remedies Directive itself, the case law of the Court of Justice, the national implementing measures, the number and content of national case law and the existing literature- inform us of the features of the two review systems covered in this study and give us a picture of the use of remedies there. Nevertheless, they

[680] Georgopoulos, "The System…", *op. cit*. footnote 59, p.86.

concern only the rules and tried cases and are silent on practical aspects of the use of the review system, such as the amount of legal costs, the success of the provided pre-trial complaints, the function of remedies out of the courts or bidders' participation to enforcement and the factors influencing their decision to use the courses of action available to them. The last point is of particular importance, since, as we have mentioned in the introduction, enforcement of EC law is mainly decentralised and relies on the willingness of individuals to seek protection of their rights under EC law before the competent national bodies. Any discussion on the practical aspects of remedies is impossible on the basis of the available information, other than in a purely speculative way.

To examine such points and, eventually, be able to make a more accurate assessment than is currently possible of the role of bidder remedies in enforcement, at least in public sector procurement on which the study is focused, we need to investigate the reality around their impact, including their use, results and side effects that do not come to light. Information of this type can be obtained only through acquaintance with the relevant practice, the perception and application of the rules by the persons benefited, affected or concerned by them. These are the persons to the relationship of which the remedies refer (bidders and authorities) as well as the persons that apply the law and remedies on behalf of the first two, their legal advisers.

We therefore need to undertake empirical research to investigate bidders' approach to remedies (whether they use them, in which cases and with what result), authorities' reaction to them (the impact of remedies in their awards, their effects and side-effects) and the related experience of lawyers, in the UK and Greece. It is hoped that answers to this research will provide practical information and an understanding of the way and context in which remedies are used.

In the light of what we have mentioned on the importance of bidders' participation to enforcement, we will divide the research and investigation questions and analyse

the findings on the basis of the attractiveness of remedies to bidders and their reasons for using them or not. It is very interesting, in this sense, that the two countries we are researching have a significant difference in litigation rates: there are considerably more cases in Greece than in the UK, where, however, litigation rates are increasing. Although the investigation will be structured around the attractiveness of remedies to bidders, the researched categories of persons, the questions and, it is hoped, the findings will be as all-encompassing as possible, including the authorities' and lawyers' views and practice. We will thus try to obtain the whole picture concerning the operation of remedies in the area.

Research of how legal behaviour in this area fits within the legal, economic, political, social, historical, national background, either general (for example, the existence and development of a common law mentality) or closely related to the study (for example, the state of the procurement market in either country) will not be attempted. The scope of this study is limited and constrains analysis to only what is relevant within its scope: use and effectiveness of bidder remedies and reasons thereof.

We will now examine the process of collection of empirical data.

1 Choice of research method

The choice of the empirical research method grows out of and is matched to the aims and focus of the research project. If a project is set to explore and investigate in depth a phenomenon, behaviour or area, the appropriate research method is qualitative, while if it is set to measure a wide range of phenomena, patterns or behaviour, the appropriate method is quantitative. Qualitative research involves the collection and interpretation of data that are not easily reduced to numbers. Quantitative research on the contrary concerns data that can be reduced to and expressed in numbers. Qualitative research is suited to

exploratory projects, is concerned with individualised experiences[681] and gives priority to depth of investigation, while quantitative research is suited to measuring phenomena, is interested in noting frequencies or distribution of patterns[682] and gives priority to breadth of investigation[683]. The choice between methods is thus determined by a discovery versus measurement distinction in the aim of the projects and a depth versus breadth selection in their priorities, for qualitative and quantitative research respectively.

We have seen that the present research project proposes to find out about the practical aspects, role and effects of remedies, discover the concerned persons' relevant experiences and views and understand (but not measure) how the two examined review systems work from the inside. This project is exploratory. No such research has been conducted in the area before and relevant problems, answers and theory have not been identified and conceptualised so far. Considering that, it appears that the approach more likely to provide answers to the research questions is one that allows an understanding of the subject, where depth and discovery takes priority over breadth and measurement. Qualitative research seems thus indicated. Indeed, before qualitative research is conducted in the area, establishing some explanations or patterns, there is no space for quantitative work, because it is not obvious what there is or should be measured. Having ascertained that our project lends itself to qualitative research, it remains to choose the most suitable method or technique of data collection.

2 Choice of method of data collection

[681] Patton, *How to Use Qualitative Methods in Evaluation* (1987), p.47.
[682] Black, "The Boundaries of Legal Sociology" (1972) 81 Yale Law Journal, p.1076.
[683] This does not however mean that qualitative research cannot be broad or quantitative deep; it is a question of prioritisation, because a tradeoff between the two is usually necessitated by limited resources and time; "…there are no perfect research designs. There are always tradeoffs", Patton, *How to Use…, op. cit.* footnote 1, p.45.

The selection of the technique of data collection is to a great extent dependent on the type of information desired[684]. A technique is chosen on the basis of its capacity to yield maximum access to the information sought and ensure maximum accuracy and relevance of that information to the research project, within the time frame and financial means available[685]. In this study, the time available for the collection and analysis of empirical data was 18 months and the financial resources were determined by the financing institution, the University of Nottingham, and were pre-estimated at approximately £600.

The process that seems more likely to yield maximum access, relevance and accuracy of information, within the time and financial frame of the research, is to conduct interviews with the persons concerned by remedies, as identified earlier, i.e. bidders, authorities and the lawyers of both. These persons are the only ones possessing the information sought and thus their input is indispensable. Conducting face to face interviews with them is the most appropriate means to access information (rather than, for example, sending them questionnaires to fill in and return), as it ensures that the research questions are understood by the respondents, eventually through clarifications by the interviewer, and allows them to be explored and examined in depth[686]. 'Other forms of data collection may share certain of these advantages. None, however, offers such a unique combination of advantages as the interview permits'[687]. Qualitative interview techniques are used often in exploratory research[688].

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[684] Vago, *Law and Society,* 1997.

[685] "…at every stage, he [the investigator] will find it useful to weigh one method against another in terms of four basic criteria: accessibility, economy of his resources, accuracy, and relevance" Richardson/Dohrewend/Klein, *Interviewing. Its forms and function* (1965), p.22.

[686] "The breadth versus depth tradeoff is applicable not only in comparing quantitative and qualitative methods; the same tradeoff applies within ... either method[s]", Patton, *How to Use…, op. cit.* footnote 1, p.49.

[687] Black/Champion, *Methods and Issues in Social Research* (1976), p.371.

[688] Murphy/Dingwall/Greatbatch/Parker/Watson, "Qualitative research methods in health technology assessment: a review of the literature" (1998) 2 Health Technology Assessment (16), p.iv.

There are three basic types of interviews, distinguished by the degree of their structuring or standardisation[689].

First, there is the structured or standard schedule interview where the questions are predetermined, put in the same words and asked in the same order for all respondents. The advantage of structured interviews is that the answers can be pooled and analysed easily and that similarities and differences between them can easily be detected. However, they restrain the initiative and participation of the respondent.

Secondly, there is the semi-structured or non-schedule standardised interview where the investigator has a list of questions to ask and points to raise, but no fixed formulation or order of questions to follow. The style is flexible to suit individual respondents. Such interviews have the advantage that, while they offer a structure for the investigator to rely on and for the findings to be relatively comparable, they are sufficiently loose to allow the respondents to present their views in their own words and in the order they prefer to, assess the importance and relevance of the questions asked of them and offer unforeseen responses. However, the analysis of the findings is more burdensome, because neither the order nor the formulation of the questions is exactly the same from one interview to the other, while the unanticipated answers may vary considerably.

Thirdly, there is the unstructured or non-standardised interview where the investigator's role is kept to the minimum, no specific questions are asked and the free flow of the respondent's narration of his experiences or ideas is encouraged to the full. In these interviews, the technique and use of which is associated with psychotherapy[690], the respondent is given full initiative but the findings may vary greatly and not lend themselves to comparison.

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[689] *Ibid.*, p.113.
[690] Robson, *Real World Research* (1993), p.240.

The choice of the interview structure depends on the project, the aims of the researcher and the existence of research already conducted in the area. However, qualitative research is usually associated with semi-structured interviews[691], because its aims and their characteristics often match. Qualitative research aims, as we mentioned, to gain insight, explore and explain a certain area, practice or phenomenon and semi-structured interviews are suited to that pursuit. They provide respondents with space and scope to elaborate on the questions in their own terms, encourage the narration of individualised experiences, offer the opportunity for factors that were not initially obvious to be drawn out and explored and allow the respondents to challenge the researcher's pre-conceptions and redefine the problem and the related issues. In structured interviews (usually associated with quantitative research[692]) the results of the collection of data are predetermined by the choice of questions and the exploration of the subject and discovery of explanations is therefore restrained or impeded. There is "a danger that the investigator has structured the interview in such a way that the respondent's views are minimised and the investigator's own biases regarding the problem being studied are inadvertently introduced"[693]. On the other hand, unstructured interviews are not suited to projects where the investigator wishes to raise certain specific points and is interested in the respondents' narration only as long as it is relevant to the investigated problem. For such projects, there must be some structure of the exchange between investigator and respondent, to contain the free association of the respondents' ideas and more or less ensure that the scope of the investigation is covered. In this project, we use semi-structured interviews. The nature of the project is exploratory and therefore structured interviews would be unsuitable. The area had not been investigated and there were not data on which to base an inflexible

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[691] Murphy *et al.,* "Qualitative…" *op. cit.* footnote 8, p.117.
[692] *Ibid.*, p.115.

question list corresponding even vaguely to the reality, which was unknown at the start of the research. Unstructured interviews were on the other hand also unsuitable, since the research focuses on a specific problem area and its aspects and therefore interviewees should be guided, though not restricted, as to the issues they should address.

There was a preliminary stage in the research, which consisted in consulting with one practitioner and one procurement officer of a contracting authority in each country, to pre-test and guide the investigation[694]. The preliminary stage was used both to try out the interviewing process -so questions were asked and answered in the same way as in the other interviews[695]- as well as to consider the viability, advisability and design of data collection, based on the participants experience of the area -so they included a discussion on methods and processes, on whether interviews were an appropriate investigation technique, on the sample, on whether the interview questions were clear, coherent and relevant and what other questions would be relevant.

The practitioners and authorities consulted in the preliminary stage were already known to the researcher (through conferences and training seminars) and for this reason responded swiftly to the request for cooperation in the project and were willing to provide assistance[696]. No bidder was consulted, because the practitioners were legal advisers to the private sector and gave some preliminary insight into their clients' attitude, which was all that was necessary at this early stage of the project. Besides, there was no existing contact with bidders and the process of locating and establishing a contact would hold up the beginning of the collection of data considerably and unjustifiably. The consultation with the UK practitioner and authority took place in a meeting with each one separately, in spring 2000. The consultation with their Greek

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[693] Black/Champion, *Methods…, op. cit.* footnote 7, p.374.
[694] The usefulness of a preliminary consultation to inform research decisions is mentioned in most articles and books concerning the collection of empirical data, for example in Richardson *et al, Interviewing…, op. cit.* footnote 5, Sudman/Bradburn, *Asking Questions- A Practical Guide to Questionnaire Design* (1982).
[695] For this reason these interviews are counted in the final number of conducted interviews.

counterparts took place at the same time over the telephone, for reasons of economy of time and financial resources.

Regarding the question whether conducting semi-structured interviews is an appropriate way to elicit the quality of information sought in the context of the present project, the outcome of the preliminary consultation was positive.

3 Collection of sample

Examination of all the units of the wider population, in which the researcher is interested, is usually impossible, impractical or simply not necessary[697]. What researchers therefore do is select ("sample") a portion of the total number of subjects and examine only that.

Researchers must, first of all, define the total population under examination and, secondly, choose the strategy which they will employ to determine the identity and number of subjects of the wider population to be examined. A question related to the selection of subjects is whether the chosen sample will be of relevance to cases other than those investigated and allow (eventually under conditions) generalisation of the findings to the wider population. The sampling strategy should ensure that such extrapolation of the found data is possible; otherwise this may not be assumed.

The total examined population in this project is bidders and authorities involved in EC public sector awards in the UK and Greece and the legal advisers of both. It is obvious that their number is such as to make research of the entirety of the population impossible, within the available time[698]. Even if the time for the research was unlimited, a complete census of the whole population is impossible, because, for example, the exact total number of the lawyers that act

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[696] Such opportunistic selection of research subjects is justified in the initial stages of research, Murphy *et al.,* "Qualitative…" *op. cit.* footnote 8, p.93.
[697] Mason, *Qualitative Researching* (1996), p.84.

as advisers in EC contracts awards is not known. We must therefore select and interview only some research subjects.

There is a range of sampling strategies. The investigator's choice of strategy has to do with the nature and goals of his research as well as with the degree of generalisability of the findings he is aiming for. The appropriate strategy is the one that fits and serves better these features. The pertinent questions are, therefore, what the nature and aims of the research are, which is the sample that best suits those purposes and how to collect it.

Qualitative research, as we have seen, gives precedence to depth over breadth of investigation. In depth research is usually intensive and time consuming and this renders the investigation of large samples impossible within the time and money limits. Thus, qualitative research is associated with small samples. As a rule, the samples are not chosen randomly[699] or to be representative[700], as is the case in quantitative research[701], but on the basis of other selection criteria, considered to be able to render more appropriate research subjects.

The empirical research project, in the context of this study, aims to develop a theoretical understanding of the patterns and causes of bidders' approach to remedies and of the operation and effectiveness of the procurement review systems in the UK and Greece. The project aims not at the generation of statistical data but at the development of explanations and theoretical generalisation[702]. The most suitable method for this type of projects is theoretical

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[698] For example, in Greece there are 603 awarding bodies; to contact and see them all would take years.

[699] This is because small samples, when selected randomly, can lead to biased findings, Murphy *et al.,* "Qualitative…" *op. cit.* footnote 8, p.92.

[700] The pursuit of representativeness often requires large samples, the investigation of which is, as we have seen, impractical in qualitative research. Qualitative research is not "particularly well supported by the generation of a representative sample", Mason, *Qualitative…, op. cit.* footnote 17, p.91.

[701] Quantitative research aims to generate statistical data, find patterns and formulate rules allowing to predict future behaviour, within a precise margin of error; large random samples are considered appropriate, as they are thought to be representative of the entire population and allow for statistical inferences and predictions, see for example, Denscombe, *The Good Research Guide* (1998), p.12, Burgess, R. G., *In the Field: An Introduction to Field Research* (1991), p.54.

[702] Firestone, "Alternative Arguments for Generalizing from Data as Applied to Qualitative Research", (1993) 22 Educational *Researcher*, p.17.

sampling[703]. This is an inductive technique[704], whereby theory emerges and is gradually developed on the basis of the findings and is, at the same time, tested against them[705]. The processes of data collection, data analysis and theory development are simultaneous and interwoven. The collection of data ends when there are sufficient convergent findings to consolidate the emerging theory and render the continuation of the empirical inquiry superfluous[706]. The point of consolidation, where the theory is considered to be conceptually adequate, is called saturation of the theory[707].

Theoretical sampling consists in choosing a theoretically meaningful sample[708], i.e. one that has certain characteristics enabling the exploration of the research questions and the formulation and testing of a theory explaining the investigated problem. The subjects are selected on the basis of their relevance to the examined area and their ability to provide data that cover different aspects of the problem, including deviant, discrepant and contradictory instances[709], point at similarities and differences and allow the elaboration of explanations accounting for them[710], assist the development of an inclusive understanding of the matter and place the boundaries of the findings[711].

In practice, these aims are sought to be achieved by incorporating in the sample a broad spectrum of types, categories, cases and thus examining more than one settings in which the problem appears. A sample ensuring such diversity would include, for example, more than one categories of subjects, especially ones with different or opposing interests, such as persons working for different professional

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[703] Developed by Glaser/Strauss, A., *The Discovery of Grounded Theory: Strategies for Qualitative Research* (1967).
[704] In inductive research, the investigator generates theory from the analysis of the collected data, as opposed to deductive research where the collection of data aims to test out or falsify an existing theory, see for example, Mason, *Qualitative…, op. cit.* footnote 17, p.100.
[705] *Ibid.*, p.97.
[706] The point of theory consolidation is also relevant to the size of the sample, as we will see.
[707] Glaser/Strauss "Theoretical sampling" in Denzin, *Sociological Methods* (1970), p.107.
[708] Mason, *Qualitative…, op. cit.* footnote 17, p.94.
[709] Hammersley/Atkinson, *Ethnography-Principles in Practice* (1995), p.43.
[710] Mason, *Qualitative…, op. cit.* footnote 17, p.97.
[711] Patton, *How to Use…, op. cit.* footnote 1, p.57.

groups or persons in the same professional group working in different business areas or in different countries. This approach was followed in this project, as we will see. The investigator obtains thus a collection of different perspectives, experiences, views and attitudes, a range of variations of the same phenomenon in different environments, as asserted by different sources. Such diverse findings allow the investigator to fulfil his aims, thus consider differences, make meaningful comparisons and analyses and acquire a full understanding of the problem. The diversity ultimately helps the development of the emerging theory, by distinguishing core aspects or patterns that cut across cases[712], and adds to its quality, making it comprehensive and holistic, able to explain and scale conditions and accommodate exceptions. Such a theory has greater generalisability.

In theoretical sampling, the size and representativeness of the sample is not a consideration. The sample size should help the investigator understand the problem, not represent the population[713]. The sample can be relatively small or even unspecified at the beginning of the investigation[714]. The researcher has to saturate his theory, therefore must continue examining subjects until he acquires a comprehensive picture of the area under scrutiny and is able to generate appropriate explanations. Saturation is reached when the findings stop telling anything new about the area and it is at that point that the investigation can end[715]. The final sample size is a matter of intellectual judgement informed by data analysis and the satisfactory development and testing of the investigator's explanations[716].

As we have mentioned, in this project the research subjects include all categories of persons affected by remedies, bidders, authorities and lawyers,

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[712] Patton, *How to Use…, op. cit.* footnote 1, p. 53.
[713] Mason, *Qualitative…, op. cit.* footnote 17, p.97.
[714] Denscombe, *The Good…, op. cit.* footnote 21, p.26.
[715] Denzin, *Sociological Methods,* (1970) p.102.
[716] Mason, *Qualitative…, op. cit.* footnote 17, p.98.

which ensures the comprehensiveness of data and facilitates the carrying out of key comparisons and the generation of an inclusive explanation.

It was decided that the empirical research would concern only one of the public sectors (works, supplies and services) to which EC procurement law applies. The sector that was chosen is the first that was regulated by EC legislation, works. The distinction between the sectors was necessary to allow a coherent and ample sampling of specialised lawyers (how their specialisation is assessed is examined in detail below) and bidders (who are, in the case of works contracts, construction firms); for consistency reasons, the distinction was also applied to authorities (which were therefore asked about their experience in EC works awards).

We will now see who concretely is included in the sample and the criteria on which the selection was made. All sampling decisions were informed by the preliminary consultation[717].

As regards bidders participating in EC works award procedures in the UK and Greece, the selection criterion was their size. Only the bigger (in terms of their annual turnover) construction firms were contacted. This is because it was suggested at the preliminary stage that small firms have less or no experience in awards above the thresholds[718] and therefore would be unable to provide much information. This was confirmed during the investigation. We contacted only national firms. It is impossible to sample in a consistent manner foreign firms bidding in either the UK or Greece, since a register of all placed bids does not exist; on the other hand, contacting foreign firms that have been awarded contracts in either country (the names of successful bidders are published and could be found) would build a bias in the sample, since such firms have won the contract and may have had no reason to challenge the award.

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[717] It is accepted that preliminary research can shape the sampling strategy, *ibid.* p.100.
[718] These are 5,000,000 Euro/£3,093,491 for works contracts.

In both the UK and Greece, there are published inventories of the bigger construction firms, listed according to their annual turnovers. In the UK, an up to date and reliable list is the contractors file, published as a supplement to the New Civil Engineer, the official magazine of the Institution of Civil Engineers[719]. In Greece, the equivalent list is published by the association of the major construction firms, named ΣΤΕΗΤ. In both countries, since the empirical research started (and in the case of the UK, was completed) in 2000, the lists used in this project are the 1999 ones.

As regards public authorities that have conducted EC works contracts awards, the criteria for selecting them were, first, their location and, secondly, the size of either their population (for local authorities) or their budget (for central government departments).

First of all, the sample contains central government departments as well as major local authorities, in order to be as diverse as possible, as is sought in theoretical sampling. The inclusion of local authorities was particularly important, as it is mentioned in literature[720] that local authorities tend, not always lawfully, to award contracts to local firms. Also, it was suggested during the preliminary consultation in both countries that local authorities they are more prone to blacklist firms that challenge their procedures[721]. Therefore, local authorities were included to explore these assumptions and their incidence on the use of remedies. Local authorities of the capital city and the regions were included in the sample in both countries.

Secondly, selection between authorities was made on the basis of budget or population. As regards central government departments, the ones with the higher budget were contacted. This is because it was mentioned at the

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[719] Information on the New Civil Engineer is available at www.nceplus.co.uk. The magazine is published by Emap construct (www.constructionplus.co.uk).
[720] Fernández-Martín, *The EC…, op. cit.* footnote 3 of chapter 1, p.123.
[721] See the discussion on blacklisting below in paragraph 4 on the research premises.

preliminary stage that the bigger departments awarded more contracts above the thresholds and thus could contribute better to the project. In the case of local authorities, the selection criterion was their population, as it was suggested during the preliminary consultation that authorities of heavily populated areas are very active in construction and that their projects are likely to be above the thresholds[722]. The accuracy of these criteria was confirmed during the investigation.

In the UK, information on the budget of central government departments was found in the national budget[723]. Information on local authorities was found in the municipal yearbook. In Greece, information on the budgets of central departments was obtained through an unpublished list of the Ministry of Public Works and on the population of authorities through an unpublished list of the Department for the Regions, both of which were procured on request for the purposes of this project. The information on authorities in both countries year was obtained in and refers to the year 2000.

As regards lawyers, the criteria in selecting them were, first, their specialisation in procurement law and experience as advisers -for firms, authorities or both- in works awards and, secondly, their location. In the UK, only solicitors and not barristers were contacted. This is because this project is directed at exploring the role of remedies in enforcement, mainly through an investigation of the factors influencing bidders' decision to sue. It was mentioned in the preliminary consultation in the UK (and confirmed during the investigation) that barristers are in most cases consulted by firms only after a (preliminary at least) decision to litigate has already been taken and usually do not participate in the taking of such a decision. Other aspects of the research, for example, information on legal

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[722] The UK procurement officer consulted at the preliminary stage said that they (a medium-sized metropolitan council) exceptionally have contracts over the thresholds and that they had only 2 such contracts in the last 3 years.

costs, could be, and were, covered by solicitors. In Greece there is no distinction between solicitors and barristers.

It was sought to sample lawyers that were as specialised as possible. Furthermore, lawyers in both regional and capital city law firms were approached. It was suggested in the preliminary stage that, while lawyers from city firms are more experienced in major construction projects, especially those awarded by central government departments, disputes arising in local procedures are usually dealt with by regional law firms. Therefore, law firms at both levels were contacted to explore their different experiences and views and maximise the comprehensiveness of the sample.

As regards UK lawyers, the sample was further diversified by the inclusion of lawyers with international practice and experience. These lawyers have both UK and non-UK clients: they advise UK firms participating in UK award procedures and in procedures in other EU countries but also advise firms from other countries (EU or non-EU) bidding in UK award procedures. The inclusion of such lawyers in the sample was deemed necessary, as it is often suggested in literature and was also mentioned in the preliminary stage, that one of the reasons of the low procurement litigation rates in the UK is a national legal culture of litigation avoidance[724]. Lawyers with experience of awards in other Member States and/or who have advised foreign firms in the UK would be able to draw comparisons and discuss whether there is a different approach to litigation depending on the nationality of the firm or the country where the procedure is taking place. In Greece, there is no suggestion, either in literature or as shown by the relatively high litigation rates, that there is a culture of litigation avoidance.

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[723] The UK budget contains a table of departmental expenditure. It is available at www.hm-treasury.gov.uk. Information on each government department can be found in their respective internet sites, all available through www.open.gov.uk and www.tagish.co.uk.

[724] See the discussion on legal culture below in paragraph 4 on the research premises.

Therefore, contacting Greek lawyers with international experience was deemed unnecessary.

It would be difficult to find which UK-based solicitor has international experience and to what extent and make a rational choice of whom to contact on that basis. It was thought and discussed at the preliminary stage that lawyers with UK professional qualification and experience but currently practising in an EU country outside the UK (for example, working for offices of UK law firms abroad) should be contacted.

In the UK, data on law firms were found in Legal 500, consulted in summer 2000. This is the leading independent compilation and classification of law firms on the internet[725]. Legal 500 has no list of firms specialising in procurement but it was suggested by the UK practitioner participating in the preliminary consultation that procurement lawyers would be listed under the areas of construction and local government (for local projects) and, therefore, we looked at these lists to find procurement specialists[726]. The Legal 500 was also used to identify UK solicitors with international experience. It became apparent from the research that the most accessible place where UK solicitors specialised in procurement and having international experience could be found was Brussels.

In Greece, there is no published list of specialised law firms. It was necessary to rely on the identification of specialists at the preliminary stage by the consulted lawyer and procurement officer (who worked for a major government department and identified the lawyers advising bidders that have challenged their awards) and cross check it throughout the investigation with firms and

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[725] Available at www.icclaw.co.uk. Legal 500 obtains statistical data on law firms (on annual turnover, cases handled etc) from the firms and the Law Society. Law firms are assessed by Legal 500 on the basis of recommendations and confidential opinions of both clients and senior practitioners in the marketplace. The editorial of Legal 500 mentions that the final published list is "the result of months of analysis and debate among the most experienced and authoritative team of journalists and commentators currently at work in the legal market", done "in good faith on the basis of the enormous volume of data" processed each year.

[726] It may be that there exist procurement specialists who are not listed under construction or local government. However, it is infeasible for the researcher to know where they are listed and how. For reasons of coherence of sampling, only the areas of construction and local government were looked at.

other lawyers. It soon became apparent, through the constant repetition of the same names, who the leading central and regional specialists were.

As far as the size of the sample is concerned, we have mentioned that in theoretical sampling the sample size is not completely specified at the outset, but fits the needs of the research. This, however, does not mean that the researcher cannot estimate approximately how many units will be included, bearing also in mind with the time and resources available[727]. It was calculated that an average of 25 to 30 interviews in each country would be a reasonable number, depending also on the willingness of contacted persons to participate in the research. The reaction was overall positive. The calculated number of interviews was slightly exceeded, not only to ensure the comprehensiveness of the theory but also (increasingly so, near the end of the interviewing process in each country) to test its aspects, which were more varied than expected.

The UK sample was contacted in August 2000 and the Greek sample in December 2000, by letters and electronic mail. All persons contacted were informed as fully as appropriate about the nature, purposes and general content of the research and were given assurances of confidentiality.

In the UK, the identity and numbers of subjects contacted and of interviews conducted are the following: contact with the 15 larger engineering firms and 4 interviews, contact with 17 authorities (1 which took part in the preliminary stage, the 10 more populated local authorities and the 6 central government departments with the higher budget) and 10 interviews (including the interview of the preliminary consultation) and contact with 51 lawyers (45 in the UK and 6 in Brussels) and 18 interviews (4 with lawyers based in Brussels and 14 with lawyers based in the UK, 1 of which was part of the preliminary stage).

The selection of contacted lawyers needs to be explained further since there is no clear ranking system as for firms and authorities. The Legal 500 list

recommended 109 law firms (in London and all the regions and in Brussels) in construction, which, we found, is the most relevant area, as it covers central and local procurement and specialised international lawyers. Most of these law firms were also recommended under local government, as there are overlaps between the two lists. On the basis of the selection criteria (geographical diversity and maximum specialisation and, in the case of Brussels-based lawyers, international experience), 51 out of the 109 law firms were approached.

In Greece, the identity and numbers of subjects contacted and of interviews conducted are the following: contact with the 15 bigger engineering firms and 14 interviews, contact with 13 authorities (the 10 more populated local authorities and the 3 central government departments with the higher budget, of which 1 participated in the preliminary stage) and 5 interviews (including the preliminary consultation), 15 lawyers identified as most specialised during the preliminary consultation and throughout the research and 13 interviews (1 of which was part of the preliminary stage).

In both countries, the professional qualifications of respondents were the following: the persons interviewed in firms were managing directors, consulted in or responsible for the decision to sue. The lawyers were senior, with considerable experience in procurement, extending between 10 and 25 years and covering a large number of projects. The persons interviewed in authorities were senior procurement officers.

The number of interviews in each country is 32 in total, therefore 64 overall. The final sample of 64 respondents includes subjects from more than one countries, more than one professional categories (and, more importantly, categories which are at opposite sides of the awards and of any related trials and therefore affected differently by the remedies and their effects), more than one levels (central and regional) within each country and category and, in the case of

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[727] Denscombe, *The Good…, op. cit.* footnote 21, p.26.

the UK lawyers, with international experience. The sample ensures therefore a wide coverage of areas, experiences and views, thus the diversity of the findings, and allows for the generation of comparisons and inclusive analyses.

The numbers of people contacted exceeded the number of interviews expected to be conducted in order to allow for a margin for non-responses. The higher number of lawyers contacted in the UK was due to the fact that some of those initially contacted responded negatively to the request to participate to the project, because they had not dealt with a complaint. The flexible sampling strategy allowed more lawyers to be approached after the initial ones were contacted, until a satisfactory number of responses was secured. The unequal number of interviewed authorities between the two countries is due to the centralised system in Greece: most major works contracts are awarded by the Ministry of Public Works (which participated in the investigation and therefore maximised the coverage of the research as regards contracting authority experience) unlike the UK where there is no such centralised government department and where it was necessary to contact more central authorities to increase the coverage.

The difference in the number of respondent construction firms and authorities in the project between the UK and Greece has to do with each group's accessibility and willingness to be interviewed. Firms in the UK preferred to direct the researcher to their legal advisers, because they considered that they would be more competent to answer the questions, though it was clarified that the research concerned all complaints, not only those that resulted in legal action. Authorities in Greece were very concerned that the information was sensitive, though they were assured that it would be treated as confidential and not divulged in any way other than anonymously as part of this project, and some refused to participate.

Danger of bias from non-responses (the danger, that is, that data can be biased because it lacks the non-respondents' input) is only existent when the non-respondents

are different from the respondents in some significant and relevant way[728]. Then, the collected data would systematically overlook facts or opinions from the non-response group and would lack comprehensiveness. However, in this case we had responses from people belonging to all categories or sub-categories within the sample and there is nothing to suggest that the non-response rate biases in any way the findings.

After approximately half of the interviews conducted in each country, certain common patterns of the use of remedies in each started to become apparent. The rest of the scheduled interviews were however conducted, in order to "saturate" the theory, consolidate the findings, confirm the importance and meaning of possible patterns and check the viability of emerging explanations.

4 Design of the interview questions

4.1 The premises

Research always begins with a set of issues. The aim in the pre-investigation phase and in the early stages of data collection is "to turn the foreshadowed problems into a set of questions to which an answer can be given"[729].

The premises on which this research was built were found in literature and explored during the preliminary consultation. A number of potentially important issues were identified and some potentially useful analytic ideas were developed.

As we have mentioned at the beginning of this chapter, the basis on which this research, and the related interview questions, is structured is the attractiveness of remedies to bidders, though authorities' reactions to complaints and lawyers' recommendations and approach were also investigated. A provisional list of potential factors influencing firms' willingness to use the available remedies follows. The

[728] Descombe, *The Good…, op. cit.* footnote 21, p.20.
[729] Hammersley/Atkinson, *Ethnography…, op. cit.* footnote 29, p.29.

empirical investigation sought to validate or dismiss them or uncover further factors, offering synergistic or contradictory explanations[730].

4.1.1 Ignorance of the law

It is sometimes suggested in literature that bidders do not use remedies, because they are not well acquainted with procurement substantive and procedural law[731], the duties of the contracting authorities under it and their corresponding rights. They are therefore unable to identify infringements[732] and/or are unaware of the available remedies, their conditions and procedure for using them. The size of the firm may be relevant to its level of awareness. It would seem that familiarity with the law is lower among small firms, which sometimes lack the resources (for example, good constant legal advice to inform them of their position and rights under the law) required to understand the law[733]. Likewise, firms that do not usually take part in EC contract awards may ignore the relevant rules due to inexperience.

However, there may be reasons for bidders to decide deliberately not to sue, though aware of the remedies available to them.

4.1.2 The features of the review system

It is sometimes suggested that "suppliers are not inherently reluctant to stand up for their rights: they would be willing to do so if they considered that there was a reasonable prospect of establishing that the awarding authority had committed an infringement and of deriving some effective sort of redress. It is the fact that such a

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[730] Schooner, "Fear of Oversight: The Fundamental Failure of Businesslike Government", American University Law Review, Vol. 50:627, 2001, p.627 at p.649.
[731] For example, Arrowsmith/Linarelli/Wallace, *Regulating..., op. cit.* footnote 8 of chapter 2, p.764. The Commission has also acknowledged in its Green Paper that ignorance is a problem.
[732] Brown, "Effectiveness of Remedies at National Level in the Field of Public Procurement", (1998) 7 PPLR, pp. 93-94.
[733] EuroStrategy Consultants, *Dismantling of Barriers..., op. cit.* footnote 3 of chapter 2, p.91.

prospect usually does not realistically exist,..., which deters would-be complainants"[734]. Thus, firms would hesitate to sue, when they consider, for any reasons, that their chances of success at trial are low.

Apart from the chances of winning the case, the costs and speed of proceedings may play a role in firms' decision to sue. An indication that this might be true is the fact that litigation is common in Member States where there is a specialist tribunal dealing with procurement cases, before which the procedure is usually quicker and sometimes cheaper[735]. In the UK, where litigation is rare, cases are brought before the High Court where proceedings are expensive[736], slow and very public.

Thus, the traits of each review system (including the procedural rules, the structure and case law of the courts and the likelihood of the plaintiff winning a case, the speed of litigation, legal expenses) may influence the firms' decision to use the available remedies.

The size of the firm may again be relevant, since a small firm might have a limited capacity to bear the litigation costs, and therefore be unable to start proceedings.

However, it is suggested in literature that bidders decision to start proceedings or not is often made on grounds other than the effectiveness of the review system. Therefore, a system might be clear, simple, accessible and effective but nevertheless still not frequently used[737] for reasons related to the mentality and market strategy of the firm as well as to the existence of practices of dispute settlement not involving litigation.

4.1.3 Litigation avoidance and litigiousness: inherent characteristics? The role of legal culture

[734] Brown "Effectiveness…, *op. cit.* footnote 52, p.93.
[735] Advisory Committee for Public Procurement, *op. cit.* footnote 34 of chapter 2, p.17.
[736] "Even an interlocutory application (for example, for interim relief) could quite easily involve costs exceeding ECU 10,000": Eurostrategy Consultants, *National Measures Implementing the EC Procurement Rules. The UK,* 1997, unpublished.

It is argued in literature that lack of litigation may be caused, in addition to other possible reasons, also by cultural inhibitions about the appropriateness of using litigation as a means of solving disputes arising out of the conduct of an award procedure[738]. Therefore, the fact that there is a more litigious climate in some Member States than in others, might mean that the decision to start proceedings is a matter of national legal culture. There are different notions in different countries of what constitutes an appropriate reaction to a problem and sometimes, even of what constitutes a problem. Country-specific motives of court avoidance may develop.

Commentators suggest that one reason for the low procurement litigation rates in the UK is its non-litigious legal culture. In the UK, "there was no pre-existing climate for litigation to be brought in this field"[739]. Before the implementation of the EC substantive procurement directives, there were, as we have seen, no formal procurement rules and no statutory rights or remedies for bidders, with limited exceptions. Also, the implementation of the EC procurement substantive and procedural law is relatively recent -in the field of public works, it took place in 1991. It may be that, as a result, bidders have not (yet) developed the habit or tendency to use remedies. However, the number of cases brought in the UK has been increasing, which may suggest that bidders are not attached to any specific "traditional" way of dealing with (or rather ignoring potential causes for) disputes and that they are increasingly becoming used to litigation or aware that it may be useful in protecting their rights.

The assumption that litigation avoidance may be linked to legal culture and the case of the UK as an example was discussed at the preliminary stage, where it was also suggested that the lawyers have not developed an awareness of litigation as an

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[737] Arrowsmith/Linarelli/Wallace, *Regulating…, op. cit.* footnote 8 of chapter 2, p.770.
[738] Bowscher, "Prospects for Establishing an Effective Tender Challenge Régime: Enforcing Rights under E.C. Procurement Law in English Courts" (1994) 3 PPLR, pp.34-5.
[739] Advisory Committee for Public Procurement, *op. cit.* footnote 34 of chapter 2, p.17.

appropriate mechanism of solving disputes either, as they used to have very limited involvement and little professional interest in the area.

Remedies are open also to foreign bidders, which have a different legal tradition and some of which may be used to litigation. It is mentioned in literature and confirmed at the preliminary stage that construction is carried out primarily by national firms, as it is expensive to move workforce and materials[740] and there are few contracts sufficiently interesting for foreign firms to withstand the complications of bidding outside their base[741]. The level of participation of foreign firms in EC works awards in the UK and Greece is outside the scope of this study and will not be investigated. However, it will be interesting to see whether foreign firms are more willing than national firms to take action to ensure that their rights are enforced.

4.1.4 Fear of retaliation

Commentators often argue that one of the principal reasons for firms' decision to refrain from suing the contracting authority is fear that the authority will retaliate by not awarding them that or a future contract[742]. Firms are thus thought to be reluctant to antagonise their potential customers and to prefer "to sacrifice short-term benefits

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[740] In construction, firms wishing to undertake works contracts in a foreign market usually either set up subsidiaries (which are registered and function as national companies) or form a joint venture with a domestic contractor, see Lozano, *International Construction Markets, EC, USA and Japan,* Advisory Committee for Public Procurement, CC/90/73, p.3, cited in Fernández-Martín, *The EC…, op. cit.* footnote 3 of chapter 1, p.127 *seq.*

[741] Some empirical research suggests that interest in intra-Community bidding is not high, see Hartley/Uttley, "The Single Market and Public Procurement Policy: The Case of the United Kingdom", P.P.L.R. 3 (1994), p.114 *seq.* There are few large special works of high value, usually inserted in governmental infrastructure development projects, for which foreign firms would be willing to place a bid, because the expected profit is large and their strategic importance for future business considerable (for example, when they are part of a large project under which several contracts would be awarded, as in the Storebaelt case, C-243/89, *Commission vs. Denmark* [1993] E.C.R. I-3353), see Fernández-Martín, *The EC…, op. cit.* footnote 3 of chapter 1, p.132.

[742] See for example, Arrowsmith, "Public Procurement: Example…", *op. cit.* footnote 132 of chapter 3, p.128, EuroStrategy Consultants, *Dismantling of Barriers…, op. cit.* footnote 3 of chapter 2, p.91.

which would have resulted from an ultimately successful judicial action for the possibility of winning future contracts"[743].

It was discussed and put forward at the preliminary stage that firms also fear reaction from authorities other than the one challenged, which may learn of the complaint and try to avoid working with a firm that appears litigious.

Furthermore, during the preliminary stage it was mentioned that fear of retaliation is increased, when the firm is at the same time performing another contract for the same authority, or, in general, when there is an established on-going relationship between the firm and that authority, as a lawsuit would might create frictions that would interfere with performance or sever professional and personal links.

One of the consulted procurement officers maintained that whether the firm feels apprehensive about suing has to do with its relative market power and that a firm with a secure position in the market, which does not depend on business with one authority for its professional prosperity or survival would not hesitate to bring proceedings, if it considers that this is, otherwise, an appropriate course of action. The size of firms may be relevant here: smaller firms often have a smaller business range and may be more dependent on certain contracts from certain authorities to remain in business and thus more apprehensive about losing them.

4.1.5 Outsiders to the market

It is suggested sometimes in literature and was mentioned at the preliminary stage that firms that do not usually operate in the market where the award is taking place (for example, foreign firms or firms usually doing work for the private sector) may be more likely to sue.

First of all, outsiders to the market may not feel apprehensive about the possible repercussions of suing, since they have no business relationships to risk. In their case,

[743] Fernández-Martín, *The EC..., op. cit.* footnote 3 of chapter 1, p.212.

proceedings may be the only way of protecting their rights, since they might not have a good bargaining position to win the contract or negotiate an out-of-court settlement (discussed later), precisely because of the absence of connections. In particular foreign firms, that bid in the country of the award only exceptionally, may have no interest in maintaining a good relationship with the purchaser[744], unless it is probable that another equally interesting contract will be advertised by them. These considerations may, however, not apply to a newcomer wishing to enter and remain in the market, as litigation may harm the firm's professional reputation or impede its building up a clientele. One lawyer suggested during the preliminary consultation that a firm would not wish to be listed as a "troublemaker", before it even starts working.

Secondly, outsiders that do not intend to stay in the market but make the effort of bidding outside their base for a particular contract are more likely to be attentive that the authority abides by the rules[745] and more willing to fight for the contract[746]. In the case of foreign firms, if there is strong evidence of preferential purchasing from national industries in the sector, it might be easier for the foreign firm to prove the breach and win the case.

Still, at least as regards foreign firms, it has been argued that "there is reluctance to start litigation in another country. Doing business abroad is one thing, but entrusting one's case to a foreign lawyer and letting him plead before an unfamiliar court is still a big step for many"[747].

In general, in literature and during the preliminary stage, domestic and foreign firms are contrasted as regards their chances of success in awards and their attitude as regards litigation. Domestic firms often have links with the authorities of the country that foreign firms do not have, as there often is a close working relationship between

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[744] *Ibid.* p.216.
[745] *Ibid.* p.215.
[746] Bowscher, *op. cit.* footnote 58, p. 45: "It seems likely that the most enthusiastic litigants will be larger, multinational suppliers seeking to use the opportunities offered by the directives as a means of expanding their markets".
[747] Bronckers, "Private Enforcement of 1992: Do Trade and Industry stand a chance against the Member States?" (1989) C.M.L.Rev., p.517.

them and officials in local and central bodies and, frequently, the future career of officials depends on national industry[748]. Their connections and influence can often ensure that they stand a good chance of winning contracts. If, for some reason, success in a particular award procedure seems unlikely due to irregularities, it was suggested that domestic firms might nevertheless be unwilling to endanger their relationships with authorities they usually do business for and would therefore not sue them.

4.1.6 The importance of the contract for the firm

It is indicated by some cases[749] and suggested in literature and at the preliminary stage that a firm's decision to sue may also depend on the importance of the contract for it. Thus, the possibility of losing a very profitable contract or a contract that might open up opportunities for further business or, even more, a contract on which the firm's professional survival depends on[750] may lead a firm to litigate, even if it would otherwise have done so, since other factors that may have dissuaded it from suing are in this instance relatively unimportant. Here, high legal costs may act as filter, letting high-value disputes through but catching low-value ones and stopping them from evolving into lawsuits[751].

4.1.7 Out-of-court arrangements

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[748] Martin/Hartley, "Public Procurement in the European Union: Issues and Policies", (1997) 6 PPLR, p.94.

[749] For example, see *Harmon CFEM Facades (UK) Limited vs. the Corporate Officer of the House of Commons*, High Court 28/10/1999. Harmon went into liquidation shortly after the award procedure, where it lost the contract. It was contended by Harmon (paras 330-340 of the judgment) that, if it had been awarded the contract, then its financial position would have been better and insolvency might have been averted.

[750] Akenhead, "What the Judgment Means", (1999) Building (19 November), p.83.

[751] For a reference in general (not procurement related) literature, see Cooter/Ulen, *Law and Economics* (1998) p.342.

A firm may not pursue legal action when it settles out of court with the authority. By settlements or arrangements or agreements (all terms are taken to mean the same and will be used alternatively in this study), we mean all terminations of a dispute (whether it has been brought before a court or not) short of a judgment. Such arrangements do not usually come to light[752]. They may be lawful, for example, corrections of breaches without recourse to the courts or financial settlements, whereby a bidder with a compensation claim may agree with the authority out of court to an amount[753]. They may also be unlawful, for example a settlement whereby the authority promises to grant a future contract to a disgruntled bidder so that he does not take action in relation to the procedure under way[754].

It was suggested at the preliminary stage that the UK is a country where out-of-court settlements are not uncommon and that this explains in part the low litigation rates. It may be that such practice is partly due to the original absence of remedies and therefore to the development of a habit of negotiation between bidders and authorities on a purely informal basis, which has not (yet) changed as a result of the introduction of a review system. The practice may also be attributable to "an ability to resolve amicably any disputes"[755], without recourse to adversarial litigation[756].

Remedies may be used to put pressure for such settlements when the aggrieved firm warns the authority that it intends to use the courses of action available to it, unless a solution is found[757]. Given the risks involved, there may be an incentive for both sides to reach a compromise. Firms often opt for out-of-court bargaining, rather than judicial action, to save legal costs and not engage in unpredictable litigation[758] and

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[752] Arrowsmith, "Enforcing the EC…", *op. cit.* footnote 2 of chapter 5, p.118.
[753] Advisory Committee for Public Procurement, *op. cit.* footnote 34 of chapter 2, p.18.
[754] Arrowsmith/Linarelli/Wallace, *Regulating.., op. cit.* footnote 8 of chapter 2, p. 771.
[755] Arrowsmith, "Enforcing the EC…", *op. cit.* footnote 2 of chapter 5, p.118.
[756] Advisory Committee for Public Procurement, *op. cit.* footnote 34 of chapter 2, pp.17-8: "…the High Court is a very formal, adversarial … forum for resolving disputes".
[757] For a reference in general (not procurement related) literature, see Harris, *Remedies in Contract and Tort* (1988), p.13.
[758] *Ibid.*

authorities usually do not wish to risk their procedures being delayed or their decisions questioned.

It is suggested in literature that the traits of the review system are relevant as far as the firm's likelihood of achieving an out-of-court settlement is concerned. If a contracting authority knows that it runs a serious risk of losing in court, it will arguably be more willing to compromise out of it. On the other hand, the firm might settle easily if is chances at trial are low[759]. Bargaining occurs in the "shadow of law": expectations about trials influence the outcome of pre-trial negotiations[760].

In connection to that, it was mentioned at the preliminary stage that the contracting authority's willingness to agree to a settlement is linked to its assessment of the likelihood of the firm's actually proceeding before the courts: the authority will compromise if it considers that there is a serious possibility of being sued. Thus, the threat of starting proceedings would more convincing in the case of firms with a litigious past record, which shows a proneness to sue, or firms with an exceptional interest in the contract.

Firms may try to put particular pressure for a settlement when they know of past ones agreed to by the authority[761]. However, information of this nature is not generally published[762].

It was suggested in the preliminary stage that firms with a strong market position or an established network of (business and other) relationships may be able to achieve

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[759] In relation to that, it has been argued, in general (not procurement related) literature, that "even modest unpredictability could generate a high rate of settlement if litigants are sufficiently risk averse", Osborne, "Courts as Casinos? An Empirical Investigation of Randomness and Efficiency in Civil Litigation", (1999) Journal of Legal Studies, Vol. XXVIII, p.190 at footnote 12.

[760] For further references in general (not procurement related) literature, see Cooter/Ulen, *Law and Economics op. cit.* footnote 71, p.333. Also, Cooter/Marks, "Bargaining in the Shadow of the Law: a Testable Model of Strategic Behavior", (1982) Journal of Legal Studies, Vol. XI, p.353. Also, Priest/Klein, "The Selection of Disputes for Litigation", (1984) Journal of Legal Studies, Vol. XIII, p.40, argue that judgments "might inform other injured parties that a case is worth bringing or increase their estimates of success and thus their settlement demands".

[761] It has been argued, in general (not procurement related) literature, that the knowledge that the defendant offers high settlements is likely to increase the settlement demands of the plaintiff, Priest/Klein, "The Selection…", *op. cit*, footnote 80, p.40 at footnote 78.

[762] However, experienced lawyers can be expected to have a comparative informational advantage, *ibid* p.12 at footnote 28.

more satisfactory settlements[763]. It was mentioned that this is more likely to be the case of some domestic firms.

Procuring information on out-of-court settlements may be difficult, since parties involved in them might not wish to disclose their existence, circumstances and conditions.

4.1.8 Alternatives to litigation

An increasing number of bidders bring complaints to the Commission[764]. It was suggested at the preliminary stage that, when bidders inform the Commission, they usually do not bring the case before the national courts as well, either because they hope that the action by the Commission will put sufficient pressure on the authority to correct the breach or simply because they do not wish to use national remedies, for any of the above reasons.

It is hinted at in literature and was discussed at the preliminary stage that bidders often prefer to bring their complaint before hierarchical superior or monitoring authorities or bidder representative bodies, for example audit bodies[765] or trade associations[766]. Firms, it was suggested, resort to such bodies because they believe that they could exert pressure on the contacting authority to comply with the rules. Firms sometimes threaten to inform these bodies, in the hope that the authority will prefer to settle the matter with them to prevent them complaining, rather than having to endure scrutiny of and interference with its procedures.

4.1.9 Interdependence of the assumed reasons for firms' abstention from suing

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[763] For an analysis in general (not procurement related) literature, see Harris, *Remedies…, op. cit.* footnote 77, p.13.
[764] Though this appears to be the case, statistics on the exact number and nature of cases are misleading, EuroStrategy Consultants, *Dismantling of Barriers…, op. cit.* footnote 3 of chapter 2, p.88.
[765] "Budgetary controls of the expenses entered into by contracting authorities exist in all Member States. Hierarchical superiors also exert some monitoring powers on the correct use of public money", Fernández-Martín, *The EC…, op. cit.* footnote 3 of chapter 1, p.125.

It is argued by commentators and was mentioned at the preliminary stage that the factors influencing the bidder's decision to litigate are interdependent; that is, the role they play is a combined effect of their own importance and of their co-existence with other factors. For example, a firm's hesitation to sue due to fear of retaliation may be reinforced, where there is no prospect of effective redress[767]. Inversely, if there is an accessible and functioning review system, firms may be less reluctant to litigate[768]. The relative value of each factor should therefore be assessed.

4.2 Formulation of interview questions

As we mentioned, the conducted interviews were semi-structured, meaning that there was no fixed list of an exhaustive number of predetermined questions (as would be the case if they were structured), but that some flexible organisation was necessary. An interview guide was drafted, to help focus the interviews, direct interviewees and serve as a checklist for the researcher that certain points were already examined or that other points still needed to be brought up. The guide covered the areas of enquiry and research questions and was compiled on the basis of the premises mentioned above.

In contrast to the interview schedule[769], which is used in structured interviews, an interview guide does not specify the sequence of questions and allows the researcher to change their phrasing, according to the status of the interviewer (in this project for example, the questions changed between firms, lawyers and public authorities) and the

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[766] United Kingdom Department of Trade and Industry, Public Procurement Review (1994), paras. 103-104, cited in Arrowsmith/Linarelli/Wallace, *Regulating…, op. cit.* footnote 8 of chapter 2, p.772.

[767] In this respect, it has even been suggested that the calculation of damages awarded to aggrieved firms should take into account the risk of being blacklisted to help them overcome their reluctance to sue, Fernández-Martín, *The EC…, op. cit.* footnote 3 of chapter 1, p.214.

[768] Arrowsmith, "Public Procurement: Example…" *op. cit.* footnote 132 of chapter 3, p.140: "The experience in Denmark [where a large number of cases is brought] does seem to indicate that the argument that firms will not be willing to 'bite the hand that feeds' by suing over contract awards may be overstated: it seems to suggest that -although doubtless this argument will be important in many cases- private legal action may nevertheless still have a significant role to play in enforcing the procurement rules under an accessible system of remedies".

[769] Gorden, *Interviewing: Strategy, Techniques and Tactics* (1975), p.74.

development of the conversation. The interview guide used contained therefore an indicative, non-exhaustive list of loosely formulated questions.

The formulation and relevance of the questions were assessed, defined and readjusted throughout the research process and the guide was revised accordingly. This is consistent with the flexible character of semi-structured interviews and the exploratory, non-measurement aims of qualitative research. The respondents' input in the choice and phrasing of questions is very important in exploratory research[770], especially in "the early stages of exploration … [when] the boundaries of relevance [are likely to be] ill-defined and shifting. …As the study progresses, the interviewer gains an increasingly clear view of what is relevant"[771]. For example, unanticipated answers provided leads for further investigation in the same and following interviews and were used to form questions that were not asked in the preceding interviews[772].

Although the interview guide was revisited and added to, its core remained the same. The original draft, on which all subsequent variations were based, is annexed at the end of this study.

The (initial) formulation of questions was based on the following rules.

Three types of questions are used in research interviews[773]: closed or fixed choice questions (yes/no or questions asking the respondent to choose from two or more fixed alternatives), open-ended questions (providing no restrictions on the content or manner of the reply) and scale questions (asking the respondent to measure his view or experience on a scale).

Open-ended questions were preferred here, for the same reasons that qualitative research was chosen over quantitative and semi-structured interviews over structured

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[770] Especially when the respondents have been chosen for their knowledge of the area, they may be better judges of the relevance of questions and scope of the subject than the interviewer, Richardson *et al., Interviewing…, op. cit.* footnote 5, p.133, p.247-249.
[771] *Ibid* p.26.
[772] Asking questions based on unanticipated responses at a late stage of the interviewing process is allowed in semi-structured interviews, Gorden, *Interviewing: Strategy…, op. cit.* footnote 89, p.133.
[773] Robson, *Real World…, op. cit.* footnote 10, p.233.

ones[774]: they are the method best suited at exploring an area, discovering phenomena and their explanations. Fixed choice and scale questions would be inappropriate, as it is "meaningless to produce measurements or qualifications of phenomena whose dynamics are not yet understood"[775]. Such questions list restrictively the possible alternative responses based on assumptions the validity of which, in exploratory research, they should be examining, not asserting; at the outset of the investigation, the researcher generally lacks the information necessary for the formulation of closed questions[776]. Open-ended questions, on the other hand, are not suggestive of any particular answer, within the natural communication limits, and are, because of that, more neutral than the other two types of questions. They are flexible, allow the interviewer to go into more depth, if he chooses, or clear up misunderstandings[777], provide the interviewees with the opportunity to present their own views and can result in unanticipated answers, which may suggest interpretations, implications and connections that were not thought of beforehand. Especially when interviewing an articulate respondent who is well informed on the subject (as is the case here), open questions of broad scope are recommended, to give them initiative and freedom of response; otherwise the respondents may feel that the questioning does not tap what knowledge they can provide and become frustrated at not being allowed to deal with the topic according to their frame of reference[778]. Some closed or fixed alternative questions were included, to clearly accept or refute some of the investigated assumptions or test the consistency of the answers to the open-ended questions.

The phrasing of the questions was as clear, specific, straightforward and non-threatening as possible. Some questions contained information relevant to the answer

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[774] Qualitative research, semi-structured interviews and open-ended questions are associated and are usually employed together in exploratory projects, since the reasons supporting the use of one usually mean that the use of the other is chosen as well.
[775] Voysey, *A Constant Burden: the Reconstitution of Family Life (*1975), cited in Murphy *et al.,* "Qualitative…", *op. cit.* footnote 8, p.114.
[776] Richardson *et al., Interviewing…, op. cit.* footnote 5, p.151.
[777] Robson, *Real World…, op. cit.* footnote 10, p.233.
[778] Richardson *et al., Interviewing.., op. cit.* footnote 5, p.237-238.

as a procedure of aided recall, to help the respondents' memory[779]. Also, special care had to be paid to questions on practices that may be illegal and/or incriminating for the respondents themselves or for others (for example, in the case of lawyers, for their clients), since respondents might be reluctant to divulge related information. To overcome, as far as possible, the said obstacle, such questions were formulated in an open-ended way[780] and often contained what is called "expectations" or "premises"[781]. Expectations are anticipations of the respondent's answer and premises are general assumptions about the content and direction of the answer. These are based on literature or on the respondent's previous answers or comments. They have the effect of relaxing the interviewee, assuring him that others assert the point or admit the practice and motivate him to give his perspective[782]. "An expectation or premise which is correct indicates that the interviewer is knowledgeable about the subject matter of the question and that he can accept the premise or the answer suggested by the expectation calmly and without embarrassment"[783]. The respondent is encouraged to reject the premise or expectation, if it is incorrect. Though a respondent may "accept an incorrect expectation or premise when he is afraid of disagreeing with the interviewer, eager to please or impress the interviewer…"[784], that was manifestly not the case here. In this project, where the respondents were experts with more experience and better knowledge of the area than the researcher (and were aware of it) and were encouraged throughout the interviews to take initiatives and express their views without restraints, they felt free to assess the premises or expectations and reject the incorrect ones.

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[779] Sudman/Bradburn, D., *Asking Questions…, op. cit.* footnote 14, p.36.
[780] *Ibid.,* p.55. The use of open questions means that the interviewer does not need to list the possible answers –which is crucial in relation to practices on which very little is publicly known.
[781] Richardson *et al., Interviewing.., op. cit.* footnote 5, p.241.
[782] Deliberately loading the question by assuming the behaviour is not recommended as a general rule, since it can influence the respondent's answer. It is, however, a good method to improve the quality of answers, when the question can be threatening to the respondent and the anticipated answer would concern undesirable or deviant behaviour, Sudman/Bradburn, *Asking Questions…, op. cit.* footnote 14, p.75.
[783] Richardson, S. *et al., Interviewing…, op. cit.* footnote 5, p.237-238.
[784] *Ibid.,* p.241. However, "the extent to which expectations and premises reduce validity [by suggesting the answer] seems to have been considerably exaggerated".

Questions were formulated both in the abstract and, in interviews with respondents involved in a specific known case, linked to that case, in order to find out what played a role in using remedies in that particular case and why.

5 Conduct of interviews

The interviews were conducted between September 2000 and early December 2000 in the UK and between late December 2000 and March 2001 in Greece. Almost all took place in the respondents' offices. 6 out of the 64 interviews (including the 2 preliminary interviews with the Greek procurement officer and lawyer) took place over the telephone, due to the respondents' full programme and inability to find free time for a meeting within the time limit for the research. Telephone contact brings with it the one-to-one communication associated with face-to-face interviews and, although it forfeits the visual contact, it retains the personal element and the two-way interaction between the researcher and the respondent[785]. Since a meeting was not possible, it was the second best option.

At beginning of each interview, respondents were assured that information collected as a result of the interviews would only be used anonymously as a part of this project. As a rule, interviews started off with general questions on the respondents' involvement in the area and experiences and gradually worked up to the central themes. This approach was followed in order to provide a context as well as a stimulus to the memories of the respondents[786].

The interview guide was memorised[787] and used in the interviews but the exact phrasing of the questions and the order they were asked was varied, capitalising on the responses made[788]. "Missed" topics or topics that were not considered to have been

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[785] Denscombe, *The Good.., op. cit.* footnote 21, p.10.
[786] Gorden, *Interviewing: Strategy…, op. cit.* footnote 89, p.70.
[787] "In some cases, the interview guide, once written, is memorised by the interviewer, so that his questioning appears spontaneous", *ibid.*, p.75.
[788] Robson, *Real World…, op. cit.* footnote 10, p.235.

fully explored were returned to. The stress of questions changed according to the category in which the respondent belonged. The stress when interviewing firms was on the reasons encouraging or discouraging them as regards litigation and on their approach to alternative complaints and arrangements. The stress when interviewing authorities was on how they react to the use of remedies in their procedures and how they approach arrangements. The stress when interviewing lawyers was on the aspects of the review system as well as on general perception and use of remedies.

In qualitative research there is often "quite a large amount of variation in the amount of time that interviews take"[789]. The interviews carried out here lasted between 40 minutes and 2 hours.

Interviews "pose the problem of how to record the information being obtained from the respondents. No foolproof system has yet been worked out to everyone's satisfaction"[790]. Interviews are often tape recorded. However, the information sought in this project was very sensitive and it was suggested at the preliminary stage that the interviewees may feel uncomfortable sharing it, knowing that they are being taped[791]. Nevertheless, since taping is the method that obtains the most complete and accurate rendition of the interviews, the use of a tape recorder was attempted at the first 2 interviews. The first interviewee asked for the interview not to be taped. The second did not object; however, when the recorder was turned off at the end of the interview, he visibly relaxed and continued talking about the subject, giving out more confidential information than when he was being recorded. After that, it was not attempted to record the interviews. Notes were taken throughout the interviewing process and were written up fully as soon as the interview was completed, while the memory of the conversation was still fresh, as this is the best way of ensuring a

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[789] Bryman, A. *Social Research Methods,* 2001, p.322.
[790] Black/Champion, *Methods…*, *op. cit.* footnote 7, p.373.
[791] It is argued that, in general and not only in relation to exceptionally sensitive information, people tend to be intimidated by recorders, *ibid*.

reliable reproduction of the interview[792]. In any event, the *verbatim* reconstruction of interviews is not necessary in this project, since what is sought is the essence of the respondents' views and experiences, not their exact words and phrases. In some cases, when the response was phrased in a particularly interesting way, either because it encapsulated the core of a point or because it was unexpected or non-standard, it was taken down *verbatim* (in longhand).

6 Analysis of answers

Analysis refers to the process of handling information after collection[793], displaying it and drawing conclusions out of it.

In qualitative research, data collection and analysis stages tend to be iterative rather than sequential[794]; they take place at the same time. Moreover, all the stages of data analysis are also concurrent.

The process of analysis was done for each country separately and was the following. The notes on the interviews were transcribed and, in the case of Greek interviews, translated, and simultaneously the cataloguing of the data begun. Data was broken down, emergent concepts and themes were identified and categories were formed, grouping similar incidences and events. The categories refer to factors affecting bidders' use of remedies but include further information on the function and impact of remedies in enforcement, for example, on their preventive power. Connections between the categories were marked and core concepts were signalled[795].

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[792] "…there is almost universal acceptance of the rule that an interviewer's notes should be written up immediately after the interview, if at all possible", *ibid*.
[793] Murphy *et al.,* "Qualitative…",*op. cit.* footnote 8, p.132.
[794] Glaser/Strauss, "Theoretical Sampling", *op. cit.* footnote 27, p.111. That is, besides, the approach of theoretical sampling, that data will be collected and analysed, investigation continued and concepts defined simultaneously, until the theory becomes saturated.
[795] *Ibid.*

The presentation of the results is done for each country separately[796]. The identification of respondents is the following. The initials F, PA and LA mean firm, public authority and legal adviser respectively and are preceded by the initials of the relevant country, therefore UK#F, UK#PA and UK#LA for the UK interviewees and Gr#F, Gr#PA and Gr#LA for the Greek ones. They are numbered, in each category, according to the order in which they were interviewed, starting with the number 1.

It is not acceptable to present the findings based on small samples as percentages, because it can be misleading[797], adding weight to an experience or view actually supported by a very low absolute number of people. However, the number of interviewees supporting the same view is mentioned, to help the assessment of the findings by the reader and to enhance the transparency of the research (transparency is discussed below in connection to the reliability of research). The data are grouped under the identified concepts and categories. The usual ("mainstream") cases as well as the negative and deviant cases are pointed out. Presentation of the findings usually consists in a summary of the participants' views and experiences, and sometimes includes *verbatim* quotations, where the comment is a good account of others' views or, inversely, atypical. It is stated in each case whether the comment is a representation of or a deviation from the majority view. When the opinion of only one interviewee is mentioned, it represents solely his views and experience and not that of all, unless stated otherwise.

When there is no distinction drawn between the categories of interviewees (bidders/authorities/lawyers), it means that answers followed the same patterns in each category, for example that all or most interviewees (in each category) agree on a certain point. When the responses vary between categories, then each category will be examined separately, mentioning the views expressed within it.

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[796] Data on traits of each system such as costs and speed (but not respondents' opinion about them) have been incorporated in the relevant chapters on the UK and Greek remedies.
[797] Denscombe, *The Good..., op. cit.* footnote 21, p. 25.

Our results consist in presenting a picture of the different aspects of the operation of remedies in this area, as drawn by those who are directly affected by them. All premises, hypotheses and assumptions were checked out against the data and some were ruled out, some confirmed, some qualified, while certain points that were not thought of before the empirical investigation began were included. It is attempted to display as much data as possible to show clearly the bases for the conclusions.

On the basis of our findings, we have attempted to compare the operation of two procurement review systems and mark the similarities and differences in how legal remedies are perceived by those concerned. We have tried to explain the differences between the two countries, though comparison of results of interviews "is not possible in the sense of the classic experiment of exposing the same conditions to the same sample of subjects in identical fashion with complete controls"[798].

Our task to contrast the practice in the two countries is made easier by the fact that the research refers to a small specialised area of business activity, with similar actors. Moreover, the area is regulated by EC law and the rules are therefore the same in the two countries. Besides, they both have a judicial review system, where actions are brought before the ordinary courts and following the usual court procedure, since none of them have opted for creating a specialist tribunal, as would have been possible and is the case in other Member States[799]. Furthermore, the review system is entirely new in the UK, but is also new in some of its aspects in Greece, where, although remedies have always existed in the area, the possibility to apply for interim measures was only introduced with the implementing law 2522/97. The only interim measure available before the implementation of the Remedies Directive, the suspension of contracting decisions was systematically refused until 1995[800]. Therefore, the research refers to an

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[798] Cicourel, *Method and Measurement in Sociology* (1964), p.87.
[799] These Member States are, in alphabetical order: Austria, Denmark, Finland, Germany, the Netherlands and Sweden.
[800] Decision 355/95 of the Suspensions Committee, *Intrasoft,* was the first to accept that damages were not an adequate remedy for excluded bidders and that suspension was, under conditions, due.

area that is in many ways a level playing field, where a number of factors are constant, and thus differences can be identified and explained better[801].

Similarities and disparities are made clearer by the separate presentation of results for each country, so this was the method followed. Comparison of the empirical findings in the two countries is found in chapter 10.

The empirical research, from the point of the development of the method to the point of analysis of the results, lasted 18 months.

7 Assessment of the results: reliability, validity and generalisability of the findings

The worth of qualitative research is usually assessed on the basis of whether it is reliable and valid and whether it allows generalisation[802].

Reliability, in the technical sense, as used in research, refers to the extent to which a researcher using the same methods can obtain the same results as those of a prior study[803]. Information is "reliable" or "dependable", when it would remain constant (i.e. be confirmed) throughout multiple examinations[804]. To enable readers and other researchers to examine the reliability of a study, the researcher needs to provide a "decision trail" of the investigation process, of the data analysis and of how conclusions were arrived at[805], which was attempted in this study.

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[801] The similarity of conditions between countries can help the comparison of legal behaviour, see Blankenburg, E., "Civil Litigation Rates as Indicators for Legal Cultures" in Nelken, D. (ed.), *Comparing Legal Cultures* 1997, p.47.
[802] Murphy *et al.,* "Qualitative…", *op. cit.* footnote 8, p.167 *seq*.
[803] LeCompte, M, Goetz, J. P, *Problems of Reliability and Validity in Ethnographic Research,* Rev Educ Res 52 (1982), cited in Murphy *et al.,* "Qualitative…", *op. cit.* footnote 8, p.175.
[804] Sudman/Bradburn, *Asking Questions…, op. cit.* footnote 14, p.301.
[805] Murphy *et al.* "Qualitative…", *op. cit.* footnote 8, p.171.

Validity is the degree of correspondence of the information to the phenomenon or area to which it refers, that is, the extent of accuracy of the data[806]. Judgment of the validity of the research depends upon the assessment of the rigour with which the research has been carried out. Researchers need therefore to provide a detailed record of their methods and of the evidence for their findings and display information with its variations, nuances and exceptions[807], which was attempted here.

Generalisability or transferability refers to whether the results of the research are relevant to groups or settings beyond those studied. Some similarities may exist between different contexts and it is possible that some concepts, ideas or hypotheses have potential of transfer[808]. To enable an informed judgment of whether results can be transferred, the researcher needs to provide "thick", i.e. full, analytic, "rich" description of the original setting[809], which was attempted here.

The aforementioned criteria are valuable but relative, as there are no simple standards that can be applied unproblematically to assess the goodness of qualitative research[810]. In such research, there is no unchanging reality to be used as a benchmark. There are multiple realities, as perceived by different people[811], and therefore subsequent research may produce different results, not because of error but because the represented reality does not exist in one single form. Standards do apply to qualitative research to check the quality of the findings; only, they should be used and judged with caution. Thus, "we can never be sure about the truth of anything"[812] but it is possible to minimise,

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[806] *Ibid.,*p.177.
[807] *Ibid.*, p.iv.
[808] Lincoln/Guba, *Naturalistic Inquiry* (1985), p.236.
[809] Firestone, "Alternative Arguments…", *op. cit.* footnote 22, p.22.
[810] Hammersley, *What's Wrong with Ethnography?* (1992), p.57 *seq.*
[811] "…realities … [may] exist in different forms in different minds, depending on different encountered circumstances and history, based on different experiences, interpreted within different value systems", Lincoln/Guba, *op. cit.* footnote 128, p.236
[812] Hammersley, *Reading Ethnographic Research* (1990), p.59.

though not exclude, the likelihood of error and thus enhance reliability, validity and generalisability. The achievement of these aims is assessed by the researcher and ultimately by the reader, based on the researcher's description. This is a process that involves judgment and the assessment may differ according to the assessor.

The aims of reliability, validity and generalisability (and the related aim of limitation of error of the findings) are best approached indirectly, through techniques which influence the characteristics of the research[813]. The researcher must start the research as much prepared as possible, in order to understand all the answers and their nuances[814]. The research needs to be clear, logical, systematic and well documented and the aforementioned aims be built into its design and execution, taking into account the personal, financial and temporal limits of the project[815].

We will now see the means that we used to improve the quality of this empirical project and assess their role in limiting the risk of error of the findings.

First of all, reliability was sought to be enhanced by the inclusion of reliability checks in interviews, for example, by summarising points made previously by the interviewee and inviting corrections, asking the interviewee to confirm a view expressed earlier or reconcile conflicting opinions, soliciting amplification and clarification when the point made was ambiguous.

As regards validity, it was sought by the choice of the investigation method: in this project, interviews were the most appropriate way of producing information of maximum insight and accuracy. Validity was also increased by informing interviewees in advance of the content of the project, so that they would be prepared to give a complete overview of the relevant practice. Moreover, the aim

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[813] Richardson *et al, Interviewing…, op. cit.* footnote 5, p.258.
[814] Hammersley/Atkinson, *Ethnography.., op. cit,* footnote 29, p.24.
[815] "…reliability and validity are relative and … an extremely high degree of accuracy may be not only unattainable in terms of [the] budget but also unnecessary in terms of [the] study"; Richardson *et al., Interviewing…, op. cit.* footnote 5, p.26.

of validity was built into the way of conducting the interviews, which was flexible in order to allow maximum exploration of the subject (prompting, for example, respondents' initiative and encouraging lengthy or unanticipated answers), but included cross checks to ensure that the information given was as close as possible to reality, as perceived by interviewees (through, for example, reiteration of questions with a different phrasing). To further approach the truth, the interview questions was designed to be broad but clear, not suggestive of particular answers and non-threatening.

Validity of information was besides increased by the sampling strategy and the ensuing variety (professional, national and local) of the respondents[816]. That led to a wide coverage of different aspects of the subject. In such circumstances, convergent findings have a higher degree of validity[817], because when independent pieces of information agree, there is a high probability that they are valid[818]. The respondents' qualifications are also important as regards validity: the more technical the subject matter of the research, the more the respondents' pertinent qualifications will count[819]. As the subject of this project is very technical and specific and the respondents are experts with long experience, their input increases the validity of the data.

Another consideration related to validity is whether the respondents have any reason not to want to give valid answers[820]. Here, participation to the research was voluntary, following an invitation, which laid down clearly the subject and purposes of the investigation and gave assurances of confidentiality. There is no reason to believe that respondents participating on such terms have any motive to distort their answers.

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[816] "…any phenomenon may be understood from a number of different standpoints. … the researcher must be wary of presenting the perspective of one group … while paying scant attention to other perspectives", Murphy *et al.* "Qualitative…", *op. cit.* footnote 8, p.192.
[817] Hammersley/Atkinson, *Ethnography…, op. cit*., footnote 29, p.231-2.
[818] Richardson *et al.*, *Interviewing…, op. cit.* footnote 5, p.130.
[819] *Ibid.*, p.132.
[820] *Ibid.*

Finally, validity was enhanced by the note taking during and after the interviews, the thorough transcription and careful analysis of the notes and findings.

Generalisability in this project was enhanced through the selection of the sample, as it was varied and included the bigger and more experienced members of the total population, thus making it more probable that the concepts and explanations developed here are applicable to the wider population of authorities, lawyers and construction firms involved in procurement.

We have mentioned that this study aims at theoretical generalisation. This is attempted through the generation of theoretical conclusions concerning, for example, interpretations, explanations or patterns of behaviour. Such conclusions may be able to allow for (but not prove[821]) generalisation of the results of the study to the wider universe. The fact that the generalisability of theoretical conclusions cannot be proven does not mean that it does not exist. Proof is not a good (or, in fact, relevant) criterion in qualitative research, because this cannot be subjected to the same degree of control as quantitative research[822].

There was evidence found in this study, offering a theoretical interpretation of bidders' use of remedies and supporting an understanding of the effectiveness of remedies as an enforcement mechanism. The theory, which is discussed further in chapter 10, consists, in short, in showing that the features of the review system are the major factors affecting bidders' approach and influencing the effectiveness of the review system, on their own as well as through their impact on use of remedies.

In choosing the focus of our research, we have chosen to bound the study in a particular way. This project is limited to one procurement sector, construction

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[821] "To generalise [a particular set of results] to a theory is to provide evidence that supports (but does not definitively prove) that theory", Firestone, "Alternative Arguments…", *op. cit.* footnote 22, p.17.

[822] Hammersley, *What's Wrong..., op. cit.* footnote 130, p.107; Murphy *et al.* "Qualitative…", *op. cit.* footnote 8, p.195.

and to two countries. However, within those boundaries, we tried to be as inclusive as possible. On this basis, it is submitted that the results of the study represent relatively accurately the situation regarding remedies in the construction sector and can therefore be extended to the wider population of the sector in the two countries. The theory can arguably also be generalised to all public sector procurement, because there is no indication that the particularities of the construction sector would affect its transferability. It may also be of limited transferability to the utilities sector, where, however, procurement procedures and remedies are slightly different and have not been examined in this study. Further empirical research would be necessary to validate the transferability of the findings of this project to the utilities sector.

We cannot reliably generalise our explanations outside the limits of procurement litigation and draw more general or far-reaching conclusions, for example, on general access to the law in either country or on the relationship between certain procedural features and persons' willingness to use remedies in the abstract. Neither can we extrapolate the results of the research to other countries, either as regards procurement remedies or, even less, as regards legal remedies in general. Nevertheless, the explanations developed here could be used as starting hypotheses to be tested and developed in different settings and areas.

It is argued in literature[823] that research should, apart from the aforementioned characteristics, also be relevant, even remotely, to some public concern, so as to make some contribution to the existing knowledge, either by confirming and complementing what we already know about a topic or exploring new aspects of it. Here, such "public relevance" of the research undertaken consists in exploring an unknown area (use of law in practice in procurement) and in its potential to inform of the issues that may

[823] Hammersley, *What's Wrong…, op. cit.* footnote 130, p.107.

arise any concerned person, for example, anyone belonging to the interviewed categories as well as legislators, scholars and policy makers.

Chapter 8

The function of the procurement review system in the UK

In this chapter we will present the results of the interviews conducted in the UK. As we have said in the chapter on methodology, the findings are grouped in categories that concern factors influencing bidders' use of remedies but also provide more general information on the function and impact of remedies in enforcement. Data are presented by summarising the participants' views and experiences, including, in some cases, *verbatim* quotations. We will mention the number of interviewees agreeing on a point to allow assessment of the conclusions drawn. Interviewees, as we have mentioned in the chapter on methodology, are identified as follows: UK#F for firms, UK#LA for legal advisers and UK#PA for public authorities. They are numbered, in each category, according to the order in which they were interviewed, starting with the number 1. The personal pronoun "he" is used for all interviewees irrespective of their real life gender.

The chapter is divided into 5 sections, each representing a group of factors affecting firms in a similar way as regards the use of remedies. The first section examines factors that encourage litigation, the second examines factors that discourage firms from litigation, the third discusses how the size and market position of the firm influence its decision to sue, the fourth concerns special circumstances, which affect the use of remedies, and the fifth discusses the impact of the UK legal culture on the use of remedies.

SECTION 1

FACTORS ENCOURAGING FIRMS TO LITIGATE

1 Chances of winning the case

17 interviewees (all 4 firms and 13 lawyers) said that firms would consider litigation when they think that they have good chances of winning the case. According to 11 interviewees (all 4 firms and 7 lawyers), firms believe that their chances are good, especially when the case concerns a blatant breach or obvious discrimination, as they easy to detect and prove at trial. Also, according to 4 lawyers, in such cases, judges would normally be convinced to grant relief. The interviewees described, as obvious discrimination, instances of evident unfair treatment directed at the firm, where, as UK#LA8 put it, "a clear and deliberate bias, a desire to exclude can be shown, as was the case in *Harmon*".

3 lawyers said that firms consider suing, in particular, when the breach is not only obvious but also systematic. The 3 lawyers said that systematic breaches are regular (i.e. not one-off) breaches, which form part of a consistent and deliberate contracting policy, as for example when the authority consistently awards contracts only to national or specific firms.

18 interviewees argued that most of the breaches of the procurement rules that occur in the UK are not blatant and that even fewer are deliberately discriminatory and that, therefore, firms will not be often willing to proceed, at least on this ground.

2 Emotional litigation

3 firms and 8 lawyers said that firms sometimes decide to proceed when they are upset by what they consider to be a clear or deliberate irregularity. Litigation is, in this sense, an impulsive or emotional reaction to a perceived injustice and is a result of "a feeling of moral outrage", as UK#LA8 described it.

9 interviewees said that emotional litigation is, first of all, related to the nature and extent of the breach, in the sense that the more blatant the breach the bigger the outrage. According to the interviewees, firms are not likely to take action against breaches that are due to confusion or ignorance.

6 interviewees maintained that firms would, in particular, take action against a perceived breach that they believe is targeted specifically at them, because they feel that they have been treated badly deliberately and they want to react. In this respect, UK#LA11 mentioned a case where the authority promised to the firm that it would stop the award procedure until the queries concerning alleged irregularities were answered and possible disputes were cleared, but failed to keep its promise and proceeded with the award. The firm took action as a result.

Also, according to 4 interviewees, emotional litigation is often engaged into by firms that depend on winning the contract for their professional survival. The interviewees said that this is especially the case of small firms.

Finally, 2 interviewees said that emotional litigation is sometimes the result of animosity between two bidders, where the one believing that it may lose unfairly sues to prevent, if possible, the other winning irregularly.

3 Conclusions of Section 1

According to the majority of interviewees, firms consider taking action usually to react to cases of blatant breaches, either because they believe that, in such cases, they have good chances of winning at trial or because they wish to react to what they consider to be obvious unfair treatment.

SECTION 2

FACTORS DISCOURAGING FIRMS FROM LITIGATING

1 Legal costs

1.1 The amount of legal costs

As we have seen in chapter 5, it is not possible to give anything other than a very rough estimate of lawyers' fees, as they depend on the remedy sought, on the complexity of each case and on what each lawyer charges. Pre-trial advice from a solicitor would cost at least £10,000, if the case is relatively complex. Interim measures cost between £50,000 and £100,000, whereas a full case (tried, with both solicitors and barristers employed) could cost up to £3-4 million. Cases that are brought and consequently abandoned can cost any amount in between. We have also seen that practitioners do not usually accept conditional fees arrangements. Filing costs (for lodging the action) are, according to the practitioners, insignificant.

1.2 The impact of legal costs

All firms and almost all lawyers maintained that legal costs are the foremost consideration when a firm contemplates litigation. They all said that they are extremely high and constitute possibly the most important disincentive for firms wishing to sue. As 5 interviewees pointed out, in some cases, the estimated costs may equal or sometimes exceed the profit expected under the contract.

15 interviewees said that high legal costs are especially discouraging, since firms are unsure of their chances at trial. UK#F3 said, in this respect, that "costs are certain, while relief is unlikely".

Furthermore, 10 interviewees said that legal costs are particularly discouraging when the firm is uncertain of its chances to win the contract. When the firm is not one of the front runner candidates to the contract, for example if their price is in the middle of the range, it often decides that it does not make sense to spend money on litigation. Firms' usual approach is, as UK#LA18 described it, that "it is not sensible to throw good money after bad".

9 interviewees also mentioned that the possibility that the court orders the unsuccessful party to pay the other party's legal costs further discourages firms from bringing proceedings.

6 lawyers mentioned that the fact that, in applications for interim measures, the applicant can be asked to give an undertaking in damages is an additional financial disincentive[824].

2 firms and 5 lawyers said that small firms in particular cannot afford litigation. 6 interviewees said that small firms can ask their trade association to help them financially in order to be able to litigate[825]. However, they maintained that trade associations would only do that, if they considered that the case concerns a point of general application and a court decision would be useful for the sector, for example, if the firm intends to challenge systematic discrimination. According to 4 interviewees, it would be difficult to convince a trade association to finance a firm to litigate.

1.3 Conclusions

[824] It is however questionable if the obligation to give an undertaking is still valid after the *obiter* in *Harmon,* where the judge questioned the compatibility of this obligation with EC law principles.
[825] As we have seen in chapter 5, associations do not appear to have standing to bring a case themselves.

Legal costs are very high and often not affordable, especially by small firms. All interviewees mentioned that they constitute a major disincentive.

2 Ignorance of the substantive and procedural law

2.1 Incidence

According to 13 interviewees (2 firms, 8 practitioners and 3 authorities), firms often ignore the substantive rules and their rights under them (and, therefore, are unaware that they may have grounds to bring a complaint, should they wish to do so) as well as the available remedies.

According to 10 interviewees, knowledge of the rules is, first of all, a question of experience. Thus, firms with a large experience in public contracts awards are more aware of their rights.

Secondly, according to 8 interviewees, awareness depends on the legal advice that the firm receives. 8 interviewees maintained that firms often do not receive any legal advice during awards, unless their in-house lawyers are instructed to monitor closely the procedures the firm participates in. Firms often think it is not worth to spend time and money to seek legal advice on awards, to find the grounds and remedies they may have against the authority. 3 lawyers said that firms sometimes think that they can solve any problems that may arise without the help of lawyers.

4 interviewees said that small and medium sized enterprises, in particular, only exceptionally ask for legal advice. They are, for this reason, more likely to ignore their substantive and procedural rights. UK#LA11 said, in this respect, that it is, however, also a question of experience in awards and interest in finding out about

the law and that "there are small firms that know a surprising lot about procurement".

5 practitioners maintained that another reason for firms' lack of acquaintance with the rules is that the quality of legal advice that firms do receive is not always good. Especially when they use their in-house lawyers, they risk receiving information that is not accurate, since in-house lawyers are (as we have seen in chapter 5) often not specialised in procurement and thus not competent to deal with related disputes.

2 lawyers in the UK and 3 lawyers working in Brussels said that even external lawyers in the UK often do not have sufficient experience in procurement and/or are not up to date with developments in procurement law, as there are not very many specialised law firms and lawyers handling procurement cases are sometimes competition law specialists. Thus, according to them, firms are often not advised well. The 3 lawyers maintained that lack of specialisation is due to the fact that, unlike Belgium where they were based and other (not mentioned) Member States where they had worked, procurement rules and remedies are relatively new in the UK and practitioners have not built up an expertise. They also mentioned that, in the UK, procurement is not a module taught in undergraduate law studies and rarely offered at postgraduate level and, thus, lawyers have not generally had adequate legal training.

10 interviewees said that, independently of how familiar firms are with EC procurement and in spite of their eventual lack of consistent and sound legal advice, they nevertheless know in the abstract that they have rights and remedies, even though they may not know exactly what these are. UK#LA8 said in this respect that "managers or engineers may sometimes ignore what remedies are available but they assume that some remedy must exist". Therefore, if they identify a breach or suspect that a breach may have occurred, they would ask to be informed of their options, when they are seriously considering taking action,

though, as we will see below, they may do so too late to be within the time limit of starting proceedings.

2.2 Conclusions

Many, though not most, interviewees mentioned that firms sometimes do not start proceedings, because they ignore their substantive and procedural rights. This may be due to their lack of experience in procurement or to the fact that they do not receive legal advice or the advice they receive is not accurate, because practitioners (especially in-house lawyers) often lack procurement training and expertise. The point about the lack of sufficient training and expertise of UK practitioners was mostly raised by UK solicitors working abroad, who have experience of other Member States.

According to several (but not most) interviewees, firms would probably seek legal advice, when they feel that their rights may have been violated.

3 The review system

We have examined the UK review system in chapter 5. Here we will examine how some of its aspects may discourage firms from suing, as revealed in the interviews.

3.1 Time limits

3 lawyers said that a firm, unless it has instructed lawyers to monitor the award from its beginning, may take some time to realise that a breach may have occurred, ask for legal advice on its rights and remedies and, eventually, take action. According to the 3 lawyers, this is because the "procurement people" in

firms are generally engineers with no real grasp of procurement law. They are, for this reason, usually unable to take swift decisions on their own, but need to be briefed first on their options by a lawyer. The procedure of deciding, asking for and getting advice is sometimes long and, according to 2 lawyers, it can be rendered lengthier by the fact that there may be communication problems between legal advisers and engineers. UK#LA12 said, in this respect, that "engineers, who are not well versed in procurement, do not always understand the issues put to them by their lawyers" and need time to process the information they receive.

The 3 lawyers pointed out that, if time is lost in the aforementioned way, when firms eventually decide to take action, they may find themselves outside the procedural time limit, which requires actions to be brought promptly and in any case within three months after the grounds for bringing the case first arose[826].

3.2 Access to information on the case

10 interviewees (3 firms and 7 practitioners) maintained that it is difficult to gain access to documents and information concerning the award, for example related to the assessment of the firm's bid, its rating and position in relation to the other bids. However, most (7) interviewed authorities said that they de-brief firms thoroughly[827].

The 10 interviewees said that, without solid information and some evidence, firms do not know if they have a case and most would not risk litigation, even if they suspect that the procedure is irregular.

4 interviewees said that, if firms have contact people in the authority, they may be informed on the conduct of the procedure and eventually provided with

[826] As we have seen in chapter 5, promptness may be interpreted to mean that proceedings should be instituted even before the three months are up.

relevant documents. According to UK#LA6, these contacts give out information and evidence either because of professional or personal links with the firm or because they are being paid by it.

3 interviewees said that if a firm has information on the award (either through contacts or not), which it feels is reliable and sufficient to base an action on, but does not possess evidence of the breach, it can institute proceedings and ask for specific disclosure of the relevant documents or memoranda that public bodies keep during the award[828]. Otherwise, if the firm feels unsure as to the existence, accuracy and proof value of the information it has, the 3 interviewees maintained that it would hesitate to sue, because it would be a very expensive course of action of a doubtful result. A firm can always ask for pre-action disclosure[829]; however, according to 4 practitioners, it is difficult to get a court order for it. 3 interviewees pointed out that, when information is acquired through inside sources, firms sometimes hesitate to ask for pre-action or specific disclosure of documents, the existence of which they learned informally and probably unlawfully, because they would risk revealing their way of getting information and their sources.

4 interviewees said that the possibility of asking for disclosure is limited by the fact that any documents issued by authorities' external legal advisers would be

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[827] See the discussion on de-briefing below.

[828] Part 31 ('Disclosure and Inspection of Documents') of the Civil Procedure Rules sets out rules about document disclosure (a statement by a party disclosing that a document related to the case exists or has existed) and inspection (the right of the party to whom a document has been disclosed to inspect that document). The court may order a party to give standard disclosure, that is, to search for and disclose documents on which that party relies as well as documents which adversely affect his own case or another party's case or support another party's case (31.6). The court may also order specific disclosure or specific inspection (31.12), which is an order to a party to disclose (and/or allow the inspection of) documents specified in the order or to carry out a specified search and disclose the documents located as a result of it (31.12(2)).

[829] Part 31.16 of the Civil Procedure Rules provides for the court's powers to order disclosure of specified only documents before proceedings start. The application must be supported by evidence. The court will only make an order, if the applicant and respondent are likely to be parties of subsequent proceedings, if the documents, the disclosure of which is sought, would be covered by the definition of relevant documents in standard disclosure and if disclosure is desirable to dispose fairly of the proceedings. Whilst the first three conditions (evidence, applicant and respondent to be parties in subsequent proceedings and relevance of documents to the case) are only minimum conditions to ensure the there will be proceedings and the documents will be relevant to them, the fourth condition (desirability of pre-

covered by legal privilege and cannot be disclosed. However, according to 6 interviewed authorities, most bodies use, in awards, their own legal departments, the advice of which is not privileged.

3.3 Unpredictable outcome at trial

All firms and virtually all practitioners said that a serious reason of firms' avoiding to litigate is that the outcome at trial is unpredictable.

8 interviewees maintained that this unpredictability is partly due to the existence of grey areas in the law, which makes it difficult for firms and their lawyers to predict the interpretation that the judge will follow. 10 interviewees argued that the unpredictability is also due to the fact that procurement remedies are still relatively new and, therefore, not enough time has elapsed for the development of clear and sufficient case law, especially, as they said, since very few cases are brought and tried. In this respect, 7 interviewees maintained that there is creates a vicious circle, in the sense that lack of cases and case law adds to the unpredictability of the trial outcome and this in its turn prevents more cases from being brought and so forth. The 7 interviewees said that if there is more case law in the future clarifying the applicable rules, this may prompt more actions.

Almost all interviewees said that, as the situation stands now, the uncertain (or, in the words of 2 firms and 2 lawyers, "speculative") outcome of litigation discourages firms, as they usually not willing to start very expensive proceedings, not knowing what they stand to gain. As UK#LA6 put it, firms do not usually sue "on the off chance that they might get relief".

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action disclosure to dispose fairly of the anticipated proceedings) gives the court a wide discretion, which it may choose to exercise to refuse to grant such an order.

5 interviewees maintained that firms are especially hesitant, when they do not know whether they stand a good chance to win the contract, in particular if the procedure is still at its initial stages. The combined effect of the unpredictability of the outcome of the award and of the trial puts firms off litigation. The 5 interviewees said that firms may consider suing over a contract that they look likely to win, but not over every contract where they suspect that a breach has occurred.

3.4 Low chances of winning

Almost all interviewees mentioned that firms are put off by the difficulty of winning the case; as UK#LA8 put it, firms are discouraged by "the sheer complexity involved in assembling the evidence and legal arguments to show material breach, material disadvantage and, in the case of damages, quantifiable financial loss". They said that the conditions for obtaining relief are very stringent and judges appear, for the moment, unwilling to relax them. Almost all interviewees said that firms avoid litigation as a result, except in the most flagrant of cases.

We will examine what interviewees said for each remedy separately.

First of all, as regards interim measures, most interviewees maintained that the case law hurdles are very difficult to overcome. 10 interviewees mentioned that interim relief would normally be refused on the ground that damages can adequately compensate the sustained harm[830]. Furthermore, 6 lawyers maintained that the balance of convenience would be decided in the authority's favour, as judges do not wish to hold up contracts. 3 lawyers said that this is especially the case in specific sectors, for example in the health sector, where, they maintained, injunctions would almost surely be refused on grounds of public

[830] However, it is debatable whether this still stands after the *obiter* in this respect in *Harmon*.

interest. As a result, firms are not optimistic about their chances of obtaining interim measures and do not apply for them.

As far as set asides are concerned, most interviewees argued that they are not likely to be obtained either. First of all, 5 interviewees said that, due to the existence of grey areas in the law, it is difficult to prove that the authority has acted unlawfully. According to 15 interviewees, any case other than based on a flagrant irregularity (which, we have seen, interviewees consider rare) would normally be lost and, for that reason, firms would generally start proceedings only in such blatant cases.

Furthermore, according to 8 lawyers, judges wish to avoid tackling difficult cases, for example cases that are technical or complex because they feel that they lack sufficient knowledge and expertise. Judges also wish to avoid cases that have wide financial implications or are politically sensitive or involve questions of public policy. For these reasons, judges sometimes (or usually, according to 3 of the lawyers) use their discretion (for example, by refusing extension of time limits) to reject such cases rather than rule on their merits.

Lastly, 8 interviewees said that the likelihood of setting aside contracting decisions is limited by the fact that judges will not normally review the way authorities use their discretion, for example in assessing technical matters. Judges believe that such review is outside their authority and also, according to 4 interviewees, they are alive to the fact that they would cause controversy if they second-guessed discretionary decisions. 6 interviewees mentioned that, in any event, authorities always find plausible reasons for their decisions and, as UK#LA6 said, "cover their tracks". This is made easier by the fact that most contracts are awarded on a most economically advantageous tender basis, where the discretion of the authority is wider than when the contract is awarded to the lowest bidder. Thus, firms are aware that they are unlikely to succeed at trial unless the authority has no discretion at all or the decision is flagrantly irregular.

However, according to 2 firms and 10 practitioners, all parties involved in procurement are against courts' scrutinising discretionary contracting decisions. The authorities dislike interference with their procedures, while firms and their advisers are aware that if, in a particular case, second-guessing the decision could result in success at trial for them, in other cases it would work against them –for example, when they are the likely winners. Therefore, according to 1 firm and 3 lawyers, firms would hesitate to bring cases alleging that the authorities have misused their discretion, because they do not want to prompt similar judicial interference in future awards.

As regards damages actions, 8 interviewees said that the difficulty of proving that the firm has suffered loss and of quantifying this loss is almost insuperable in most cases and that firms would only start proceedings in exceptional cases. Though 2 central authorities and 4 lawyers mentioned that the precedent of *Harmon* probably made a difference, 1 firm and 6 lawyers dismissed it as a virtually one-off case and one without any impact.

3.5 Conclusions

Almost all interviewees mentioned that the unpredictability of the trial outcome and the usually low chances of winning the case are important reasons that dissuade firms from bringing actions. Firms would probably only proceed if they have a case of flagrant breach, where it is easier to prove the firm's allegations, convince the judge and win the case. The difficulties of having access to information and documents on which to base a case also discourage firms; that point was mentioned by many but not most interviewees. Only 3 lawyers said that the time limits may bar some actions, when firms do not act swiftly.

4 Lawyers' advice

4.1 Impact on litigation

12 interviewees said that whether firms sue is also related to how litigation is presented to them by their legal advisers and whether it is made to appear worthwhile. They maintained that lawyers' usual response to clients' questions as to the advisability of litigation is that it is ineffective and sometimes counterproductive, for example, when there is a risk of the firm being blacklisted as a result. Only if the case appears to be easy, for example, if the breach is obvious, would the firm be advised to proceed.

The 12 interviewees maintained that lawyers advise against suing, basically for reasons of professional integrity: clients are entitled to be informed that procurement litigation is expensive and rarely successful. 3 lawyers said that, in their case, they also advise against suing, because they do not want to disappoint firms by losing a case for them (which they know is not unlikely), as they might lose them as clients. 2 lawyers said that they do not, besides, want to have lost cases in their record, because they do not consider it beneficial for their professional reputation. Finally, 2 lawyers mentioned that big law firms have sometimes personal links within the authorities, which help them negotiate informal arrangements for their clients, and that they do not want to jeopardise such links through suing.

10 lawyers said that firms' approach to litigation is, in any event, negative, and that their lawyers' usually negative stance only reinforces any initial hesitation. 5 lawyers said that, in their experience, even when they advise firms to sue, firms rarely take this advice, because of the costs and because they are afraid of being blacklisted.

4.2 Conclusions

Firms are often advised against suing by their lawyers, but they usually also have a negative opinion of litigation themselves. This point was mentioned by many but not most interviewees.

5 Fear of retaliation

Authorities or firms sometimes try to retaliate against a firm that has taken legal action. We will discuss the reasons that may cause authorities and firms to retaliate, the forms their reaction can take, the occurrence and frequency of retaliation and to what extent it is a factor influencing firms' approach to litigation.

5.1 Retaliation from authorities

All interviewees said that authorities are inconvenienced by litigation and wish to avoid it as much as possible. Litigation is costly, delays awards and interferes with the authority's contracting decisions. 13 interviewees (3 firms and 10 lawyers) also pointed out that officials sometimes feel personally antagonised by firms' challenges of their decisions. UK#LA6 said in the respect that "public bodies are staffed by individuals and individuals tend to take challenges against their decisions personally". In short, sometimes litigation creates tension and even animosity in the firm's relationship with the authority, which may try to translate this animosity into action, by taking measures against the firm.

The interviewees did not entirely agree on the extent and frequency of authorities' reaction to legal actions.

Almost all of the interviewed authorities said that they prefer to give contracts to firms that they have already worked with and from whom they have not had any complaints, at least in the form of legal actions, because they feel that they can work well together. 5 interviewed authorities said that they would avoid, as far as possible, to award contracts to firms with a litigious record (as UK#PA6 put it, "claim-conscious firms"). The 5 authorities said that they try to exclude such firms, because they consider that are likely to litigate again in the future and thus cause unwelcome interference, delays and expenses. As far as legal costs are concerned in particular, UK#PA6 said that they try to avoid litigious firms, even if their bid is the cheapest, because, if they do litigate, they will prove to be expensive in the long run. The 5 authorities mentioned that they would try to exclude not only firms that have sued them but also firms that have sued other authorities, because they consider that they are litigation prone and likely to cause trouble. 8 authorities said that there is a

network between awarding bodies, whereby they inform each other of disputes that have arisen in their procedures.

All interviewed firms and 8 lawyers said that there is no evidence on the existence or operation of blacklists but they believe that they exist. They also believe that authorities pass information to each other on firms that have taken legal action, ensuring, as UK#LA5 put it, "that litigious firms will be spotted across the country". According to 5 interviewees, this network of information exists in particular in sectors where firms and authorities all know each other and, as UK#LA16 said, "troublemakers can get easily named", for example in construction. 7 lawyers mentioned that there are, to their knowledge, certain authorities that consistently try to exclude from their procedures firms that have litigated against them and that they had cases were their client was indeed blacklisted.

Only 3 lawyers said that, since there is no evidence of blacklisting practices, all that is said is speculative and probably untrue. One of the 3 lawyers, UK#LA11, said, in this respect, that "authorities know that firms have rights and expect them to use them" and thus do not react to litigation. Another lawyer, UK#LA13, said that "public authorities, central bodies in particular, consider legal actions as part of their job" and do not view them as a personal affront. UK#LA13 said also that "most authorities have tight budgets and cannot afford to reject the lowest bid to punish the firm".

The interviewees described three basic ways in which authorities retaliate when they decide to. First, according to 12 interviewees, they try to exclude the firm at a later stage of the current procedure. Secondly, 6 interviewees said that if the authority does not manage to exclude the firm and this eventually wins the contract, the authority may be exaggeratedly strict during performance. Lastly, 20 interviewees said that the authority may try to exclude the firm from its awards in the future. They maintained that authorities that have had problems with a firm in the past can easily work reasons to exclude that firm in the selection criteria.

Virtually all interviewees agreed that, independently of whether the fear of being blacklisted is founded or not, it is one of the major causes of litigation avoidance.

All 4 interviewed firms, none of which has ever taken legal action, said that they have had complaints but have preferred not to sue and one of the basic reasons for that was that they were afraid of retaliation. UK#F3 said that it is not certain that blacklists exist but "one cannot be too cautious". UK#F4 said that "firms must show prudence", while UK#F1 argued that "even if you win a particular case, you may lose the war" in the sense of long-term harm to business. UK#F2 said that legal action may "brand a firm as litigious" and ruin its chances for future business. All firms said that if they have a complaint, they prefer to arrange it informally.

Almost all lawyers and authorities also said that firms are afraid of being blacklisted and that, even though they are not sure that authorities would retaliate, they refrain from suing, "just in case", as UK#PA7 said. 6 interviewees pointed out that, besides, if the firm sues, there is no guarantee that it will win the case or the contract. UK#LA11 said in this respect that "the only certain thing is that the firm will earn itself a bad reputation", since "there is nothing worse for the market than to stop a procedure moving".

Various factors influence the extent to which the possibility of retaliation affects firms' decision to sue. All 4 firms and almost all interviewed authorities and lawyers said that firms consider carefully whether it is worth maintaining a good relationship with the authority, in view of its financial capacity and future work likely to be advertised by it, and would only consider suing if there appears to be no prospect of bidding again for that authority. The interviewees maintained that in particular awarding bodies with a large buying potential are sought after clients and bidders often do not pursue legal action against them to remain in good standing for future projects. Also, 15 interviewees said that firms are careful not to upset on-going relationships with authorities with whom they work regularly, as they consider it important to keep business contacts that they have established. Furthermore, according to 2 firms and 3 lawyers, firms working for the private sector might not take action so as not to appear litigious or aggressive to private clients either[831]. 2 firms and 4 lawyers also mentioned that firms consider that litigation can create an atmosphere of lack of trust, which may cause problems in performance, if they win the contract.

3 lawyers based in Brussels said an instance of unfair exclusion shows that the authority, first of all, does not hesitate to violate the rules and, secondly, possibly has a preferential arrangement with some other firm, which it may repeat, unless

someone is willing to take a stand and challenge its conduct. They opined that fear of retaliation is absurd, since abstention from litigation does not guarantee firms that they will be treated better in the future and, in fact, may have the contrary effect of allowing the discrimination to subsist. The 3 lawyers said that they advise clients that have been discriminated to sue. They maintained that that they have a friendlier approach to litigation and are less sensitive to its negative side effects than lawyers living and working in the UK, due to the fact that they have experience in awards in other (not mentioned) Member States, where litigation is not an unusual reaction to an injustice. However, they said that firms everywhere often do not sue, because they are afraid that litigation may harm business.

5.2 Retaliation from other firms

According to 1 firm and 4 lawyers, firms often wish to be on good terms with each other, because they are either partners in other contracts or are aware of possibilities of working together in the future as part of a consortium or through subcontracting. The interviewees said that firms are sometimes afraid that litigation may harm their relationship with actual or potential business partners, when their challenge endangers these firms' chances to win a contract, and that they, thus, sometimes refrain from suing for this reason.

5.3 Conclusions

Almost all interviewees mentioned that fear of retaliation by authorities is a major reason why firms are unwilling to litigate. It is interesting that, though firms are often

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[831] UK#F1 said, in this respect, that firms do not litigate to project a non-aggressive image, but that, otherwise, litigation against a private client is a "non-issue, because you can negotiate the terms of the contract until you arrive at a mutually acceptable position".

not sure of the existence or extent of retaliation, they are unwilling to risk business in any event. Fear of retaliation by other firms was mentioned by only 5 interviewees as a reason of litigation avoidance.

6 Decision to move on

Firms often do not litigate, because they believe that the resources needed for litigation are best used elsewhere and because they consider it natural to lose some of the contracts they bid for.

6.1 Time and work management

17 interviewees (all 4 interviewed firms and 13 lawyers) said that both managers and, sometimes, in-house lawyers are involved in taking the decision to sue. If the case is handled by external lawyers, the firm provides information and documents, monitors the lawyers' billing of hours (to control the costs), is regularly debriefed and is involved in any decision concerning the development and continuation of litigation. Thus, the decision and process of suing takes up a lot of resources, in terms of time and man power, which, the 17 interviewees said, firms often feel that could be best spent elsewhere. The interviewees said that firms prefer to concentrate on their current work or future business opportunities rather on litigation and prioritise bidding for other contracts over suing for lost ones.

6.2 Losing contracts as a natural business risk

All 4 interviewed firms and 14 lawyers mentioned that firms expect to lose some of the contracts they bid for and that, therefore, would not normally sue over one they lose, even if they could conceivably find grounds to complain. They said that firms

try to regard their failures as "a learning experience" (as UK#F1 put it): they try to find out what they did wrong so that they avoid repeating it but would not, otherwise, dwell on a lost contract, unless it is one that the firm particularly wishes to win. 2 firms and 5 lawyers said that most firms bid, in fact, for more contracts than they can undertake, expecting to lose some; UK#LA7 estimated that firms aim to win roughly a quarter of the contracts they bid for. 2 firms and 5 lawyers said that firms do not attach special importance to one contract, as "the market is buoyant" (in the words of UK#LA17) and "there is enough work to go around" (as UK#F1 said), which means that eventually firms will get a share of the work without having to resort to litigation. 1 firm and 2 lawyers said that, especially if the body is systematically unfair, firms would prefer to move on and not bid again for contracts tendered by it, rather than try litigation.

The majority of interviewees said that the only instances where firms would not be philosophical about losing are cases of flagrant discrimination or exclusion from a contract they particularly want, where they may consider taking action.

6.3 Conclusions

The majority of interviewees said that firms often do not consider it worthwhile to spend time and energy pursuing an action of uncertain outcome and view losing contracts as part of business. They would only sue in exceptional cases and not every time they can find a possible ground to base an action on.

7 "Clean hands" of the bidder

7.1 Impact on litigation

If a firm has participated in the breach, for example, by taking part in negotiations not allowed under the law, it cannot sue without revealing its involvement. 2 firms and 4 lawyers maintained that there are cases where firms wish to sue the authority at a later stage of the procedure but cannot do so, as they would expose their own unlawful behaviour. However, most interviewees did not consider that the "clean hands" of the firm, though a concern, is a crucial factor of litigation avoidance.

7.2 Conclusions

Firms may be prevented from suing because their own behaviour has been unlawful, but it is not a major concern. It was a point made by few interviewees in any case.

8 Alternatives to litigation

Sometimes firms decide to react to an irregularity through channels that do not involve litigation. Here we will discuss the use of alternatives to litigation in the UK, both of those envisaged or allowed by the law (complaints to UK auditing and supervising authorities, complaints to the Commission) and those not envisaged by or even contrary to the law (use of the media and of politicians, arrangements with the contracting authorities). In each case, we will discuss the effectiveness of that option and whether it can and/or does function as an alternative to litigation.

8.1 Complaints to audit bodies and supervisory government departments

8.1.1 Their effectiveness and use

There is an audit trail to ensure that public bodies award contracts efficiently. The National Audit Office (NAO) audits the accounts of all government

departments and agencies and the Audit Commission those of local authorities and health service bodies. 10 interviewees (the 4 firms and 6 lawyers) mentioned that when a firm feels that its rejected bid was the best in terms of value for money, it may try to draw the NAO's or the Audit Commission's attention to the case. If the procedure is found to be inefficient, in the sense of overspending public money, the audit bodies may put pressure on the authority to change its decision (if the contract is not yet awarded) or at least to be more careful in future awards.

The 10 interviewees mentioned that auditors cannot, however, control the use of the authority's discretion on technical matters, which means that, in practice, auditors will often be unable to find fault with the authority's conduct of the award. The interviewees said that almost all contracts are awarded to the most economically advantageous tender, which involves technical decisions, made by the officials in charge of procurement within the authority, usually engineers. Auditors are not engineers and have neither the knowledge nor the power to scrutinise such decisions. Therefore, the authority's assessments remain to a large extent uncontrolled, as long as the authority is careful to show that they do lead to the most advantageous option. The interviewees said that, if the authority is in bad faith, it will "always find a way to skew selection criteria" (as UK#LA17 put it) and that auditing is in these cases useless.

The 10 interviewees said that firms do not consider complaints to audit bodies as real alternatives to litigation; they hope that their intervention (or threat thereof) will enhance compliance and minimise breaches in the future, thus reducing cases where they would want to take action.

Award procedures of public bodies can also be scrutinised by government departments responsible for supervising or funding them. The Treasury, which issues the Budget and decides on the allocation of public spending, and the Department for Transport, Local Government and the Regions (DTLR), which,

among other tasks, provides funding for local government and controls their finances, have a monitoring role to ensure competence and efficiency in awards tendered by central government and local authorities, accordingly.

15 interviewees mentioned that if the Treasury and the DTLR are informed of breaches leading to inefficient (i.e. not value for money) procurement, they may try to put pressure on the authority to correct them or at least to be compliant in future procedures, if the current award has been completed. Such pressure would be informal and off the record, since government departments have no formal powers of intervention in awards. If they do act, however, their intervention is often successful. According to the 8 interviewees, contracting authorities do not welcome interference in their work and are afraid of budget cutting, if they are found to use funds inefficiently, and therefore would try to correct irregularities and to minimise such mistakes in the future.

10 interviewees (all 4 firms and 6 lawyers) said that, while it is not certain if the Treasury or the DTLR would take action once contacted, it is worthwhile to try. They mentioned that such complaints often generate some reaction, if the two government departments are convinced that breaches lead to overspending. 3 interviewees said that the departments are more likely to take action when the firm has personal contacts in them.

The 10 interviewees said action by the Treasury or the DTLR can function as an alternative to litigation, if the department intervenes before the procedure in relation to which the complaint arose is completed and the irregularity is corrected. They maintained, however, that it is not usual the two departments can achieve much in an award already in progress, because, as we have mentioned, they do not formally have powers of intervention and do not want to risk their involvement becoming publicly known by imposing amendments of contracting decisions. As in the case of audit bodies, the interviewees consider

that their intervention (or the threat thereof) can act preventively, minimising the number of breaches and therefore the grounds for complaints.

8.1.2 Conclusions

Many (though not most) interviewees mentioned complaints to audit bodies and government departments. Such complaints are not really perceived as alternatives to judicial action but rather as a way to pressurise the body to be more compliant. The existence of such bodies and departments acts mostly preventively, reducing cases of misconduct on which a firm may want to take action. Only if government departments are convinced to intervene to put pressure for the irregularity to be corrected, before the contract is awarded, their action replaces litigation. Audit bodies cannot assess technical assessments of the bids by authorities and, therefore, their role in the correction of breaches is often reduced.

8.2 Complaints to the European Commission

8.2.1 Their effectiveness and use

Almost all interviewees said that firms rarely bring their complaints to the Commission. The interviewees identified several reasons for this.

First of all, it is question of acquaintance with the existence and procedure for lodging a complaint. All 4 interviewed firms were aware of the possibility -despite the fact that had never actually used it. 8 lawyers said, however, that many of their clients ignored or very vaguely knew about their right to send a complaint. 4 lawyers (of which 2 based in Brussels) maintained that there are also a lot of practitioners unfamiliar with the procedure, a phenomenon which one lawyer based in Brussels,

UK#LA10, qualified as "an aspect of the general ignorance surrounding procurement remedies in the UK". The 2 lawyers based in Brussels maintained that in other (not mentioned) Member States firms and lawyers are better acquainted with the procedure before the Commission.

Secondly, almost all interviewees said that complaints to the Commission are generally perceived as useless or ineffective.

According to 8 interviewees, this is, first of all, due to the fact that firms and lawyers believe that the Commission would only exceptionally decide to take up a complaint. The 8 interviewees said that the Commission would probably take action, if the authority has a consistent discriminatory policy, for example, a policy of buying national, but would not intervene for an one-off breach, unless the breach or the contract are very serious[832]. Therefore, firms are not advised or do not decide to go to the Commission, unless there is evidence of systematic or flagrant discrimination or the contract is very high-profile.

In addition to that, 3 lawyers said that the Commission would not necessarily act on a complaint, even if it pointed at a flagrant breach or discrimination on grounds of nationality. According to the 3 lawyers, this is because the Commission may decide that it is an inopportune moment to antagonise the Member State of the breach, for reasons that have to do with internal Community balance and politics but not with the seriousness or validity of the complaint. Moreover, they maintained that the Commission may try to trade off the complaint to reach a compromise on another matter with that state, either related or unrelated to procurement[833]. In these cases, the complaint would only

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[832] This is a valid consideration, as the Commission itself has stated that it will concentrate its action on cases with a particular Community interest and leave the rest for the national authorities to handle, in its Green Paper, p.16, and Communication, p.13, *op. cit.* footnote 22 of chapter 1.

[833] The 3 lawyers said that whether the Member State would be willing to trade as well would depend on the significance of the complaint and its possible repercussions, if taken up by the Commission. For example, if the complaint refers to matters crucial to the way award procedures are carried out and if the public sector and the industry particularly wish to avoid any related Commission intervention, the state may be willing to negotiate and eventually compromise on other matters.

serve to give leverage to the Commission, while not leading to enforcement of the rules in the procedure in question.

Furthermore, almost all interviewees mentioned that, even if the Commission decides to act, it is often not very effective. First of all, it usually takes too long to decide whether to pursue the case, which means that by the time it acts, the contract will probably have been awarded and rendered irreversible and bidders would not be able to draw any benefit from the Commission's intervention. 3 lawyers said that the Commission may be convinced to act quickly in high profile cases, but not otherwise. 2 lawyers said that if the procedure is still at an early stage, the Commission may have time to act before the contract is awarded.

3 lawyers said that firms are also aware or warned by their advisers that the Commission is not reliable as regards keeping the complainant's anonymity and are, therefore, afraid that authorities will try to retaliate against them, for having involved the Commission in their awards.

All 4 firms and 4 lawyers said that recourse to the Commission increases legal costs and takes up time. Firms normally consult an external lawyer on whether to complain and how to proceed, which is costly. Consulting in-house lawyers may cost less but would mean that, as time will be spent on the complaint, handling of other legal issues that the firm may have will be delayed.

All firms and almost all lawyers mentioned that another basic reason for firms' not soliciting the intervention of the Commission is that "firms are nervous about losing control over their case" (as UK#LA14 said) and do not want the Commission to "take the case out of their hands" (as UK#LA6 said), as the infringement procedure cannot be stopped afterwards at their discretion, if they reach an agreement with the authority.

3 interviewees said that complaining to the Commission is ultimately a question of perception. In the UK complaints to the Commission are viewed as "too remote" and that it does not occur to people to take a complaint to Brussels. The

interviewees also mentioned that administrative complaints are not very usual or well understood in the UK and they maintained that in other Member States, people are more familiar with administrative ways of intervening in award procedures.

Finally, 3 lawyers and 2 firms pointed out that if a firm decides to make the effort, bear the expense and risk exposure of its identity to challenge a breach, it might as well sue before the national courts and, as they said, at least hope for compensation. If national remedies are used, then according to 2 lawyers, resort to the Commission may be attempted as well, to add pressure on the authority. 3 lawyers based in Brussels said that this negative approach is partly due to the traditional UK suspiciousness towards the usefulness of complaints or remedies. They mentioned that they have many non UK clients that are willing to try contacting the Commission, to exhaust their options.

Firms would, in some cases, consider proceeding before the Commission. First of all, 2 lawyers mentioned that if the firm is outside the time limits for lodging national remedies but it is determined to take some form of action against the authority, it may contact the Commission, provided that it considers that something can be achieved in this way. Secondly, 6 interviewees said that, sometimes, complaints result in authorities' correcting the breaches of their own accord to prevent the Commission's intervention. This is because authorities, especially government departments, are sometimes sensitive to the possibility of Commission action, as they consider it politically embarrassing and inconvenient, and may, therefore, correct a breach after the complaint has been sent, in order to avoid scandal and interference. Thus, firms that are determined to take action may send their complaint to the Commission. Moreover, 7 interviewees said that firms sometimes threaten to complain to the Commission, without necessarily intending to do so in reality, precisely to put pressure on the authority to correct the breach. Sometimes the threat works indirectly: the Treasury is warned of the possibility of a complaint and encourages (or, as 5

interviewees maintained, even puts pressure on) the authority to correct the breach, eventually going through the DTLR for local authorities. 3 interviewees said that usually such government departments are not actually involved in the process, as their position is delicate, since they cannot appear to support the claim of one firm at the expense of another. 4 lawyers said that this network, though complicated, works.

8.2.2 Conclusions

Almost all interviewees said that few complaints are brought to the Commission for reasons ranging from ignorance of the procedure and unwillingness to bear its costs to lack of trust in the speed, reliability and effectiveness of the Commission's action. Few interviewees said that, sometimes, complaints to the Commission or the threat thereof can put pressure on authorities to correct breaches, in order to prevent the Commission from taking action and to avoid giving the impression to the public that their procedures are irregular. The latter is especially true of government departments that have increased political exposure.

8.3 Political and media intervention

8.3.1 Their effectiveness and use

9 interviewees (3 firms and 6 lawyers) said that bidders sometimes try to use political contacts, in order to put pressure on authorities to consider their complaint seriously and either change harmful contracting decisions or, eventually, reach another type of agreement with them (agreements are examined below). The interviewees mentioned as such contacts local MPs or MPs that firms know personally. The 9 interviewees said that resort to

politicians is sometimes used as an alternative to litigation. 5 interviewees said that, if firms' efforts to use political contacts does not work, they often '"give up the case for lost" (as UK#LA16 put it) and take no further action.

According to 7 lawyers, firms sometimes contact the media with their complaint, if it makes a good story (for example, if it concerns a flagrant breach or a high-profile contract) to stir the interest of the public and create, if possible, a scandal. Firms hope that combined media and public opinion pressure will result in the authority's correcting the breach (or stopping and restarting the procedure) or otherwise settling the matter with the firm. UK#LA6 was the lawyer in a case where media coverage of the case helped the firm to achieve a very satisfactory financial settlement. According to 3 interviewees, when firms contact the media, they also usually try to link the case to politics and involve politicians to increase the scandal value of the story and, if possible, gain public support. 2 interviewees said that sometimes firms give details of their case to the media (thus providing them with a story to sell) in exchange for information on the award procedure that journalists may have access to, for example information on who handled certain matters, how and why. Firms only contact the media, when they are not apprehensive about projecting an aggressive image and are not concerned about the possible repercussions of such action on future business.

According to 6 interviewees, contacting the media, or the threat thereof, may lead to the authority to correct a breach or reach an agreement with the firm, in order to avoid public embarrassment. 3 interviewees said that firms sometimes threaten to contact the media without actually being prepared to do so, if the threat does not work.

5 interviewees said that firms sometimes start litigation at the same time. 3 interviewees said that firms sometimes believe that media coverage of the case will influence the judge, in providing paralegal information, making him more aware of the importance of the claim and the stakes involved, stressing the moral/ethical aspects of the case (for example, UK#LA17 said, through underlining "the moral outrage of

some cases of flagrant discrimination") and, sometimes, when the public opinion leans heavily with the firm, making difficult for him to refuse relief.

8.3.2 Conclusions

Less the half of the interviewees said that the (threat of and) use of politicians can sometimes function as an alternative to litigation. Few interviewees mentioned that contacting the media may also be an alternative to litigation, if the authority agrees to correct the breach or otherwise settles with the firm to avoid public embarrassment. Few interviewees also said that the media are sometimes also used to used to aid litigation, in cases that have an increased scandal value (for example, cases of flagrant discrimination), where coverage of the case is expected to enlighten and/or put pressure on the judge to grant the firm's claim.

8.4 Settling the matter with the authority

As was revealed in the interviews, firms often prefer to try to reach a solution to the problem by talking or negotiating with the authority, instead of resorting to the courts. What firms are seeking and the response they get can vary. Sometimes, firms are only interested to find out how the authority interpreted and applied the law, why their bid was unsuccessful and how they could improve on it when bidding for another contract, so they only ask a de-briefing on the conduct of the procedure and the assessment of the bids. Sometimes, firms consider that their complaint is serious enough to warrant another type of reaction by the authority. In these cases, firms try to reach an informal arrangement, whereby either the breach is corrected or they are promised a future contract. If they have already started proceedings they can only reach the latter

arrangement, i.e. for future work, or agree to a financial out-of-court settlement with the authority, when their claim is for damages.

8.4.1 De-briefing

All 10 authorities said that when firms are excluded from a procedure, they ask to be de-briefed by authorities to find out why their bid failed, so that they can improve in the future[834].

The 10 authorities said that they try to inform firms as much as possible[835] and that, in general, authorities are very open in the way they conduct awards, always answer queries and demonstrate why they rejected one firm or chose another[836].

Some authorities go through the bid with the firm and show them how it was evaluated against other bids. According to 4 authorities, de-briefing under the restricted procedure often takes place at each stage of the procedure, i.e. at the stage of the invitation to tender, for those the firms that were not invited and at the stage of the contract award, for the unsuccessful bidders. 3 authorities said that they give unsuccessful firms the successful bidder's name and the reasons he won the contract.

During the de-briefing, disagreements with the way the authority conducted the award or evaluated the bids are expressed. All authorities said that they try to answer to such objections and, according to them, this is usually all that firms expect from them. Firms would only consider pursuing legal action or trying to settle otherwise with the authority, if they consider that their queries have not been answered and their complaint is serious, for example, if they feel that the

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[834] UK#PA6 said that queries usually originate from the people at the firm that put the bid together, who want to be able to improve their offers and win at future awards.

[835] According to UK#PA2, authorities give each firm the "right amount of time and information", but they are the judges of what amount of either is right.

[836] For example, the guide for suppliers of the Department of Trade and Industry (DTI) provides that "within the limits of some commercial confidentiality, DTI will always offer unsuccessful tenderers the reasons why their bid failed. Such de-briefing can be by letter, by phone or face to face…. The

law has been obviously violated at their expense. The authorities affirmed that such obvious violations, causing the reaction of firms, are rare, because authorities know and apply the rules carefully and scrupulously and their procedures are lawful and transparent. UK#PA6 said, in this respect, that "authorities do not take a cavalier attitude towards procedures and are very alive to the fact that they must comply with the rules".

All interviewed firms confirmed that if they have a complaint they communicate it to the authority and expect "an explanation, so that they learn from their mistakes" (as put by UK#F1), when they really do not know what they did wrong. They said that they are satisfied when they receive an adequate answer and try to concentrate on winning future contracts, without normally contemplating legal action, unless they feel very badly treated by that authority. However, the firms mentioned that public bodies do not always de-brief them at their request or do not always answer all their queries.

8.4.2 Informal arrangements after negotiation with the authority

Almost all interviewees said that firms often try to settle disputes with the authority through reaching a mutually acceptable compromise involving either the correction of the breach or a promise by the authority to grant a future contract to the complainant. The latter arrangement is sought, when it is too late to correct the breach or when the body has already made arrangements with another firm for the current contract. Informal arrangements are achieved after negotiations with the authority, eventually under the threat of the firm bringing an action, contacting supervisory government departments, audit bodies, the Commission or even politicians and the media, if a satisfactory solution is not reached. 10 interviewees said that firms sometimes

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comments are aimed at making unsuccessful tenders aware of certain weaknesses (and strengths) and enable them to better compete for future work".

threaten to sue to coerce authorities to settle, without always really intending to proceed, if negotiations fail.

According to 18 interviewees, such arrangements are not uncommon, especially in the form of a promise for future work. 8 interviewees said that arrangements are more likely to be achieved when the firm and/or the representing law firm has connections within the contracting authority or an authority which is in a position to put pressure on the contracting authority, for example, a supervisory body.

All interviewed firms and most lawyers said that such agreements are "always the best way out" for firms (as put by UK#F2), as litigation is usually not a reasonable option, because of the legal costs and the uncertainty of the outcome at trial. Thus, firms are as a rule willing to settle, provided, according to 2 firms, that they trust the authority to keep arrangements, otherwise the firm would not try to negotiate but move on.

Authorities are not, however, always prepared to negotiate. First of all, 4 interviewees mentioned that authorities are often not concerned about legal costs, if they are sued, since "it is not their money but the taxpayer's", as UK#LA6 put it. However, the interviewees said that, if the authority's budget is tight, it may wish not to burden it with legal costs.

Moreover, 10 interviewees (5 authorities and 5 lawyers) maintained that authorities are usually not afraid of firms' threats to sue, because they doubt that the case will actually be brought. Authorities know that litigation is expensive and often unsuccessful and believe, as UK#LA18 described it, that "firms will cave in before they do". Thus, authorities usually feel "immune from challenges", as UK#LA6 said. However, the 10 interviewees said that authorities may try to settle the dispute if the case against them is strong, because they consider that in such circumstances firms are likely to proceed and because they realise that, if the case is brought, they may lose it.

3 lawyers mentioned that authorities are often reluctant to settle, because they are afraid that, if the settlement becomes known, it will open the floodgates for more firms

trying to put pressure for other settlements in the future, thinking that the authority is "weak" and willing to trade. UK#LA11 said that, especially in cases where the initial arrangement "was reached by one -out of several- runners for a contract, the others will try to push for one as well". Information on settlements is, according to most interviewees, very easily leaked to the market.

According to 4 interviewees, unwillingness to negotiate has often to do with the officials' mentality: they do not want to admit to a fault and are concerned about the impact that such an admission may have on their career. UK#LA6 said in this respect that this is "typical civil servant mentality". However, the 4 interviewees pointed out that if the arrangement does not involve the amendment of decisions already taken in the course of an on-going procedure but consists in a promise for a future contract, officials are not exposed to criticism of their professional aptitude and may be prepared to agree to it.

According to 4 interviewees the correction of breaches is also avoided by authorities because, when a decision is amended, that will often affect other firms' position in the procedure and this may lead to more complaints. Authorities wish to avoid, as much as possible, entering the same cycle of negotiation and compromise with more disgruntled firms. The interviewees mentioned that authorities may, however, be willing to reach an arrangement for future work.

According to 8 interviewees, authorities negotiate, in cases where they are afraid of a public scandal, if the claim reaches the courts and their misconduct is made public, especially when it is grossly irregular.

8.4.3 "Classic" financial out-of-court settlements

According to almost all interviewees, there are some rare instances in procurement of classic out-of-court settlements, whereby the plaintiff in an action for damages withdraws the action in exchange for a sum of money paid to him by the defendant.

According to 15 interviewees, authorities do not easily agree to such settlements. First of all, 6 interviewees said that authorities are afraid that, if it becomes known that they have settled once, firms with complaints will try to push for financial settlements in the future. According to 5 interviewees, authorities are also afraid that the burden of the settlement on their budget will limit their financial resources and impede carrying out new projects and realising their plans. Authorities with small/tight budgets (usually local authorities), in particular, are apprehensive of the strain a financial settlement will lay on their resources. Authorities with larger budgets (for example, some government departments) can afford such settlements more easily. According to 2 lawyers, differences in budgets between the authorities are also relevant to how they bargain when negotiating a settlement; authorities with small budgets are harder bargainers.

According to 6 interviewees, settlements are usually agreed when authorities consider it almost certain that they will lose the case and wish to save, at least, on legal costs. Authorities also settle when they urgently want the withdrawal of a case that can cause or is actually causing a scandal. They also settle when they wish to keep the amount of compensation off the record, (since, in the case of a judgment, this would be disclosed), in order not to outrage the public opinion, who is sensitive to taxpayers' money being spent through public bodies' fault. In such cases, authorities will be careful that the amount of the settlement is not leaked to the press. Fear of scandal, according to 3 interviewees, is felt more acutely by central bodies, which are more exposed to public scrutiny and more aware of the need to present a law-abiding image.

8.4.4 Conclusions

According to all interviewed authorities and firms, bidders ask as a matter of course to be de-briefed on the way the procedure was run and their bid assessed. However,

firms' queries are not always answered. De-briefing is not a real alternative to litigation, in the sense that if a firm feels that responses to its queries are not satisfactory and that their complaint has enough merit to warrant pursuing further action, it would consider litigation or would try to settle with the authority.

If the firm pursues the complaint, it may manage to reach an agreement with the authority whereby the breach is corrected or the firm is promised work in the future, in exchange for the firm's not taking legal action. The majority of interviewees said that such arrangements, especially in the latter form, are not uncommon. Arrangements replace litigation and are negotiated when the firm believes and the authority understands that the complaint has "lawsuit value", for example, if the case against the authority is strong, and they both agree that the matter is best solved outside the courts. When arrangements lead to the correction of a breach, they restore legality, so they enforce the law, in the original 'proper' remedy sense. In the case of a promise for a future contract, however, one breach, serving as a negotiation basis for the arrangement, leads actually to another, since it results in another procedure where the contract is not awarded fairly.

Financial settlements of actions for damages are classic dispute solutions, but are however unusual in procurement, as almost all interviewees said. They do not function as alternatives to litigation, since they follow the lodging of a lawsuit. When achieved, they lead to a case being dropped and in that sense they replace the final stages of litigation.

As regards the effect that remedies have on authorities, we have seen that authorities think it unlikely that legal action will be brought or, if it is brought, succeed. In the context of informal arrangements, this means that authorities are not likely to agree to one, when they are threatened with litigation, unless the case against them is strong. As regards the effectiveness of remedies to enforce the rules in general, this means that the preventive power of remedies is limited, since authorities do not take remedies

seriously into account when awarding contracts, as we will also see in section 5 on the UK legal culture.

9 Conclusions of section 2

Firms sometimes ignore their substantive and procedural rights. However, firms that feel aggrieved would seek advice on the courses of action available to them. Thus, abstention from litigation is mostly due to thought out reasons. It seems, from the interviews, that the basic factors of litigation avoidance (attempting a sort of "hierarchy") are, first of all, the very high legal costs, secondly, the low chances at trial (in this factor, the negative advice of lawyers as regards the usefulness of suing plays a role), thirdly, the fear of retaliation from authorities and fourthly, the tendency to accept losing a contract as natural business risk and move on with business, especially since the market is buoyant. Recourse to ways of reaction to perceived breaches that do not involve litigation was mentioned, but there was no majority agreement on the success and frequency of such alternative courses of action.

The existence of remedies often does not preoccupy authorities, as they consider the likelihood of a case against them being brought and won small.

SECTION 3

SIZE AND MARKET POSITION OF THE FIRM

The size and market position of the firm (in the sense of its presence in the market, which refers to the duration of its existence, experience and network) are relevant to its decision to start litigation. They are discussed in a separate section, because they cannot be strictly classified as factors that encourage or discourage litigation, as they are not taken into account by the firm as such when it decides whether to litigate. They form however part of the context in which the decision to sue is taken.

1 Small and big firms

10 interviewees (1 firm, 4 authorities and 5 practitioners) mentioned that the size of firms plays a role when they decide whether to bring a case or not.

According to 5 interviewees, big firms bid for a lot of contracts expecting to lose some and are thus not likely to sue, when this happens. Furthermore, the interviewees said that often big firms also work outside the European Union and, if they are excluded from a European award, would not normally go to the trouble of challenging it but rather concentrate on other markets, where, as the interviewees said, the award rules are often less strict.

Furthermore, 6 interviewees said that big firms, which usually have a bigger field of commercial activities than small firms and bid for contracts in various areas, including the private sector, do not want to risk acquiring a litigious image, which may "scare people off" (as UK#PA3 put it) and jeopardise business in sectors or countries (not necessarily in the European Union) where litigation is unusual and viewed with suspicion.

According to 5 interviewees, big firms are, however, likely to sue when they particularly want that specific contract, especially if they depend on it to

consolidate or expand their competitive position in the market and they feel that their chances of winning are jeopardised by the authority's irregular conduct of the procedure.

6 interviewees said that small firms often depend on certain contracts for their business survival and are upset when they believe that they may lose them unfairly. UK#LA16 said in this respect that small firms sometimes "get quite emotional about losing contracts they depend on". Thus, they may consider challenging a perceived irregularity.

8 interviewees said that, however, small firms would sometimes refrain from litigating, although they may have a case, for various reasons. 6 interviewees said that small firms are often not able to afford the legal costs[837]. Furthermore, they pointed out that small firms cannot easily spare the management time involved in deciding and pursuing litigation either[838]. 5 interviewees also maintained that small firms, when they depend on certain contracts for their professional survival, are afraid of jeopardising their relationship with the bodies that award them.

2 Established and new firms

According to 4 interviewees, firms established in the public works market do not wish to upset their business links by suing bodies they work for. They would rather try to use their links to secure another contract instead.

3 interviewees said that firms new to a market may wish to make their presence felt by suing, if they find evidence of a breach. Nevertheless, they would be careful not to jeopardise the chances that they have got to develop such relationships through suing

[837] We have seen that trade associations could perhaps be convinced to fund a small firm that does not have the resources to litigate, but that this would only rarely happen.

[838] UK#LA7 said that the fact that small firms depend more on certain contracts mean that, when these are at stake, they become more emotionally caught up in the case, spend more time discussing and managing it and this takes up resources.

their potential clients, as litigation "is hardly the best way to get in one's good books" (as UK#LA4 described it). The 3 interviewees said that, therefore, firms would try litigation only if the breach is such as to warrant legal action on their part.

3 Conclusions of section 3

It appears that small firms are sometimes more willing to litigate than big firms. However, small firms sometimes do not pursue a complaint they have, because they cannot afford legal action, due to limited (financial, time and staff) resources or because they are afraid of harming business. Also, new firms may be more prone to litigate than established ones, though it would depend on whether they are afraid that litigation would risk the establishment of business relationships. The answers to the interviews are varied and not sufficiently convergent to clearly explain the way the size and market position of firms may influence their decision to sue.

SECTION 4

SPECIAL CIRCUMSTANCES

By special circumstances we refer to situations that present special, i.e. distinctive and unusual, features, which encourage or discourage litigation. In these circumstances, the firms' decision to sue does not depend on the assessment of the usual factors discussed above but is primarily the result of these special features.

1 Important contracts

Almost all interviewees said that firms would sue over important contracts. The interviewees described, as important, contracts that are very profitable or unique as regards their size, the profit prospects they offer or their value as professional experience, because of their particular characteristics, for example, a contract for construction using new innovative technologies.

All interviewees said that these contracts are very sought after by firms. 10 interviewees mentioned that sometimes firms are set up specifically to bid for and win them. These firms will either be dissolved afterwards or continue operating, if, in the meantime, more business opportunities are presented.

Most interviewees said that firms often consider such contracts sufficiently important to disregard the various reasons that may have discouraged them from litigation. Firms usually spend a lot of time and effort in preparing their bid as well as in trying to convince the authority, informally and using any means they have, that they are the best candidates. They are therefore unwilling to let their efforts "be wasted without a fight" (as UK#LA6 said) and are likely to sue, if they detect in the procedure an irregularity that could jeopardise their chances to win.

According to most interviewees, firms that were specially set up for that contract would particularly likely to sue, if they detect breaches. For these firms, in any event, considerations such as maintenance of business relationships do not

apply, since they have none; this is especially relevant for firms that are destined to be dissolved after the contract has been completed.

2 Outsiders to the market

15 interviewees maintained that outsiders to the public works market are more likely to sue than firms that usually operate there.

The interviewees described as "outsiders" firms that do not normally work in that market or country but have decided to expand their business activities, for example for the sake of winning one particular contract. The interviewees mentioned as outsiders foreign firms, firms that usually work for the private sector or firms that usually undertake types of construction different from the one that the award concerns.

First of all, we will examine the case of foreign firms[839] bidding in UK procedures. According to 15 interviewees, their number is insignificant. They said that construction (unlike supplies and services) is primarily national, because it is difficult to move the machinery and workforce to another country. The interviewees maintained that only few contracts are "worth crossing the channel for" (as UK#PA7 said) and that foreign firms participate in UK procedures only exceptionally.

11 interviewees (2 firms, 4 authorities and 5 lawyers) said that foreign firms are likely to sue. First of all, 9 interviewees said that, since foreign firms bid in the UK only for contracts they have a special interest in, they are more determined to fight over them. 3 interviewees said that, especially if there is a clear discrimination in favour of national firms, foreign bidders would try to take action, as they consider that the breach is, in such cases, obvious. Furthermore, 8 interviewees pointed out that foreign firms do not have established links in the national construction market and are usually not interested in creating them, as they often do not intend to remain in the market. Thus, they do not worry about the possibility of future retaliation by authorities as a reaction to litigation. Finally, 4 interviewees said that foreign firms which have a stronger tradition of litigation in their country may be more prone to

litigation. In relation to that, 2 interviewees mentioned that subsidiaries of foreign firms set up in the UK are sometimes asked by the foreign parent company to sue.

4 interviewees mentioned that national firms scrutinise procedures more carefully than foreign firms, because they have an interest in seeing that the law is complied with in the market they usually operate in. If they find evidence of consistent irregularities, they would complain to the authorities and would consider suing. However, the interviewees said that national firms are more likely to be afraid of retaliation and may, in the end, refrain from bringing proceedings.

3 interviewees mentioned that, in cases where foreign firms bid for contracts in a joint venture with a national firm, deciding whether to sue may be rendered difficult by the fact that the different parties to the venture may not agree.

What was mentioned about foreign firms' absence of business links and therefore relative fearlessness as regards retaliation is also true, according to 6 interviewees, for most outsiders to the market. They are, thus, not afraid to sue, if they have a case. 4 interviewees mentioned that, if certain authorities have a consistent practice of working with specific firms only, newcomers to the market may try to sue to break this practice. However, 5 interviewees said that outsiders intending to stay in the market are aware of the fact that they need to build and keep business relationships and that litigation may be detrimental to such objectives. They may, for that reason, decide not to sue. In general, however, 6 interviewees said that outsiders are more likely to start proceedings than firms with a constant presence in the market.

3 Conclusions of section 4

Almost all interviewees said that firms are likely to sue over a contract, which offers exceptional profit or business opportunities.

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[839] National firms bought by foreign companies or subsidiaries of foreign firms that have been set up in the UK on a fixed basis participate in national procedures and operate in the market in the same way as a

Almost half of the interviewees said that foreign firms and, in general, outsiders to the market are more prone to challenge awards than firms with established relationships, as they have no business links to harm and are more aware of the need to make a dynamic break through in a market where there already are other players.

national firm. For the purposes of this discussion, they are considered as national firms.

SECTION 5

THE PARTICULARITY OF THE UK

Almost all interviewees mentioned that the relative low rates of litigation in the UK can be attributed to an extent to specific national characteristics, absent from other countries.

The first UK particularity mentioned is the non-confrontational national legal culture. The second particularity mentioned is that, in the UK, there is a generalised trust in the integrity of the public sector, which means that firms are less suspicious of foul play on the part of the authorities than firms in other (non specified) Member States. This trust lessens the number of queries, complaints and, eventually, lawsuits.

1 "Non-confrontational" legal culture

Almost all interviewees maintained that, for various reasons, in the UK there is no developed tradition of litigation as a natural reflex to an irregularity. They said that this is true in general and does not refer only to procurement.

First of all, 5 interviewees said that litigation avoidance can partly be explained by the fact that litigation in the UK has always been expensive and thus not often attempted.

Furthermore, almost all firms and lawyers mentioned that there is, in the UK, a conservative legal culture and that open confrontation in court is, if possible, avoided. UK#LA4 said in this respect that there is "no culture of using the law as a sword rather than as a shield". People usually view litigation as "a hassle" (as UK#F1 said) and are unwilling to engage in it. According to 10 interviewees, this non-

confrontational attitude is very British. In short, in the UK, litigation "does not usually cross people's mind", asUK#LA4 said.

Moreover, 3 interviewees mentioned that in the UK litigation is often viewed as principally a means of enriching lawyers, without necessarily ensuring protection of the interests of the litigant, and is therefore avoided. UK#LA6 described this view as "a healthy mistrust of lawyers".

As a result, most interviewees said that parties to a dispute prefer to negotiate with each other in order to reach a mutually convenient informal agreement, without involving the courts. UK#LA13 said, in this respect, that a lot of disputes are solved "behind the scenes" and UK#LA17 mentioned that "a lot is done with a nod, a wink and a handshake" between the parties. The interviewees mentioned that people usually believe that negotiation is more likely to provide solutions than the courts. Litigation is only the last resort and, according to 7 interviewees, it is tried when there is "a break up of communication between the parties, a failure to reach an agreement" (as UK#LA11 said). UK#LA14 maintained that litigation is "the result of ill management".

9 interviewees maintained that, though absence of a habit of suing, as a natural reaction to a perceived injustice, is a general trait of the UK legal culture, this tendency is more prominent in procurement, due to several factors.

First of all, 3 lawyers mentioned that because of the original absence of procurement remedies, firms in the UK have not had experience in and developed the reflex of suing in awards and therefore litigation does not occur to them as a matter of course. The use of the recently introduced remedies is, until now, limited. This means that the case law is limited and insufficient and the trial outcome unpredictable, which, combined with the general "conservative" UK legal culture, makes firms even more cautious towards litigation.

4 lawyers mentioned that the reluctant approach to procurement litigation in the UK is partly due to what UK#LA17 called "a conspiracy of non-complaint". This means

that firms often avoid suing, because they prefer not to clarify some points in the law, since they consider that the clearer the rules become, the more constraints are laid on both the public bodies and the firms and this is something neither the authorities nor the firms want. UK#LA14 mentioned as an example that firms prefer not to clarify the circumstances in which the negotiated procedure can be used, in order not to stress that it is an exceptional procedure and should only be used under defined special conditions. According to the 4 lawyers, firms prefer the current situation of "relative freedom, where perhaps not all the rules are followed but there is the option of settling things with a quiet wink; they do not want to tie a noose around their neck" (as UK#LA17 said). The 4 lawyers said that, precisely because of this "relative freedom", some firms often have won contracts that they should not have and they are not willing to change the *status quo*.

Furthermore, 9 interviewees (all 4 firms and 5 lawyers) said that another aspect of the national legal culture, as expressed in the area of procurement, is that litigation is in many cases perceived as an exaggerated reaction to a failure to win a contract, even when the failure is attributable to an irregularity. There are many bidders and only one winner for each contract and, UK#F1 said, firms feel that "there is no need to be paranoid", if one contract is lost. UK#LA18 said, in this respect, that "there is a fine line between being a bad loser and having a case", which firms are unwilling to risk crossing. The 9 interviewees said that the realistic approach is to "take failures on the chin and move on" (in the words of UK#LA17), especially since, as we have seen, there are sufficient contracts put out to tender. Thus, firms try basically to understand why they failed and how they can improve (and ask, as we have seen, to be de-briefed) and would only rarely take action, for example if a flagrant breach occurs.

3 lawyers based in Brussels said that the lack of reaction to perceived breaches, unless in exceptional cases, is endemic to the UK market and 2 of them qualified the UK approach to possible breaches as "apathetic". They maintained that in other (not

mentioned) Member States firms are less likely to "shrug their shoulders" (as UK#LA11 said) and more willing to take action.

2 firms and 2 lawyers based in the UK also mentioned the difference between the litigation rates in the UK and in other (not specified) Member States, where the climate is more litigious. They said that national legal cultures are naturally different, as every country has a distinct tradition, and that differences in litigation patterns between Member States are normal, as they are due to country-specific circumstances, that cannot be replicated in another environment. UK#F1 said in this respect that the UK "is an island" and, therefore, both isolated and special in relation to continental countries and that it is to be expected that it would have different characteristics from other Member States.

6 interviewees (3 firms and 3 lawyers) argued that there needs to be "a break through" (as put by UK#LA18) and that, if some firms take the first step and sue, others would follow. However, they opined that the likelihood of firms taking the first step is small, since, in the words of UK#F1, firms do not want "to be the first to stick their neck out", but refer to let others try litigation first and, if these succeed, they would then consider the possibility of suing themselves.

Nevertheless, according to 4 lawyers, the situation as regards litigation is changing, as there are already more cases. The 4 lawyers think it likely that there will be more litigation in the future, as firms and practitioners become gradually more familiar with the available remedies. They maintained that increase in litigation will clarify the case law and improve knowledge about remedies, enhance awareness of their existence and usefulness and build a habit of resorting to them. Such developments will in their turn prompt more actions, and so forth, so that "changes will be self-generated", in the words of UK#LA17.

2 Trust in the integrity of the public sector

Almost all interviewees mentioned that in the UK procurement market there is trust in the integrity of the public bodies and in the fairness of their procedures. Firms normally assume that awards are run well and do not question the way they are conducted, unless they have evidence of a breach.

All interviewed authorities insisted that they were fair, in the sense of not discriminating between bidders. They said that, although they sometimes violate the rules to make procedures more efficient, the fact that they do not discriminate is sufficient for bidders. The authorities said that they consider it very unlikely that their procedures will be challenged for minor non-discriminatory breaches.

The 4 interviewed firms also said that authorities are "fair and not corrupt" (as UK#F1 said), though not always compliant. According to the 4 firms, breaches are either involuntary, due to the complexity of the procurement rules and the existence of grey areas therein, or minor. The firms said that such breaches may lead them to lodge a query or informal complaint but they do not warrant the institution of proceedings against the authority. Only if the authority is grossly unjust would firms sue, but, the firms said, such instances are rare. They maintained that other firms share their views.

Almost all lawyers maintained that there are breaches and that, in general, there is a low level of compliance with the law. 8 lawyers said that public authorities breach the law because they are ignorant and that, for this reason, routine procedures, in which authorities have acquired expertise, are usually run according to the law. 10 lawyers said, however, that many authorities are very lax in applying the rules and often award contracts in the way they consider best, even when they know that this involves breaching the law. Lack of litigation, according to the lawyers, does not reflect an absence of breaches. UK#LA18 said, in this respect, that "although the rule of law is generally strong in the UK, it is not so in procurement; public bodies are complacent in the knowledge that their procedures will not be challenged and are not compliant".

According to 3 lawyers, especially in procedures for very large or technical projects authorities sometimes breach voluntarily the law to make procedures quicker or, in their view, more efficient; the 3 lawyers said that some of the breaches are condoned by the Treasury. However, most interviewed lawyers argued that, in their view, unfairness is not usual and that firms are not often discriminated in the sense of action taken specifically to exclude them.

Almost all (15) lawyers confirmed that the general perception of bidders is indeed that public authorities are not corrupt and do not act in a discriminatory or "unfair" way. As UK#LA15 described it, the difference between the UK and other countries is that, there, "authorities are considered to be corrupt and colluding with certain contractors"; there exists, in a sense, a presumption that authorities breach the law. The 15 lawyers said that, in the UK, on the other hand, there is a general consensus that this is not the case, though, as 5 lawyers pointed out, whether this perception of the market reflects the reality is another matter –there may be more breaches than firms think. The point is, according to the 15 lawyers, that firms are not suspicious and do not question the conduct of awards, unless they notice a serious breach. UK#LA17 said, to describe the situation, that "in the UK, if you have no proof of foul play you assume that there was none".

5 interviewees said that this perception of the public sector is the case of national firms, which have experience of the market and can have an opinion of its characteristics and which, besides, tend to absorb and adopt the general mentality. They said that foreign firms carry their own national mentality and do not necessarily share national firms' beliefs and approach.

Almost all interviewees said that the trust in the integrity of the public sector minimises instances where firms would take legal action, first, because they do not look for and probably would not notice irregularities, unless flagrant, and

secondly, because they think that fairness is sufficient and would not take action against non-discriminatory minor breaches.

3 Conclusions of section 5

According to most interviewees, the UK legal culture is a major reason of litigation avoidance. Out-of-court negotiation, and not litigation, is considered to be the natural reaction to a dispute. Many interviewees mentioned that the difficulties of litigation in procurement add to the general tendency of avoiding confrontation.

Almost all interviewees agreed that trust in the public sector is another reason firms do not usually challenge procedures, as they are to a large extent convinced that authorities are fair. Authorities consider fairness sufficient and discount the risk of being challenged for breaches that they consider minor or not discriminatory. Thus, remedies do not seem to be able prevent breaches in such cases, as authorities do not consider that they would be sued, if they violated the rules.

Conclusions of chapter 8

There are various reasons for firms' avoidance of litigation. All interviewees maintained that the significant legal costs are possibly the major disincentive. If we attempted to "rank" the rest of causes of litigation avoidance according to the findings of the interviews, arguably, the first would be the low chances at trial and the second the UK legal culture of avoiding litigation, which is linked to other, more specific, reasons of avoidance, such as, first of all, firms' wish to move on with business and not to waste resources suing over one contract and, secondly, firms' fear of being blacklisted.

The only situations in which it was mentioned that firms would seriously consider suing are, again in a sort of order, first of all, when the firm is dependent on or, for any other reason, particularly wants a certain contract and, in second place, cases of blatant infringement of the rules or violation that is unfair or targeted at the firm.

Lawyers based in Brussels opined that the UK legal culture, as expressed in both firms' and lawyers' negative view of litigation, is the foremost reason for the low litigation rates in the UK. They said that they are more open to the idea of litigation and advise it more often and with less hesitation than UK-based lawyers, due to their acquaintance with Member States, where there is a more litigious climate than in the UK, and experience of non-UK clients, who are often more willing to litigate than their UK clients.

We have seen that the power of remedies to prevent breaches is not strong in the UK. Remedies do not enhance compliance, as authorities usually consider that their risk of being challenged is very low, since firms are put off litigation, due to the high legal costs and low chances of success at trial, and because they

consider that non-discriminatory breaches do not, as a general rule, warrant legal action.

Chapter 9

The function of the procurement review system in Greece

In this chapter we will present the results of the interviews conducted in Greece. As we have done in the previous chapter, the findings are summarised (but some *verbatim* quotations are included) and divided by factors influencing firms' recourse to litigation. We will mention the number of interviewees agreeing on a point to allow assessment of the conclusions drawn. Interviewees, as we have mentioned, are identified as follows: Gr#F for firms, Gr#LA for legal advisers and Gr#PA for public authorities. They are numbered, in each category, according to the order in which they were interviewed, starting with the number 1. The personal pronoun "he" is used for all interviewees irrespective of their real life gender.

The chapter is divided into 5 sections, each representing a group of factors affecting firms in a similar way as regards the use of remedies. The first section examines factors that encourage litigation, the second examines factors that discourage firms from litigation, the third discusses how the size, market position and mentality of the firm influence the decision to sue, the fourth concerns special circumstances, which affect the use of remedies, and the fifth discusses how, for a short time, the adoption of the new law on remedies (law 2522/97) had an impact on litigation.

SECTION 1

FACTORS ENCOURAGING FIRMS TO LITIGATE

1 Legal costs

1.1 The amount of legal costs

We have seen that legal costs consist in lawyers' fees and trial costs, joined in a single bill.

We have seen in chapter 6 that trial costs are negligible in both administrative and civil courts, apart from the judicial stamp in damages actions, which is 6,5‰ of the amount sought by way of damages.

Regarding lawyers' fees, we have seen that lawyers are paid always a compulsory minimum fee, the so-called pre-payment, which is determined by law. The pre-payment is approximately 1,175 Euro for the application for annulment and 590 Euro for the application for interim measures before the Council of State. The pre-payment for actions in damages before the Administrative Court of First Instance amounts to approximately 675 Euro. In the Civil Courts of First Instance, the pre-payment is approximately 295 Euro for the application for interim measures and 2,200 Euro for each the action in damages and the action for declaration of nullity.

We have seen that the ultimate amount paid to the lawyer depends, first of all, on whether they work in-house for the bidder, in which case they receive their monthly salary and the compulsory pre-payment for any action they lodge. External lawyers are paid either by the hour (fees range between 150 and 200 Euro per hour for procurement specialists), which is unusual, or by a fixed monthly salary, which may

be added to when, in a certain month, the firm happens to have a higher than usual number of queries, or else (and usually) by a lump sum for each remedy they prepare and plead. The compulsory pre-payment is owed in every case. The lump sum for the application for annulment before the Council of State ranges roughly between 1,200 Euro (i.e. approximately equivalent to the pre-payment) and 2,400 Euro (at the top of the scale) and half of that for interim relief. In damages actions, lawyer and client often have an agreement that the lawyer will receive a percentage on the amount eventually awarded as compensation to the plaintiff.

1.2 The impact of legal costs

Almost all interviewees said that, first, legal costs are crucial to the decision to litigate and, secondly, the legal costs in Greece are insignificant and unlikely to prevent a firm from proceeding. 6 interviewees (2 lawyers and 4 firms) mentioned specifically the fact that we are referring to procurement procedures above the thresholds, where, first, firms are big enough to be able to afford the fees and, secondly, the expected profits are often well worth the legal expenses. Another lawyer, Gr#LA8, maintained that "the costs of eventual proceedings are calculated in the bid", in the sense that firms calculate their profits in such a way as to cover eventual legal expenses. In short, if a firm wants a contract and is willing to sue over it, "costs are the least of its worries", in the words of Gr#F11.

However, in relation to actions in damages, 3 lawyers maintained that the extra cost of the judicial stamp adds considerably to legal costs, with the result that firms are sometimes unwilling to claim damages, as they are reluctant to pay a relatively high amount of money for an uncertain result.

Only 3 interviewed firms said that litigation expenses are not negligible, but they still agreed that they are not forbidding. One of them, Gr#F13, referred to the risk of the firm losing at trial and being ordered to pay the successful party's costs and said that this increases the opportunity cost of suing. However, he said that legal expenses would not stop them from pursuing a worthwhile case.

1.3 Conclusions

The amount of legal costs depends basically on lawyers' fees, as trial costs are negligible. Trial costs are only significant in the case of the action for damages because of the extra expense of the judicial stamp.

Almost all interviewees qualified legal expenses as insignificant and unlikely to dissuade firms from bringing proceedings.

2 Chances of winning the case

2.1 Impact on litigation

20 interviewees, of which 10 firms, mentioned that bidders would start proceedings if they consider that they have good chances of winning the case. According to 8 interviewed firms, the chances of winning are usually assessed by the firm after consultation with its legal adviser. The adviser gives the client an overview of the available remedies, lays out the arguments that can be used in that particular case and gives an estimate of the odds of winning[840]. Firms then decide whether to proceed or not, depending on whether they consider their odds satisfactory for that particular case. According to the majority of the interviewees, the characteristics of each case influence this assessment. Such characteristics are, for example, the importance of the contract for the firm (thus, the less worthwhile the contract, the more chances of winning will firms require to decide to proceed) or fear of jeopardising an on-going business relationship with the authority (thus, the less acute the fear, the less strong odds will firms require).

According to 10 interviewees, firms usually consider that their chances are good when there is a flagrant irregularity (because they believe that it means that the case

[840] One firm, Gr#F1, said that, with the help of their lawyer, they come up with a percentage representing roughly their chances of winning.

will be relatively easy to prove), when they have documents or other evidence supporting their claim and/or when the case law on cases similar to theirs is favourable for the applicant.

According to 5 interviewed firms, bidders also often believe that they stand a chance of winning at trial when, due to the complexity of the substantive and procedural procurement legislation, it is unclear whether their or the authority's proposed application of the law is the correct one. As we have mentioned in chapter 6, the substantive procurement rules in Greece are not codified but are dispersed in many different legal instruments, while some of the procedural rules are unclear. The Ministry of Public Works issues circulars to provide guidelines on how a provision should be interpreted and applied, but, according to the 5 firms, it often complicates matters and creates confusion for both firms and authorities, especially when two circulars with apparently contradictory provisions seem to apply to the same case. The interviewees pointed out that the case law is also unclear or undecided in some cases, as the courts have not reached a coherent, uniform and set interpretation of the substantive or procedural rules. There are conflicting judgments concerning legal issues and facts that are comparable and sometimes identical, where in principle the approach of the court should have been the same[841]. Thus, in cases where, due to the obscurity of the rules and/or the lack of clarity in case law, there may be more than one *a priori* defensible positions, firms sometimes consider that they have good chances of winning and start proceedings on this basis.

According to 3 interviewees, firms are especially encouraged to proceed when they know that there is a disagreement concerning the correct application of the rules between the awarding authority and its supervising authority or within the awarding authority, since they hope that the disagreement, if shown, may be an added argument

[841] For example, as regards the procedural rules, we have seen that law 2522/97 contains unclear provisions and that, on some points, for example, as regards the relation of the various administrative recourses, the case law has changed more than once.

for their case. In fact, one firm, Gr#F10, said that the only two times they went to court was there was such a divergence of opinions.

6 interviewees maintained that the mentality of the firm is relevant to the decision to sue in the absence of a strong case, in the sense that an "optimistic" (in the words of Gr#LA9) firm will take a more favourable view of its chances of success and will be more likely to sue. We will examine in more detail the role of the mentality of the firm in the decision to sue in a later section of this chapter.

2.2 Conclusions

According to the majority of interviewees, firms would sue when they consider that their chances of winning the case are good. Few interviewees maintained that sometimes firms believe that their chances are good, when the relevant rules and case law are not absolutely clear; the mentality of the firm is relevant in this respect.

3 Hope to win in the absence of a strong case

3.1 Impact on litigation

According to 12 interviewees, some firms are willing to "try their luck", even when they are aware that their chances of success are not high, to exhaust all courses of action available to them to defend their interests. All 12 interviewees said that an important factor in taking this decision is that legal costs are insignificant. Gr#F5 said that, in his experience, around 40% of lawsuits are brought in the hope that the firm may win, though it does not *a priori* seem that it has a case.

According to 6 interviewees, bidders are especially hopeful when the relevant rules seem to allow more than one interpretations and the issue has not been decided in case law in a definitive way. The 6 interviewees maintained that, due to this lack of clarity

of the rules, some of the actions are unmeritorious and that, often, the firm is aware of that but still hopes that it may unexpectedly win. According to 5 interviewed firms, cases of unmeritorious claims, where firms proceed in "an opportunistic way without a genuine complaint" (as Gr#F6 said), constitute an improper use of remedies and are regrettable, since they account for a lot of useless delays or cancellations of awards and prevent unnecessarily everyone involved in procurement from conducting business efficiently and planning ahead. As the 5 firms said, while all litigation has potentially the same negative impact on the market and is unwelcome by authorities and other bidders, it is an accepted disturbance when the complaint is genuine, as it is an expected reaction of aggrieved firms. Unmeritorious actions however cause unjustified complications and the 5 interviewed firms criticised those starting such actions for behaving in an unprofessional way, deliberately or recklessly short-circuiting procedures and creating problems for everyone, "causing trouble without a cause" (as described by Gr#F13), in an effort to obtain an undue advantage for themselves. In this respect, 3 firms (Gr#F5, Gr#F6 and Gr#F13) observed that if the legislation and case law were clearer and coherent, there would be fewer such cases.

3.2 Conclusions

According to many (but not most) interviewees firms sometimes sue though they do not have a good case, to exhaust all available means to defend their interests. Some of the actions brought in this spirit are, however, unmeritorious.

4 Emotional litigation

4.1 Impact on litigation

17 interviewees said that firms may start proceedings when are upset by what they perceive as unfair treatment by the authorities, especially in cases of flagrant discrimination against them. According to the interviewees, in such cases, part of the motive of the firm when suing is to "punish", in a way, the authority (as well as, sometimes, the winner, if the firm believes that he participated in the irregularity) through the inconvenience caused by litigation. Litigation is, in this sense, an impulsive or emotional reaction to a perceived injustice and is used not only to seek protection of the firm's rights, but also because of its frustrating potential for the authorities, since it interferes with their completing the award in the time schedule and on the terms they want.

According to 8 interviewees (of which 5 firms), in such cases disgruntled firms may start proceedings, even when they are not certain that they have chances of winning, only in order to "teach authorities a lesson", as Gr#F14 (that had at the time of the interviews recently started such proceedings) said. Gr#LA4 mentioned the example of a client that had been deliberately misled: the authority had indicated to the firm that it accepted a certain interpretation of the law and then followed a different one in the procedure. The firm challenged the procedure immediately, though the breach would probably not be easily proven.

According to 7 interviewees (of which 5 firms), whether and how often a firm would proceed "impulsively" will depend, first, on the kind and degree of the breach. The more flagrant the breach and the more discriminatory the authority's conduct, the more unfairly will the firm feel it has been treated and the more will it tend to start proceedings. Secondly, 6 interviewees (of which 4 firms) the mentality of the firm, in

the sense of whether they adopt a confrontational attitude to a perceived injustice, also plays a role.

4 interviewed firms said that in most cases firms are not upset when they are excluded, even if their exclusion was unfair, because they consider it a usual "business risk", as Gr#F10 said. They often take the view that if they were treated unfairly in one procedure, this will happen to some other firm in another, so do not feel that they were treated especially badly, though this will depend on the breach.

4.2 Conclusions

The majority of interviewees said that firms may sue to react to what they consider unfair treatment. Their reaction depends mainly on the extent and nature of the injustice and on the mentality of the firm.

5 "Assertive" litigation

5.1 Impact on litigation

7 interviewees (of which 3 firms) maintained that one of the reasons that firms use remedies is to show authorities and other bidders that they are prepared to stand up for their rights and will not give up on the contract without using all courses of action available to them. According to the interviewees, firms consider that the use of remedies shows that they are aware of the law and of their rights and indicates readiness to react, confidence, lack of apprehension of possible repercussions (such as future retaliation from the authorities) and determination to win. Firms use therefore remedies to build a dynamic and assertive image and make it noticed by all concerned. The 7 interviewees said that the aim of the firm here is not chiefly to win the case, but to warn clients and competitors that they should be taken seriously, which, they hope,

will prevent discrimination against them in the future. In such cases, firms, in short, "sue to impress", as Gr#LA8 said.

We will see later in this chapter that such use of remedies may have a negative effect on the firm's relationship with authorities and other firms.

5.2 Conclusions

Some, though not many, interviewees, said that firms sometimes sue to show that they are determined to exhaust all available courses of action and, thus, prevent being unfairly treated in the future. In this instance, firms use remedies to try to prevent, not correct, irregularities.

6 Conclusions of section 1

Almost all interviewees maintained that the low legal costs are the main factor encouraging firms to consider and use remedies. Other than legal costs, factors likely to lead to litigation are (attempting a sort of "hierarchy'), first, the existence of a good case, likely to succeed at trial and secondly, instances of blatant or discriminatory breaches which provoke firms' "emotional" reaction. Firms' wish to use litigation to impress upon authorities and competitors that they are not likely to suffer an injustice without a fight and that their rights should be observed, as well as firms' starting litigation without a strong case, hoping for an unexpectedly favourable outcome, have also been mentioned but the findings are not sufficiently clear or convergent.

SECTION 2

FACTORS DISCOURAGING FIRMS FROM LITIGATING

1 Ignorance of the substantive and procedural law

1.1 Incidence

According to the majority of interviewees, most firms are aware of the procurement rules and the remedies available to them and are thus able to identify breaches and, should they wish to, know how to proceed when their interests are harmed.

According to 15 interviewees, acquaintance with the rules is, first of all, a question of experience in public contracts awards. Thus, firms with limited experience, for example firms that work more for the private sector, are less familiar with procurement law.

According to 8 interviewees, firms may be unaware of irregularities and of their related rights of action when they do not receive legal advice. According to the 8 interviewees, firms sometimes do not ask for external legal advice, because they cannot afford or do not wish to bear the costs of it, or sometimes seek it when it is too late for them to act upon it, for example, after they are outside the procedural time limits. 6 interviewees maintained that the role of legal advice is less important in the case of firms with experience in awards, as they are bound to know the substantive rules and their remedies without the help of advisers.

Ignorance of the law is sometimes a question of the specialisation and expertise of the legal adviser. According to 3 interviewed lawyers, there are some (though not many) lawyers handling procurement cases, who are not very well versed in procurement, especially as regards the procedural rules of law 2522/97, as it is still relatively new and the relevant case law is not always clear. These lawyers fail to inform their clients correctly or to make use of the available remedies for their benefit.

According to the 3 lawyers, such lack of sound knowledge of procurement law is due to the fact that many Greek law firms are small and not specialised; they undertake all types of cases and that reduces their expertise in specific areas. Procurement, being a highly technical field with rules and procedures specific to it, is notably one of the areas that suffer from this lack of specialisation. As a result, there are circumstances where a firm, which has a case and possibly would have been willing to pursue it, fails to do so, because it has not been properly advised. However, as was said before, firms with experience in awards are usually familiar with their rights.

1.2 Conclusions

According to most interviewees, firms usually are familiar with the relevant rules. Only 3 interviewees pointed out that lawyers may not be well versed in procurement and may, in particular, ignore some of the rules contained in law 2522/97, as interpreted and applied in case law.

2 The review system

We have examined the Greek review system in chapter 6. Here we will see how some of its aspects may affect litigation, as revealed in the interviews.

2.1 Length of proceedings

According to most interviewees, the speed of proceedings is far from satisfactory.

As regards interim measures, according to 11 interviewees, the two months approximately that the Council of State currently needs to decide is a long time for interlocutory proceedings, though it is an improvement on the situation before law

2522/97 was adopted. Civil courts take usually longer. 5 interviewees maintained that the situation is unlikely to change, due to the courts' considerable caseload.

As regards annulment, most interviewees maintained that the delay is also long, as applications are decided on average two years after they are lodged (depending, according to 2 interviewed lawyers, on the judge handling the case and how long he needs to study the file).

According to 8 interviewees, courts' delay in deciding, first of all, on interim measures often discourages firms from applying. As mentioned in chapter 6, there is no obligation under law 2522/97 for the authority to suspend the procedure following an application for interim relief, though it may do so of its own accord. In this respect, GR#LA5 said that, when he notifies the application for interim relief to the authority, he attaches a request that it suspends the procedure, though, as he said, "this is a moral rather than legal kind of pressure". If, however, the authority does not suspend the award to wait for the judgment (which, according to 8 interviewees, would be unusual) or the firm does not obtain an *ex parte* order (which, according to 2 interviewed lawyers, is becoming increasingly difficult), in the time between the lodging of the action and the judgment the contract may be concluded, after which point interim measures will be of no avail. Firms are aware or informed by their lawyers of this risk and often decide not to apply for interim relief.

The same considerations apply more or less to annulment: most interviewees said that firms are discouraged by the delays, as they are aware that the decision will be issued almost certainly after the award has been completed, unless interim measures have been awarded in time.

4 interviewed firms maintained, in fact, that it is best to avoid causing such delays in awards for an uncertain outcome at trial. Delays disrupt procedures and are detrimental to the construction market and everyone involved in it, as they cause the flow of work to stop, meaning, in the words of GR#F13, that "the

market stagnates". The 4 firms maintained that the speed of awards is to the benefit of all and that, if contracts are given out quickly, most firms would get some work, often through subcontracting. Thus, it is better, in their view, for firms to let awards go ahead fast (unless the breach affects their chances of winning a contract they particularly want), even if that means that they would, in some cases, refrain from defending their rights.

As far as actions in damages are concerned, 5 interviewees said that their length is disappointing. One even indicated that the length of proceedings could mean that by the time the judgment is issued, it may have become irrelevant to the people that started the action, as firms may undergo restructuring and/ or their ownership may change. However, one lawyer, GR#LA4, maintained that speed is not as important in damages actions, because the amount eventually awarded will include interests.

Only 4 interviewed lawyers said that speed is relatively satisfactory, though they pointed out that, as lawyers, they are used to the time consuming procedures before the courts.

2.2 Tight time limit for the administrative recourse

8 interviewees said that the 5-day deadline to lodge the compulsory pre-trial recourse under 2522/97 is very tight. It causes firms that might have been willing to bring an action not to do so, as the time they have to find out if there has been an irregularity, to decide if they wish to challenge it and to prepare, write and lodge the complaint is too short. As Gr#F13 said, "5 days are not sufficient for firms to even identify breaches, let alone actually prepare the complaint".

According to the 8 interviewees, the time limit is particularly restrictive, given that the application for interim relief cannot contain different allegations form the recourse.

According to 2 interviewees, the time limit is “suffocating” (GR#F13) especially as regards challenge of the contract notice. 5 days are not enough for firms to study the notice and see whether and which terms should be challenged. Notices are often complex and vague and it is not always clear straightaway whether the terms of the notice, first, breach the law and, secondly, harm the interests of the firm. Thus, firms that would perhaps wish to challenge it, if they had time to find the correct arguments and prepare the complaint, find it difficult to do so within the provided deadline.

3 interviewees maintained that the law should be amended to relax the time limit for the recourse.

2.3 Difficulty of proving the case before the Council of State

As we have seen, the only evidence allowed before the Council of State and the Suspensions Committee is documentary and basically consists of documents relating to the award procedure that the applicant has adduced. No statements under oath may be taken into account or witnesses examined, though the Committee allows then in exceptional circumstances. These limitations of evidence do not apply to civil courts.

According to 4 interviewees, it is not always easy to prove an irregularity, in order to obtain interim relief, only on the basis of documentary evidence, especially given that the Suspensions Committee asks, as we have seen, for full proof of the breach to grant the application.

Secondly, it can be difficult to get hold of documents, which are in the authority’s possession, if the authority does not produce them when asked. 3 interviewees said that sometimes reluctance of authority to relinquish documents in its possession can be overcome, if the firm is sufficiently tenacious or if it has contact persons within the authority. However, according to 4 interviewees, it can be difficult sometimes to even prove the existence of documents. 3 interviewees mentioned cases of documents

disappearing from files[842]; though they said that such instances are uncommon, since most authorities, and in particular central bodies, would not, as a general rule, act in such an irregular way.

2.4 Unpredictable outcome at trial

10 interviewees mentioned that firms are discouraged by the fact that the outcome at trial is unpredictable. They argued that unpredictability is mainly due to the lack of sufficient, relevant and clear case law. As regards interim measures, we have seen that many applications are brought and tried and the case law is growing steadily. However, since law 2522/97 is relatively new, not all points on which there is a controversy have been dealt with. Furthermore, such case law as there is, is not always clear and definite on all matters. The result is that firms often do not know what to expect. It is even more so as regards judgments on annulment/nullity, which are relatively fewer, and actions in damages, for which the case law is small and obscure.

The 10 interviewees said that this uncertainty does not allow firms to assess realistically their chances and weigh the pros and cons of litigation and, since firms are often not willing to spend the time, money and energy involved in litigation for an unknown outcome, dissuades them from suing. In the words of Gr#F10, firms often prefer not to engage in "an improbable exercise"[843].

2.5 Low chances of winning

[842] For example, GR#F2 mentioned a case where their bid was rejected on the ground that a necessary document was missing, even though they had included it in the file, a fact that they did not manage to prove.

[843] We have seen in section 1 of the chapter that the unpredictability of the outcome at trial can produce the opposite effect on optimistic firms, which will sue as long as they can put together an arguable case, hoping that they will be able to use the lack of clarity of the case law to their advantage.

As virtually all interviewees said, firms are discouraged by the low rates of success at trial. The interviewees identified several reasons why procurement cases often fail.

First of all, according to 14 interviewees (9 lawyers and 5 firms), cases fail because judges are not qualified or are reluctant to grant relief. The problem does not present itself in the same way before administrative and civil courts. According to 11 interviewees (8 lawyers and 3 firms), administrative courts and especially the Council of State have traditionally focused on and identified themselves with the interests of the administration, "almost as if they were civil servants rather than independent adjudicators", as Gr#LA12 said. Thus, they tend to accept the authorities' arguments rather than those of the firms. The 11 interviewees mentioned that the Council of State in particular considers it "its duty to defend the interests of the authorities against those of the firms", in the words of Gr#LA11. This is best exemplified by the case law of the Suspensions Committee on the balance of interests, which, as we have seen, often finds that there is an overriding public interest, usually requiring that interim relief is refused so that the award goes ahead without delays.

However, as 8 interviewees (6 lawyers and 2 firms) maintained, the Council of State has a good grasp of procurement, is specialised and experienced in the area and is, thus, the only court where firms stand a chance of their arguments being understood and, in some cases, their claims granted.

According to 6 interviewees (6 lawyers and 2 firms), civil judges, on the other hand, do not have enough experience in procurement[844] or time to learn about its rules, terms or case law, since they have a huge overload of cases. The interviewees argued that in an area as technical as procurement specialisation is necessary. Civil court judgments are often badly written or do not make sense.

Sometimes, claims are refused, because civil judges have not understood the issue (one lawyer, GR#LA4, mentioned that virtually all of the cases he had before civil courts were refused because the judge failed to appreciate correctly the problem) or because, knowing that they lack the skills to make a correct assessment of the situation, hesitate to hold up contracts that may be vital and refuse relief.

Notwithstanding, 3 lawyers maintained that civil judges have a wider knowledge of the law as a whole and are familiar with a greater range of issues, as opposed to the purely public law focus of the Council of State. Civil judges have a more comprehensive outlook and a more grounded, less legalistic, approach to cases, which may facilitate the grant of relief. Thus, according to the 3 lawyers, civil courts are more likely than their administrative counterparts to identify and uphold the interests of the firms. In relation to interim measures, the lawyers maintained that civil courts are less familiar with the concept of public interest, since it is not often relevant to cases before them, and thus are less likely to refuse an application on that appears otherwise justified on this ground. In relation to actions in damages, 2 lawyers maintained that civil courts are more probable than administrative courts to grant compensation, since they are "less protective of the finances of the state", as GR#LA5 said.

Thus, administrative courts seem to have knowledge and experience in procurement, but are likely to uphold the authorities' arguments, and civil courts follow a more sympathetic approach to the interests of bidders, but lack the skills to identify and understand the questions. In either case, as the interviewees said, the situation is discouraging from the point of view of the firms, which consider that they do not have good chances of winning before either set of courts and thus are reluctant to proceed.

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[844] According to one interviewed lawyer, GR#LA7, civil courts have heard approximately 10 cases brought under law 2522/97 in the first 3 years of application of the law. It is difficult to verify the accuracy of such numbers, since there are no relevant official data.

Secondly, according to 7 interviewees (4 lawyers and 3 firms), the low chances of success at trial are due, as regards interim measures, to the condition of virtual certainty of the breach required by the Suspensions Committee. Firms are aware that it is difficult, in the short deadlines of interlocutory proceedings, to adduce such proof and thus often refrain from applying. According to 2 lawyers, the Committee requires virtual certainty, because it feels that it would be exposing itself to accusations of delaying unnecessarily procedures, if it suspends an act that is later upheld by the Council.

Thirdly, according to 2 lawyers, chances of winning the case are low, as the Council of State and its Suspensions Committee have started to apply an increasingly strict admissibility test, resulting in the rejection of many applications. The Council has a substantial workload[845] and aims, by being strict on admissibility, first, to reject some of the applications currently pending before it without examining their merits and thus reduce its current backlog, and, secondly, discourage firms from bringing more such applications in the future and thus prevent a similar built-up of cases. According to the 2 lawyers, firms are indeed discouraged.

According to 6 lawyers, the approach of the courts and the low rates of success are unlikely to change in the future.

Almost all interviewees, firms and lawyers, said that the firms are aware of the situation and are discouraged, unless the case concerns a flagrant irregularity, for which there is sufficient proof. Nevertheless, the interviewees mentioned that, due to the relatively low costs, some firms proceed in any case.

2.6 Conclusions

[845] The Council of State is currently receiving 3-4 applications for interim relief every week, according to GR#LA9. It is difficult to verify the accuracy of such numbers, since there are no relevant statistics.

Several traits of the review system function as disincentives for firms.

First of all, most interviewees believe that speed of proceedings for all three remedies is unsatisfactory and deters firms from suing, because they either think that any relief that may eventually be granted will come too late, or (as 4 firms said) because they do not want to create disturbances in the market.

Secondly, many (but not most) interviewees maintained that the 5 day time limit for the recourse of law 2522/97 is too tight, especially, 2 interviewees said, as regards the possibility to challenge the award notice. 3 interviewees argued for amending the law to improve this situation.

In the third place, some (not many) interviewees said that the limitation as to the accepted means of evidence before the Council of State can be forbidding for firms, as they sometimes consider that documentary evidence will not be sufficient to prove the case. Some (not many) interviewees said that there are cases where evidence is withheld by the authority; however, though authorities can be uncooperative, they would not usually go as far as to destroy documents or deny their existence.

In the fourth place, many (not most) firms often prefer not to sue, because they are not certain of their chances of winning the case, unless they take what we have called an optimistic view on litigation.

Finally, almost all interviewees stressed that the high failure rate at trial is a deterrent for firms, though few firms may proceed, given that the expenses involved are not significant.

3 Lawyers' advice

3.1 Impact on litigation

Lawyers, as part of their professional advice, outline the law and case law and assess the advisability of bringing proceedings. 10 interviewees said that lawyers point out the high likelihood of the case failing at trial and often dissuade their client from taking action. According to one firm, Gr#F11, there are even cases where "the firm is more eager to start proceedings than its lawyer".

Most (8) interviewed lawyers said that they explain to their clients what they personally believe as regards the usefulness of starting proceedings, since otherwise they would be breaching their duty to defend clients' interests in the best possible way. The fact that it is unusual that the case would succeed should be made clear to firms interested in starting proceedings, for reasons of professional integrity and, according to 3 lawyers, "common honesty", as Gt#LA9 said.

5 lawyers maintained that they advise against suing, as they do not want to undertake actions with low chances of success; they find it demoralising for them and bad, to a certain extent, for their professional reputation. This is, however, not a feeling shared by all. 3 lawyers said that all lawyers lose procurement cases anyway, so failure is not detrimental to anyone's reputation.

Only one lawyer, Gr#LA8, said that some lawyers sometimes suggest starting proceeding, in order to increase their own work and pay, but that this is an unusual course of action, when advising a good client.

Firms learn of the remedies available and of their chances of success basically through their lawyers and are influenced by their assessment of the advisability to sue. According to 15 interviewees, most firms refrain from suing when advised against it, unless their reasons for starting proceedings are other than relief at trial, for example when the firm intends to use litigation to coerce the authority to reach an out-of-court arrangement with it. It is only exceptionally that a firm will insist in bringing an action and, according to 3 interviewees only if, for any reason, it does not place enough trust in the opinion of the lawyer.

3.2 Conclusions

Almost half of the interviewees said that lawyers often warn their clients that suing is unlikely to be a successful course of action and that the advice of lawyers is usually followed by firms.

4 Fear of retaliation

Firms sometimes avoid using remedies, because they are afraid that, since litigation is an unwelcome interference in awards, affected authorities and firms may try to retaliate. We will discuss the reasons that may cause such a reaction by authorities and other firms, the forms that the reaction can take, whether and how often it occurs and to what extent firms take it into account when deciding to sue. The reaction of authorities and firms will be discussed separately, in that order.

4.1 Retaliation from authorities

Most (18) interviewees (including 2 authorities) maintained that remedies are not well received by authorities, because they can delay procedures and may lead to the amendment or annulment of the authority's contracting decisions. This is inconvenient for authorities, who want to conduct procedures unhindered, within the time frame they have set and on the terms they want. According to 6 interviewees, remedies are particularly unwelcome, if authorities have a special interest in a procedure finishing quickly (for example, because they will only receive a subsidy, if they complete the award before a certain deadline) or in a contract being awarded to a specific firm (for example, because they have an arrangement to this effect).

According to 6 interviewees, litigation can also annoy the officials of authorities on a personal level. The interviewees said that authorities are not impersonal, they are staffed by people, who often do not want to have the way that they conduct procedures questioned and may feel personally antagonised by litigation. According to 4 interviewees (including 2 authorities), this is felt particularly where there exists a personal relationship between people in the authority and people in the firm, for example when they have previously worked together on a project and know each other personally.

5 interviewees said that authorities are likely to react to cases of unmeritorious actions, as they consider that, while firms pursuing a founded claim are trying to enforce their rights under the law, this not the case of unmeritorious complaints.

According to 5 interviewees, authorities also object to what we have called assertive litigation, because they consider that firms are, in such cases, aggressive and voluntary troublemakers, who do not hesitate to cause the trouble associated with litigation for extra-legal purposes. The same applies to what we have called emotional litigation, as, according to 3 interviewees, authorities dislike the fact that firms desire to cause the inconvenience of litigation to "punish" authorities for their unlawful conduct.

4 interviewees said that the more advanced the stage of the procedure and the more critical the authority's decision, the more likely it is that the authority will be upset. Thus, if a remedy is lodged at the beginning of the procedure (for example, against the notice) or if it aims at improving the firm's position without interfering drastically with the authority's choices (for example, an application against the decision to exclude the firm) then authorities tend to react less to them. These actions were qualified by 3 interviewed firms as "passive", as opposed to "aggressive" actions, for example those against the award decision, and are generally considered to be inoffensive.

The interviewees were divided in their views as to the existence or frequency of retaliation practices.

14 interviewees (including 2 authorities) said that retaliation on the part of the authorities is usual, for any of the above reasons. While it is a clearly illegal practice, it is uncontrollable, because authorities can usually find a ground to exclude a firm from a procedure. 3 interviewees said that authorities even inform firms that they have been blacklisted so that they not bid in the future. According to 3 interviewees, firms are sometimes blacklisted for a long period of time. 3 interviewees maintained that authorities sometimes try to exclude firms that have not challenged their own procedures but that have sued other authorities, because they consider that such firms have a potential of causing trouble and are likely to sue again during their award and probably, if they win, during performance.

According to 18 interviewees (including 2 local authorities), local authorities, in particular, are likely to have blacklists. Most interviewees said that local authorities often behave "as if they were beyond the reach of the law" (in the words of GR#LA1). The interviewees maintained that central bodies and especially government departments are more law-abiding, because they feel that their procedures are closely observed by the public and that they therefore cannot afford to break the law. They are also more used to their procedures being challenged, since they often award big contracts, over which firms do not usually hesitate to sue (as we will see in a later section of this chapter), and are thus not upset by litigation. According to 3 interviewees, local authorities are also more likely to retaliate against a firm that has sued another authority (and not them), because local authorities inform each other of such incidents and have a common "blacklist network", as GR#F12 described it.

5 interviewees argued that litigation does have an adverse effect on the relationship between the firm and the authority, but that it is a mild effect; as GR#F7 said, "there is not so much a blacklist as an unfriendliness". Litigation, in their view, creates an

antagonistic climate, which however would not result in an unlawful, consistent and indeterminate punishment of the firm. Thus, while the authority would not break the law to retaliate, it would probably show increased strictness towards the firm, for example the authority may not ignore a mistake the firm makes during bidding or performance (if the firm wins the contract), whereas it would probably have been more lenient, if the firm had not sued it. Nevertheless, the interviewees maintained that as long as the firm fulfils its obligations, authorities would not deliberately try to cause problems to it. The 5 interviewees distinguished however the case of local authorities and confirmed that they are likely to blacklist firms that have sued them.

Finally, 6 interviewees (2 lawyers, 2 firms and 2 authorities) said that they doubted that litigation can cause enmities. First of all, as regards inconvenience because of litigation-related delays, 2 interviewees mentioned that authorities expect that some firms may sue and calculate possible delays (according to Gr#LA5, by calculating the average suspension time, if interim measures are granted), when they make the time plan for the project. Furthermore, the 6 interviewees said that the relationship between firms and authorities is a business one, with strong financial interests at stake for both sides, where personal grudges and conflicts are neither easily created nor do they play a role. According to the interviewees, authorities consider that challenges are "part of the game" (as GR#F5 said) and do not perceive them as antagonistic. They expect the firms will stand up for their rights and sometimes even appreciate the firm's assertiveness. Authorities may try to avoid litigation, for example, by settling the issue with the firm, but would not, however, exclude this firm from the present or future awards. Besides, according to 2 interviewed firms, if authorities blacklisted all the firms that have sued them, they would be left with a very limited choice of firms in the end. The 6 interviewees said that, even when there is a personal relationship between the firm and the authority, it will not deteriorate because of a challenge and firms would not, in any case, take it into

account if they wish to sue. The interviewees said that challenges can have no personal edge, because decisions are taken by committees in college and, therefore, a complaint does not target any one person in particular. For those reasons, the interviewees dismissed the possibility of the authority retaliating against a firm that sued it as a truism, a fear not grounded in fact, which must not be taken into account by the firm when deciding whether to sue. GR#F14 said in this respect, that "a firm must proceed when it seems appropriate; the less attention it pays to such theories [of blacklisting] the better". However, here as well, the interviewees distinguished the case of local authorities and said that they have blacklists.

6 interviewees maintained that, in any event, big firms or firms with a high degree of expertise in one particular field cannot be blacklisted easily, because they are often the only ones that have the financial capacity and/or technical know-how to undertake certain works. Furthermore, big firms especially often know people and/or have sufficient leverage to ensure that their business is not jeopardised and thus are not in an acute danger of blacklist.

The interviewees described three basic ways in which authorities retaliate when they decide to.

First, according to 13 interviewees (including 2 authorities), authorities may try to prevent the firm from winning the contract on any grounds they can find. If the firm wins at trial, authorities try to find grounds to reject the bid at a later stage of the procedure.

Secondly, 14 interviewees (including 2 authorities) said that authorities may try to exclude the firm from any contracts they award in the future. However, 5 interviewees said that, because competition for contracts is fierce and bids are competitive, it can be hard for authorities to exclude firms without a sound argument, especially as the rules are rigid and authorities have limited discretion.

Thirdly, 6 interviewees said that, if the firm manages to win the contract, the authority may retaliate by being exaggeratedly strict during performance, supervising it closely and raising objections. In this respect, GR#F13 said that, during performance, there are infinite grounds concerning the details of the work on which an authority that wishes to strict can base objections, thus making work difficult for contractors.

We will now discuss how the fear of retaliation influences firm's decision to sue.

Even though there is generally no hard evidence on retaliation, 18 interviewees (of which 8 firms) said that firms often avoid using remedies as a preventive measure, "just in case there turns out to be a blacklist", as GR#PA1 said. Firms believe that confrontation is potentially detrimental to business. According to 5 interviewees, firms are aware of the fact that most cases fail at trial and thus prefer to invest resources in creating alliances or improving any that they may already have rather than complaining and, in the process, possibly jeopardise their professional future.

According to 7 interviewees, firms are particularly concerned about possible repercussions, if they have a good business relationship with the authority, have done work for it in the past and hope to do more work in the future. The interviewees said that firms also avoid suing when they are currently doing work under another contract for the authority and are afraid of complications in supervision.

According to 5 firms, bidders are also concerned lest they acquire a litigious image, which may become known and lead to the firm being branded as a "troublemaker" in the market. However, the 5 firms consider that for this to happen and for litigation to have an impact beyond the firm's relationship with the specific authority, the firm must have a long litigation record and show an

exaggerated tendency to litigate, that is, its use of remedies must be unjustifiably high.

In spite of firms' fear of retaliation, many interviewees said that firms would still litigate under certain circumstances.

First of all, 5 interviewees maintained that firms would take action in cases where the risk of upsetting authorities is small, for example at the beginning of the procedure.

Furthermore, 13 interviewees said that firms would sue in cases of flagrant irregularity, where they consider that authorities would expect the firm to stand up for its rights.

According to 9 interviewees, firms would also sue when they have no interest in maintaining a good relationship with the authority, for example when they have no prospects of future work with it. Firms would however be careful not to jeopardise their chances in the current procedure and would try to find a solution to the problem before it reaches the courts.

Finally, 8 interviewees said that firms would also sue over very big contracts or contracts that are particularly important to it, though it would, as above, try to minimise confrontation and settle the issue, in order not to risk its chances of winning the contact.

4.2 Retaliation from other firms

According to 10 interviewees, firms want to maintain a good relationship with other firms, because they often get work through them, either as subcontractors or by participating with them in consortia to perform other contracts. According to 8 interviewees (4 firms and 4 authorities), firms are actually more concerned about their relationship with other firms than with the authority. Therefore, firms need to consider whether their challenge will upset another firm, for example a firm that

seems likely to win that contract or that has an arrangement to this effect with the authority. 3 interviewees said that if, in particular, there is a pre-existing good relationship with another firm, a challenge may be felt personally and may be harmful.

6 interviewees maintained that any past collaborations or hopes of future joint work will not stop a firm challenging a decision when it has a case –other firms may object to unmeritorious actions but not to real complaints, as firms are expected to do what they consider best for their interests. As was mentioned as regards relationships between authorities and firms, there are strong financial interests at stake, which cannot be affected because of personal grudges. One firm (Gr#F5) said that even if the relationship between two firms is temporarily harmed, firms will co-operate regardless of past differences, if the financial incentives are strong.

4.3 Conclusions

Most interviewees, including most firms, think that litigation may endanger business relationships and bidders usually try to avoid it for this reason, in spite of the fact that they are not always sure whether and to what extent other firms and authorities would retaliate. Almost all interviewees stressed that local authorities have blacklists. Few interviewees pointed out that early or non aggressive challenges are not likely to cause a reaction in any case.

5 Decision to move on

Sometimes firms do not sue, because they do not think it worthwhile to waste resources in litigation or because they consider that losing some of the contracts they bid for is a natural business risk. In these cases, the decision does not so much reflect the firm's view on litigation as its view on how business should be conducted.

5.1 Time and work management

12 interviewees said that firms often do not sue because they consider litigation an ill allocation of their resources. The decision to sue and procedure of suing occupies firms' time and workforce. This is especially so, when the firm prepares the administrative recourses itself, as it requires a lot of work by several people to go through the relevant award documents, to find, group and structure the grounds for the complaint and then write the actual recourse. In this respect, 3 interviewed firms said that in few cases the time and effort needed for a complaint are relatively small, for example, when there is a flagrant breach or when where the firm has proof of the irregularity.

Thus, firms often do not consider it commercially sensible to invest resources in litigation, especially given the small chances of winning the case. According to the 12 interviewees, firms prefer to use their staff, time and energy elsewhere, for example bidding for more contracts.

6 interviewees maintained that the willingness to use resources for litigation depends on the firm's mentality as regards remedies. As we will see, some firms are more litigious than others. Also, according to 10 interviewees, firms would spare time and effort for contracts they particularly wish to win or when the relation of resources used for litigation to the expected result seems advantageous for the firm, for example, if their chances at trial are good and/or if their chances of winning the contract are good. In this respect, Gr#F3 said that "it would make sense to challenge the award decision only when you are the second best, so that, if it is annulled, you may be awarded the contract".

5.2 Losing contracts as natural business risk

8 interviewees said that firms often consider that losing a contract is part of the commercial reality of procurement, a natural risk in an area where work is awarded on the basis of competition and where there will necessarily be one winner and several losers in every procedure, especially considering that the market is active and competition for contracts is fierce. Thus, firms prefer not to dwell on one contract but move on with business. Gr#F2 said in this respect that firms view procurement procedures with "scepticism as well as stoicism": they are not very optimistic about their chances but are accordingly not very disappointed when they lose. According to GR#F10, firms sometimes think, when they are discriminated against, that "another firm has connections in the authority and will win the contract in any case" so decide not to pursue the case. The 8 interviewees said that firms would however consider taking action if they want the contract for a specific reason or are particularly disgruntled at the way they are treated, for example, if they are obviously or systematically discriminated against.

5.3 Conclusions

According to many (not most) of the interviewees, firms may not consider it worthwhile to sacrifice time and manpower for litigation, especially as the chances of winning the case are small and losing a contract is natural in a competitive area. Several, but not many, interviewees said that firms sometimes prefer to move on with business, though this is matter of approach. Firms would consider proceeding, if the effort required is limited or the expected result at trial is worthwhile, thus justifying spending resources in litigation.

6 "Clean hands" of the bidder

6.1 Impact on litigation

17 interviewees maintained that it is not uncommon for firms to participate or consent to the breach or otherwise not comply with the rules. 8 interviewees said that, in such cases, the implicated firm would refrain from bringing proceedings, even if later in the procedure there arises a problem, as the involvement of the courts could lead to its own violation of the rules being revealed.

6.2 Conclusions

According to some interviewees, firms are sometimes barred from using remedies through their own action, when they have not complied with the rules and are afraid to sue lest their unlawful conduct is revealed.

7 Alternatives to litigation

Absence of litigation does not necessarily mean that firms have not reacted to what they consider to be an irregularity; they sometimes act through ways that do not involve litigation. We will discuss options open to bidders under the law (administrative complaints, complaints to the Commission and to trade associations) and courses of action not envisaged by or even contrary to the law (use of the media, arrangements). In each case, we will discuss the effectiveness of that option, the frequency of its use and whether it can and/or does function as an alternative to litigation.

7.1 Complaints to the supervisory authority

7.1.1 Their effectiveness and use

9 interviewees said that firms sometimes try to obtain the correction of an alleged breach by lodging a complaint before the authority supervising the awarding body. The supervising authority is often the Ministry of Public Works[846].

Only 3 interviewees believe that such complaints are sometimes effective. According to 10 interviewees, most complaints fail, for various reasons.

The 10 interviewees said that supervisory authorities, including the Ministry of Public Works, are often more interested in the speedy completion of procedures than in the enforcement of the law and thus tend to reject complaints.

According to 6 interviewees, another reason for the low success rate of such complaints is that authorities, and especially the competent unit in the Ministry of Public Works, are understaffed and do not have time to reply to complaints, unless the contract is big or publicly known, in which case they may make a special effort.

According to 3 interviewees, complaints also fail because sometimes the awarding authority does not co-operate with the supervisory authority and does not forward the relevant file or leaves it until it is too late. The interviewees said that this is, first of all, due to the fact that supervised authorities often try to hinder scrutiny of their procedures, either because they do not want eventual irregularities to be unveiled or because they have a specific firm they want to award the contract to. Secondly, lack of co-operation is sometimes due to negligence on the part of the supervised authority. In the latter case, Gr#LA6 argued that if the firm insists and repeatedly contacts the supervisory authority,

[846] Local authorities are normally supervised by the Department for the Regions but law 2839/12-9-2000 transferred the competence of the Department to receive complaints concerning contracting decisions of local authorities to the Ministry of Public Works.

Also, for the Olympics works of 2004, the authority co-ordinating and supervising the award procedures, even those tendered by other ministries, is the Ministry of Public Works. Article 18 of law 2218/94 designates the committee within the Ministry of Public Works that receives the relevant complaints.

enquiring about the result of the complaint, it may obtain results, though he considered it unlikely that many firms would make the effort.

2 interviewees said that complaints sometimes fail because the supervisory authority is under pressure from the awarding authority not to stop the procedure.

Almost all interviewees said that, however, firms often bring such complaints, although they are aware that most fail, because they are inexpensive (according to 10 interviewees, firms usually write the complaints themselves, thus saving the extra cost of employing a lawyer) and because complaints may lead to the breach being corrected, without resort to litigation, which firms consider more adversarial and thus more likely to damage their relationship with the authority.

As regards the latter consideration, however, 2 interviewees maintained that complaints before the supervisory authority are not well received by the awarding authority, because it does not want mistakes to be exposed to supervisors, and may create problems in the firm's relationship with the awarding authority.

7.1.2 Conclusions

Almost all interviewees said that complaints are often brought before supervisory authorities, in spite of their high failure rate, to exhaust firms' options. They are not perceived as effective alternatives to litigation but rather as a mild course of action, which may solve the dispute without resorting to litigation.

7.2 Complaints to the firms' trade associations

7.2.1 Their effectiveness and use

Firms sometimes ask their trade association to intervene in order to ensure that the law is enforced. Almost all firms said that the procedure of informing the association of breaches is easy and consists in submitting to the association a written complaint, usually in the form of a letter. If the association decides that the complaint has merit, it will send a letter to the authority –often reproducing the content of the firm's letter, without however revealing the identity of the complainant. The association would try to put pressure on the authority to correct the breach. The association may notify its action to the supervisory authority so that it may intervene, if it chooses.

According to 9 interviewees (of which 7 firms), trade associations are not unwilling to help their members, especially in big contracts, though they take action only in the case of obvious breaches. However, they do not want to take sides in a dispute opposing at least two of their members -the firm that complained and other bidder(s)- so will not intervene in any procedure after the bids have been sent. The 9 interviewees, including 2 interviewed firms that participate in the management of the trade association of construction firms, mentioned that typical cases in which an association would intervene are against tailor made notices (before the bids are placed) or against repeated flagrant breaches by the same authority (but not in relation to a specific dispute).

However, 2 firms maintained that trade associations would take action only when a person working for them has a special interest in a certain firm winning and wants to use his position to put pressure on the authority to award the contract to it.

When associations take action, the 9 interviewees agreed that their intervention is effective.

7.2.2 Conclusions

9 interviewees mentioned complaints to trade associations. Such associations would act against flagrant breaches, as long as bidding has not actually started. Their intervention seems to have results. However, due to the limited number of cases where they would take action, resort to them cannot act as a substitute to litigation in most cases.

7.3 Complaints to the European Commission

7.3.1 Their effectiveness and use

Most (17) interviewees (10 firms and 7 lawyers) believe that complaints to the Commission are not effective alternatives to national remedies, for various reasons.

First of all, 4 interviewees maintained that not all firms are familiar with the possibility of complaining to the Commission. Firms that participate usually in public works awards are aware of it, but other firms, especially small firms, sometimes ignore it. 2 interviewed lawyers said that lawyers are also sometimes unfamiliar with the procedure –they are not sure where and how to send the complaint or what can be expected of the Commission's intervention. However, they said that this is not the case of lawyers with experience in procurement.

However, most interviewees said that even firms and lawyers familiar with this course of action often dismiss it as ineffective, as they believe that the Commission is not likely to act upon a complaint or, if it does, its intervention will be too tardy, ineffective or counterproductive.

First of all, 5 interviewees consider that the Commission would not act, unless the contract or the policy or law issue in question is important[847]. Thus, most complaints would not be acted upon. One lawyer, Gr#LA7 said that he knew that the Commission had, at the time of the interviews, recently received and looked into approximately 10 Greek complaints but had decided to act only on one[848].

Secondly, 5 interviewees said that many firms believe that they are not powerful or well-connected enough to prompt the Commission's intervention; they consider that only the complaints of big and influential firms or of firms with contacts in the Commission are noticed. 2 interviewees maintained that the Commission would, as a general rule, take action only if it wishes a specific firm to win the contract, for

[847] This is a sensible consideration, since the Commission itself, in its Green Paper, p.16, and Communication, p.13, *op. cit.* footnote 22 of chapter 1, stated that it will concentrate its action on cases with a particular Community interest (to be assessed by the Commission itself) and leave the rest for the national authorities to handle.

[848] Such information is unconfirmed and it is difficult to verify its truth, since numbers of complaints are not public.

example, because it is under pressure from its Member State to ensure the contract to that firm.

4 interviewees maintained that the Commission is aware of most irregularities but does not wish to intervene in order not to disturb the progress of works. In their view, the prompt award and construction of works is important for the Commission, independently of the way (lawful or otherwise) it is achieved, because it means that Community policies, such as regional policy and construction of Trans-European Networks, can be implemented according to plan –though not always according to the law. The Commission and its officials can thereby achieve to an extent their targets of ensuring the inflow of subsidies, promoting market integration and showing that the Commission works, thus avoiding the political cost of non-achievement.

Many interviewees mentioned that firms often refrain from contacting the Commission, because they do not believe in the effectiveness of its action, even when it decides to take up a case.

6 interviewees said that firms are discouraged by the length of the whole process. The Commission usually takes a long time to decide to start the infringement procedure. Then, the procedure itself is time consuming, since, for cases reaching the Court of Justice, it can take several years for a final decision[849]. By that time, the contract will have been performed. The 6 interviewees mentioned that firms do not have the wish or patience to wait for that long. They are not interested, as Gr#LA6 said, in "showing they were right *ex post* or in ensuring that the law is followed in general; they want the contract".

3 interviewed firms said that contacting to the Commission would be "a lot of trouble and not worth their while" (Gr#F3), especially if the contract is not very big.

[849] As we saw in chapter 2, infringement proceedings can take up to 3 years to be completed, counting from when the reasoned opinion is issued until the moment the Court delivers its judgement.

Small firms, in particular, consider that it would be disproportionate to the importance of the contracts they usually bid for to complain to the Commission.

Also, 3 interviewees said that firms are sometimes afraid to involve the Commission, lest the authority finds out who started the complaint and decides to retaliate, either in future awards or, in case the firm wins the contract because of the Commission's assistance, during performance. In fact, in one lawyer's experience, an authority openly threatened to retaliate against any firm that would contact the Commission with complaints concerning its awards. Though complaints are in principle anonymous, the 2 interviewees said that authorities often know who started them, either because the firm has already complained before national *fora* or because such information is sometimes leaked.

2 interviewees mentioned that the possibility of contacting the Commission often does not occur to bidders, until after national remedies have been exhausted without success. By that time it would be too late to achieve through the Commission anything as regards that contract, which will normally be under way. Gr#LA5 argued that, by that time, any initial anger caused by the irregularity will have subdued and the firm will not want to pursue the case, unless it was really hoping to win or dependent on that contract and thus is still "dwelling on it".

Finally, according to 3 interviewees, the Commission is perceived by many firms as mostly a forum for foreign firms bidding in Greece[850]. If national firms decide to proceed, they would use national remedies. In this respect, 2 interviewees argued that national disputes are better solved before national *fora* and that sending complaints to the Commission is "bad for the image of the country" (as Gr#F13 said) and, thus, should be, if possible, avoided.

In spite of the above, firms may complain to the Commission to show that they will stand up for their rights and react to breaches (as in "assertive" litigation),

according to 2 interviewees. 3 interviewees said that firms also go to the Commission because they feel aggravated and want to punish the authorities (as in "emotional" litigation); according to the interviewees, this is, in fact, the basic reason firms complain, because it is unlikely that they will otherwise get any tangible and timely results from the Commission's intervention.

6 interviewees maintained that complaints to the Commission can be effective in some cases and to an extent.

First of all, 6 interviewees mentioned that when the Commission takes action, for example when major works are at stake, it has the power to convince or pressure the authority to correct the breach –or it may ask the Court to suspend the procedure until the irregularity is corrected.

Furthermore, according to 3 interviewees, complaints or threat thereof to the Commission may put sufficient pressure on the authority to either correct the breach or settle otherwise the matter with the firm. Authorities are generally apprehensive of public embarrassment, if breaches become known, and wish to prevent involvement of the Commission, because they are afraid that it may create a scandal.

According to 4 interviewees, the threat of contacting the Commission is particularly effective when the authority is receiving a European Union subsidy for the project, as the authority will often try to find a solution to the dispute not involving the Commission, as it is afraid that, if irregularities are revealed, the subsidy may be discontinued[851]. The threat is only effective, as long as the firm does not actually send a complaint, as otherwise the authority will have no reason to compromise, especially since, once lodged, the complaint cannot be withdrawn by the firm and the Commission will proceed at its discretion.

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[850] See on foreign firms' resort to the Commission later, under the section on outsiders to the market.

[851] For this reason, Gr#F10 said that they address their complaints not to the Procurement Directorate but to Regional Development that handles subsidies.

All interviewees (17) said that it is unlikely that the Commission is contacted, for any of the above reasons, and that firms that decide to take action would normally proceed before the national courts.

7.3.2 Conclusions

Most interviewees said that firms do not feel convinced about the effectiveness of Commission action and would not try to contact it. Complaints to the Commission are neither perceived nor used as an alternative to national remedies.

7.4 The media

7.4.1 Their effectiveness and use

According to 5 interviewees, firms sometimes, instead of using remedies, try to put pressure on authorities, by informing or threatening to inform the media of the committed irregularities. Firms believe that bad publicity may compel authorities to correct breaches or otherwise settle the dispute.

According to the interviewees, drawing the attention of the media to the complaint can be easy or difficult, depending on the nature of the work, the particulars of the breach and the contacts of the firm.

First of all, the award of major or high profile projects is covered by the media in any event, because it interests the public. In these cases, the firm does not have to make an effort to draw attention to its complaint. In fact, it may be found out, even when the firm wishes it to be kept private, in order to allow for an informal arrangement.

As regards projects that are not remarkable enough to warrant coverage, journalists can become interested in them if informed that a flagrant breach has taken place. As 2 firms said, obvious irregularities have a publicity value of their own and journalists can be convinced to cover them, because "they make a good story" (as Gr#F10 said).

Also, 2 interviewees mentioned that firms with contacts in the media may try to ensure coverage of the dispute through them. The term "contacts" refers to both corporate links between firms and the media (some construction firms own newspapers and/or radio or television channels or belong to the same corporate group as them) as well as to personal links. Not all firms have contacts and, therefore, this is a course of action open only to those who possess them; however, the 2 interviewees maintained that most big firms have access to the media.

However, 3 interviewees said that, to involve the media, the firm must not have participated in or consented to the irregularity, at least in any obvious way. If it has done, journalists are bound to uncover its involvement, unless where their intervention is engineered by the firm through its contacts. In that case, the newspaper/channel in question would not publish harmful information on that firm –but other newspapers or channels getting hold of such information might. Therefore, whether it is wise or not for a firm to involve the media depends largely on the firm's "clean hands" in the matter.

5 interviewees said that firms often prefer not to involve the media, because they know that, after a case has been made public, it is impossible to reach an arrangement with the authority without the media getting hold of it, unless both sides are very careful when negotiating. When such arrangements do not consist in the correction of the breach but involve, for example, a promise for future work, parties to them are anxious that they are not disclosed.

4 interviewees pointed out that contacting the media is more effective as a threat rather than as a reality, since once the dispute has been made public, authorities often have no longer an interest in solving the problem, since their public image has already been tarnished. The threat of publicity is usually only effective as long as it has not materialised –as Gr#LA4 said, once the threat is carried out, it is emptied of its power. However, there are cases where the authority tries to correct a problem, after it has been made public, to show compliance with the law even *ex post.*

Firms sometimes also contact the media just to expose the authority's conduct, when they feel angry at the way they were treated.

7.4.2 Conclusions

Few interviewees mentioned the possibility to use the media as a means of putting pressure on the authority to correct the breach or settle. It may be a partial alternative to litigation, when the firm has no reason to keep the case quiet and when the authority is sensitive to the risk of scandal.

7.5 Settling the matter with the authority

Firms often try to resolve their complaint directly with the authority without involving the courts. Firms' complaints are either lodged formally, under the procedures provided by law, such as the pre-trial recourse of law 2522/97 and recourses open to bidders under the general procurement rules, or consist in queries or disagreements that the firm voices informally and without using a specific or formal procedure. Here we examine the role of complaints as alternatives to litigation.

7.5.1 Complaints and correction of breaches

According to most (22) interviewees, the effectiveness of complaints to correct breaches and enforce the law is minimal. Most complaints fail. GR#PA1, a senior official working for a large contracting authority, mentioned that, in approximately 80% of procedures, they receive complaints, but either reject or fail to reply to most. Only 3 interviewees (one lawyer and 2 firms) believe that complaints may be effective, though they still mentioned that their success rate is relatively low. 5 interviewed firms said that they consider that they stand a better chance before the courts, especially if the breach is obvious, than before the authorities.

Complaints fail for various reasons. According to 3 interviewees, the usual reason for complaints being rejected is that they are unfounded. Most interviewees, however, consider that rejections can be attributed mostly to problems within with the authorities.

First of all, according to 8 interviewees, authorities are unable to reply to complaints, because they lack sufficient time and staff. They receive many complaints and have too few human resources to be able to examine and reply to all within a reasonable time –or within the deadline prescribed by law, in the case of formal complaints. The Ministry of Public Works, especially, is very understaffed, as we have seen, so if it is the awarding authority, it is not likely that it will reply in time. 5 interviewees maintained that authorities may only examine the complaint, if they have a special interest in the contract, for example, big or publicly known contracts may be considered to be worth the authority's scarce time.

Additionally, complaints often fail, because officials are not always adequately trained and are, thus, unable to grasp the issues correctly. 3 interviewees maintained

that this is more the case of officials in local authorities; the staff of central government departments is, according to many (10) interviewees, well trained and competent.

Assuming that an authority has staff, time and knowledge to handle complaints, these may still be rejected. The majority of interviewees, 4 out of 5 interviewed authorities included, said that awarding authorities prefer to let procedures continue rather than ensure that the law is followed. Furthermore, 6 interviewees said that many authorities are unwilling to admit they were wrong in the initial decision. Also, according to 4 interviewees, sometimes authorities do not reply to complaints because they are lazy. In this case, 2 interviewees maintained that firms might be able to get a response by pursuing actively their complaint, contacting regularly the authority and enquiring about it; the interviewees said that, however, few firms have the required time or patience. Finally, 6 interviewees (of which 2 authorities) said that, in some cases, the authority has already decided which firm it wants to award the contract to and will therefore reject any complaints that risk endangering the preferred bidder's position.

5 interviewees, of which 3 firms, maintained that only firms with contacts in the authority have a chance of their complaint being accepted[852]. Such contacts are, according to the interviewees, officials with personal or professional links with the firm, who are willing to support it[853]. Complaints serve to "remind" these contacts that their help is needed and to give them time and an excuse to review the harmful act. The 5 interviewees maintained that firms would only use their contacts, first, if they have a case, as only then would their contacts find arguments to help them, without exposing their support of the firm to the rest of the authority, and, secondly, if they know that their bid is in good position to win

[852] In this respect, Gr#F3 and GR#10 said that firms with contacts may be able to solve any problems that arise immediately, thus rendering the need to start a complaint redundant.
[853] One of the firms, Gr#F10, argued that contacts do not equal necessarily corruption. They are mostly professional connections, which are acquired through the firm's marketing itself well, acquiring a reliable

the contract. Information about the ranking of the bid is not always openly available to firms, but, according to the 5 interviewees, firms with connections often have such information. 4 interviewees maintained that bidders that do not have connections do not usually complain[854], because they consider it unlikely that they will succeed unaided.

Nevertheless, according to 11 interviewees, if a firm threatens to sue, it may manage to put sufficient pressure on the authority to correct the breach, especially if the breach is blatant, as, in these cases, the action may be decided against the authority.

In spite of the fact that complaints are not perceived as being generally successful, almost all interviewees said that firms, for various reasons, bring complaints routinely and often instead of remedies; according to 10 interviewees, most complaints are not followed by litigation.

6 interviewees maintained that firms, first of all, often use complaints to assert the seriousness of their interest in the contract and give authorities one last chance for an amicable settlement of the dispute, before the case reaches the courts. Especially if there are several ways of interpreting the law, the firm hopes to convince the authority to follow the solution that best suits its interests.

Furthermore, according to 7 interviewees (of which 4 firms), firms sometimes bring complaints when they would not use remedies, because they consider them a milder reaction to a perceived breach than litigation and thus less likely to jeopardise their relationship with the authority. This is because neither the complaints themselves nor their procedure are considered to be as adversarial as litigation: both sides present their arguments, analyse the issues and try to find a solution to the problem.

Also, according to 3 interviewed firms, sometimes bidders lodge complaints instead of remedies because they do not want to spend money on litigation. 6

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image and persuading the authority that it is the best for the work. Such professional connections support the firm's bids and claims because they are convinced of its worth.

firms and 3 lawyers said that it is common practice for bidders to prepare administrative complaints themselves, without the help of lawyers, as they have sufficient relevant experience.

7.5.2 Complaints and arrangements for work

According to 17 interviewees (of which 2 authorities), disputes are sometimes settled through a compromise, consisting in the authority's promising future work to the firm in exchange of the firm's refraining to sue in the procedure currently under way.

According to 16 interviewees (of which 3 authorities), though such arrangements exist, they are few, mainly because the authorities do not usually feel that they have a reason to agree to them. Besides, according to 10 interviewees, firms themselves are unlikely to agree to withdraw a complaint for a promise for future work, unless they know and trust the authority, as there can be no guarantee that such promises will be fulfilled, once the risk of litigation is over. The interviewees said that there have been instances of authorities breaching such agreements.

10 interviewees, including all 5 interviewed authorities, said that authorities are reluctant to compromise, first of all, because they are aware of the fact that most cases fail at trial and thus are not usually afraid of litigation, especially if the case against them is not very strong[855]. Moreover, according to 3 interviewees, though firms sometimes threaten with personal exposure of the responsible for the breach, authorities are not intimidated, as contracting decisions are taken by a committee and cannot be attributed to one person only, unless, in a specific case, a person can be singled out. 5 interviewees, including 2 authorities, said that authorities try not to give in to threats of suing, because they consider that, if

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[854] In fact, Gr#F10 said that it is unusual for a firm to even bid, if it does not have people in the authority.

they do, they show that they are vulnerable to such pressure. Authorities believe that arrangements for work are bad precedents, as the same or other firms, having learnt of the arrangement (the interviewees said that such information is easily leaked to the market), may try to use remedies in future awards in the same way, i.e. to extract a promise. In connection to that, GR#LA8 said that firms sometimes threaten to sue because they want to test the authority's limits and see whether and to what extent it is willing to negotiate.

11 interviewees, including 3 interviewed authorities, said that arrangements for future work are, in any case, not easy to implement, as procurement rules are fairly rigid and authorities cannot or (according to 3 interviewees) are afraid to breach the rules flagrantly, especially as competition at awards is fierce and irregularities would be noticed. Thus, authorities may be unable to guarantee that the contract will be actually awarded to the firm and, realistically, can only promise to try. 3 interviewees said that there have been instances where authorities, to implement such arrangements, drafted the specifications to fit the firm that they wanted to award the contract to in such detail that the firm was the only one fulfilling the required technical characteristics, with the result that the specifications had to be amended to be more general[856].

Nevertheless, 17 interviewees said that there are cases where authorities may compromise with firms, to avoid cases reaching the courts, especially if the contested act is clearly irregular.

First of all, 8 interviewees said that authorities would negotiate, when they are in a hurry to complete the award and do not want to risk it being suspended. Authorities are particularly anxious to avoid delays when they receive funding for that project

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[855] In this respect, Gr#LA5 said that informal arrangements are easily obtained during performance, because there the claim of the firm is easier to prove and more likely to succeed at trial.

[856] Gr#F12 said that, in any case, such tailor made specifications are difficult to draft since most firms do not have a special trait distinguishing them others.

(from either the state and/or from the European Union as a subsidy) that is dependent upon completing the award or starting performance within a deadline.

According to 9 interviewees, authorities may also reach an arrangement with a firm threatening to start proceedings, when they have specific reasons for wishing to complete that award without judicial interference, for example when they want to negotiate with bidders, though not allowed to under the rules, or when they want or have arranged to award the contract to a specific firm.

Furthermore, 4 interviewees said that authorities wish, in particular, to avoid litigation (and possible ensuing delays and annulments), when completion of the award and progress of the work is part of their political agenda and concerns achieving specific objectives[857], fulfilling electoral promises or securing votes, putting in place local or national policies, implementing action plans and consolidating the authority's participation in public life[858]. National and local authorities are elected for a four-year mandate and have to complete projects within this time to achieve the aforementioned goals, thus it is important for them to avoid delays[859]. Besides, 4 interviewees mentioned that people working for authorities, politicians and staff, also want awards to be completed and contracts performed for career reasons, in order to appear to have done tangible work and build an active, competent and efficient record.

7 interviewees stressed that authorities are likely to reach an arrangement to avoid litigation, when there is danger of political damage, especially if the dispute concerns major works or a flagrant breach and the media may give publicity to the case if brought. In the words of Gr#LA7, "authorities want to have an efficient, law-abiding

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[857] According to Gr#LA6, these include, for example, creating employment, helping the construction industry and/or any other sector of the economy concerned by the work, improving the infrastructure of the country, promoting the development of the region where the work will be built.

[858] **According to Gr#LA2, this is especially true of the Ministry of Public Works, that needs to ensure that public works progress, as this is its primary role, and if it is not fulfilled, its involvement in public life is diminished and its role as an independent ministry questioned.**

[859] In connection to that, Gr#LA6 and Gr#F10 mentioned that even in contracting authorities that are not elected, such as utilities and public enterprises with specific functions (for example, ERGOSE, which is responsible for maintenance and building of rail lines, Athens 2004, which is responsible for works related to the Olympic Games of 2004, ATTIKO METRO, which is responsible for the extension of the subway in Athens and others), the heads are often appointed by the governing party and are replaced when it loses the elections to another party.

and clean profile" and are afraid that litigation, especially if covered by the media, could destroy their image. According to 5 interviewees, this is in particular the case of central government bodies, which have bigger public exposure and are more sensitive to the risk of political damage than local authorities[860].

Finally, 3 interviewees said that said that certain officials, if personally responsible of the breach, are worried that litigation would bring their actions to the fore and that criminal and/or disciplinary action may be started against them and so try to come to an agreement with the firm.

7 interviewees, including 2 authorities, said that the content of the promise (and, as we have seen, whether it will be kept) depend largely on the firm's relationship with the authority and that usually only firms with contacts can achieve arrangements that are satisfactory and that will be complied with[861].

7.5.3 Conclusions

According to most interviewees, firms bring formal or informal complaints to enforce their rights frequently. Many interviewees mentioned that firms often view such complaints as an intermediate solution between starting litigation (the repercussions of which on their business relationship with the authority they sometimes fear) and not taking any action at all (thus losing the contract without a fight). However, most interviewees said that complaints are unsuccessful, unless the authority has blatantly breached the rules (and thus wishes to avoid judicial scrutiny of its procedures) or when the firm has contacts in the authority. In general, complaints are not perceived as alternatives to litigation in terms of effectiveness but rather as a

[860] Firms' usual target is the ministry and the minister of Public Works, since it is the department that has competence for awarding most of the major nation-wide construction contracts.
[861] Gr#F10 maintained that firms with contacts would negotiate with these persons, as informally and off the record as possible, so that interference from other officials is minimised.

course of action that is acceptable, when the use of remedies has been, for any reason, ruled out.

Arrangements for work often prevent litigation, as firms exchange their claim in the current procedure for future work. These arrangements breach of the law, thus, independently of their usefulness as alternatives to litigation for firms, they cannot replace the role of remedies in restoring legality. We have seen, however, that arrangements are not easily obtained, are not common and are not always followed.

It is interesting that firms' threats to sue have sometimes an impact on authorities and prompt the correction of breaches or lead to authorities' promising work in exchange of the firm's refraining from proceeding, in spite of the fact that authorities know that most cases are lost at trial. Authorities seem to wish to avoid litigation, because of the multiple non-legal complications it might entail for their work plan, their role in public life and the career of the persons working for them, rather than out of fear that the case will be decided against them.

We have seen that authorities often believe that legal action will be unsuccessful. This means that the authority will not necessarily agree to an informal settlement because it is threatened with litigation, unless the case against it is strong or has political implications. That authorities do not take remedies into account seriously arguably also means that the preventive power of remedies against breaches is limited.

7.6 Arrangements between firms

7.6.1 Their forms and frequency

21 interviewees (including all interviewed authorities) said that disputes are sometimes solved by arrangements between firms, consisting in securing the contract for one firm by offering rewards to other bidders, whose complaints threaten that

firm's chances of winning, so as not to pursue them. Authorities are sometimes involved in such arrangements, though not always. The interviewees said that such arrangements are common and by large outnumber arrangements between firms and authorities.

According to 18 interviewees, the most common arrangements between firms are subcontracting arrangements, whereby the bidder that seems likely to win or that has an agreement to that effect with the authority promises to subcontract a part of the work to the firm that has brought or threatened to bring a complaint, if it does not proceed with it. There are also instances, according to 4 interviewees, where the firm threatening to bring a complaint has been paid not to pursue it, but these are less common. According to 6 interviewees, sometimes, when the authority wants to award the contract to a specific firm (often as a result of previous arrangement), it warns that firm of complaints by other bidders, so that they can come to an understanding and ensure that the initial arrangement stands[862]. The 6 interviewees said that authorities usually refrain from participating in such negotiations. According to the majority (17) of interviewees, a firm would agree to subcontract work or pay a sum to other bidders for not pursuing their complaint, only when it has high chances or a certainty of winning the contract and only to those firms that it considers reasonably serious competitors for it. 5 interviewees said that there are usually no arrangements between firms for very big or high profile contracts, because no firm standing a reasonable chance of winning is willing to give them up for a financial reward or subcontracting[863].

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[862] According to Gr#LA1, authorities have sometimes agreed to award the contract to a firm for a financial reward and are afraid to lose the reward, if the complaint is successful and they are not allowed to complete the award as they want.

[863] According to most (22) interviewees, very important as regards the use of remedies are also work share arrangements between candidates for a contract, which are agreed before the bids are sent. Such arrangements prevent disputes from arising and render the use of remedies redundant for firms that participate to them. The agreements are reached between competitors for a contract, who either settle in advance which one will be the winner (that will then subcontract parts of the work to the others or, exceptionally, pay them), or, in the case of a series of contracts in the same area or tendered by one authority, share the contracts between them. This is done in each case by arranging which firm should bid or what each firm should put in its bid. Which firms will be included in these agreements and what

7.6.2 Conclusions

According to most interviewees, arrangements between firms solve disputes and thus constitute alternatives to remedies. As was mentioned in the case of arrangements between firms and authorities, such practices breach the law and thus, independently of their role in replacing litigation for firms, cannot substitute remedies in restoring legality.

8 Conclusions of section 2

Ignorance of remedies is not a common phenomenon, which means that firms mostly refrain from suing for specific thought out reasons, having to do with some difficulties of the review system, the sometimes negative advice of their lawyers as regards suing, their fear of endangering business through litigation, their frequent unwillingness to spend resources in litigation, their fear that litigation may expose their own violations of the rules, when their conduct has not been compliant, and their resort to ways of reacting to perceived breaches that do not involve litigation. It seems, from the interviews, that the basic reasons for litigation avoidance are (with an attempt at establishing a sort of "hierarchy"), first of all, the low chances at trial, secondly, the existence of arrangements between firms and authorities (especially those between firms), that prevent disputes from reaching the courts, and thirdly, the fear of retaliation from authorities and other firms.

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share of the work each will take depend on the firms' market power and chances to win the contract. Thus, firms that would reasonably be expected to win would normally participate.

The existence of remedies often does not preoccupy authorities, as they consider the likelihood of a case against them being won relatively small.

SECTION 3

SIZE, MARKET POSITION AND MENTALITY OF THE FIRM

There is a difference, in the approach to litigation, between big and small firms and between established firms and firms new to public works. The mentality of the firm is also relevant to whether and when it decides to sue. The size, market position (which the interviewees described as the presence of the firm in the market, including the duration of its existence, its experience and network) and mentality of firms are discussed in a separate section, because they cannot be strictly classified as reasons that encourage or discourage litigation, as they are not taken into account as such by the firm when it decides whether to litigate. They form, however, part of the context in which the decision to sue is taken.

1 Small and big firms

5 interviewees said that small firms show a greater interest in litigation than big firms, for various reasons.

First of all, small firms cannot afford easily the costs of bidding for many contracts, so it may be vital for them to win the one that they have bid for. Big firms, on the other hand, usually bid for several contracts and are not inconvenienced when they lose one, unless it is one that they particularly want. Besides, big firms have a share of the market and usually have work, as only they have the financial capacity to bid for and construct certain contracts. Also, big firms often have sufficient leverage to secure work through arrangements. Therefore, according to 5 interviewees, small firms often consider suing in cases in which big firms would not have reacted, because they need work and cannot ensure it through other channels –in spite of the fact that legal costs (though, as we have seen, not significant) are more onerous for them. The

interviewees maintained that small firms often view litigation as the only way to defend their rights, since it is open to all on equal terms, unlike out-of-court negotiations. Also, according to the same 5 interviewees, small firms sometimes "feel bitter" (as Gr#LA7 put it) about the way procedures are conducted -i.e. often on the basis of arrangements and in breach of the rules- and about the fact that, as a result of their weaker position in relation to big firms, they do not get a good share of the work. They are, therefore, more likely to use litigation "impulsively" (as Gr#LA6 said) or "vindictively" (as Gr#F10 said) against authorities that have treated them unfairly.

According to 3 interviewees, small firms, however, hesitate sometimes to proceed, because they are afraid of retaliation or are vulnerable to threats of retaliation by authorities. Small firms often have a smaller area of business activity than big firms, which means that, if they are blacklisted by their clients, their livelihood may be threatened. This is not often the case of big firms, which often have alternative business possibilities, if their relationship with one authority is damaged. Especially firms working often for one specific authority do not want to sue it and risk losing a source of work, which ensures to an extent their income.

2 Established and new firms

Apart from the size, the market position of the firm also affects its likelihood to sue. According to 7 interviewees, firms established in the public works market tend to litigate less than new firms, for various reasons. First of all, established firms have experience in the area and consequent expertise and are, therefore, often the winners of awards. Moreover, their long presence in the market often means that they have acquired connections which help them to secure some contracts informally. Furthermore, established firms, due to their experience, are better acquainted with alternative ways of reaction to an irregularity, such as

arrangements with authorities. The fact that, one way or the other, established firms are often the winners of contracts or of arrangements means that they are often at the receiving end of the effects of litigation: if it were not for other firms suing, they would have won and/or been allowed to proceed with construction immediately. Thus, according to 5 interviewees, they see more the advantage of quick and undisturbed completion of awards than that of the possibility to challenge the way they are conducted. 4 interviewees maintained that some established firms believe that it would be best if remedies and, in particular, interim measures were not available, as they delay and disrupt procedures.

According to 3 interviewees, established firms' reduced willingness to sue may also be explained to an extent by the fact that, through their longer experience and better knowledge of the market, they have become "more philosophical or cynical" (as Gr#F3 described it). They are more familiar with and accept more easily the fact that procedures are not always run according to the rules and thus do not react to breaches, unless in extreme cases and as a last resort, when other ways of problem solving have been exhausted. They do not "have the energy to consistently challenge procedures, even when they risk losing a contract", in the words of Gr#F3.

3 interviewees said that experienced firms also know that acceptance that authorities and other firms breach the rules may be a condition of professional survival or prosperity and that winning a case has short-term benefits but may have long-term side effects such as breakdowns of business relationships.

Finally, according to 4 interviewees, established firms have experience of what it costs in terms of money, time and use of human resources to challenge a decision and often do not consider it worthwhile.

6 interviewees (of which 4 firms) said that established firms would sue if they considered it necessary or beneficial, for example, for major contracts or when they wish to push for an out-of-court agreement with the authority, but that they would not sue as an impulsive reaction to unfairness. According to the interviewees, established

firms are likely to have a thought out strategy of how to behave in the market and how to react to breaches and would not act in a rash way.

8 interviewees (4 firms and 4 lawyers) said that established firms do not engage in any form of litigation without good chances of winning at trial, such as optimistic or opportunistic litigation. This is because they aware of the possible prejudicial effects of such litigation on their relationship with the authorities and are unwilling to allow its unlikely advantages to jeopardise business.

5 interviewees said that new firms do not have the expertise or contacts that established firms have and cannot win or secure contracts or arrangements with the same ease, do not have the same philosophical attitude or experience of what litigation entails and are thus more likely sue, especially as they sometimes have no other way of defending their interests.

3 Mentality of the firm

14 interviewees maintained that there is a personal element in corporate decisions, which defines the firm's mentality (here, in the sense of its litigiousness) and explains to an extent why some firms litigate more than others. The interviewees argued that the decision to sue reflects the approach of the persons competent for deciding, who, according to almost all interviewed firms, are the managers of the firm, after consultation with the team that prepared the bid and the legal adviser(s).

Thus, according to 9 interviewees, some firms are relatively litigious, because they are "feistier" (as described by Gr#LA8) and do not give up on contracts easily, but wish to exhaust all the courses of action available to them to try to win. 5 interviewees mentioned that the fact that some firms have a more optimistic view of litigation and of their chances of winning at trial is attributable to mentality. In this respect, 3 lawyers said that they have clients that sue in a systematic way, independently of whether they have a good case, because their management takes the

view that it is worthwhile to attempt litigation "on the off chance they win" (as Gr#LA9 said).

4 interviewed firms, however, maintained that it is important not to overestimate the personal factor in corporate decisions. First of all, firms are business entities that do not usually act on the basis of personal preferences, but after analysis of the advantages of suing and of the different courses of action, because there are financial interests at stake, which cannot be jeopardised. Secondly, there is a high degree of rationalisation in decision taking at corporate level, since decisions are reached after consultation with more than one (groups of) persons. However, they agreed that there is a personal element in all decisions, as they are ultimately taken by persons.

4 Conclusions of section 3

Some (not many) interviewees mentioned that small firms are more willing to litigate than big firms, because their livelihood depends upon winning some contracts and because litigation is sometimes their only way to react to a breach. However, small firms sometimes hesitate to proceed, as they are afraid of being blacklisted. The answers to the interviews are not sufficiently convergent to clearly indicate in which direction the size of firms may influence their decision to sue.

Some (not many) interviewees said that new firms are more willing to sue than established firms, often for similar reasons as small firms.

According to almost half of the interviewees, mentality plays a role in the decision to sue and some firms are more prone to litigate than others. The point was qualified but not disputed.

SECTION 4

SPECIAL CIRCUMSTANCES

Special circumstances are situations with distinctive and unusual features. In such situations, firms' decision to sue is not taken on the basis of the factors discussed above, but is chiefly the result of the special features.

1 Important contracts

Almost all interviewees said that firms would sue over important contracts. The interviewees described as important, contracts that are very profitable or unique as regards their size, the profit prospects they offer, the business possibilities they open or their particular value as professional experience (as for example a contract for construction using new technologies).

According to the interviewees, firms want and need such contracts and are willing to sue for them, even when, for any of the reasons mentioned above, they would not sue over other contracts. The interviewees said that since (as we have seen) there are usually no arrangements between firms for such contracts, firms starting litigation usually pursue the case to the end.

2 Outsiders to the market

12 interviewees said that firms who are outsiders to public works awards of a country are more likely to sue than firms usually participating in them. The interviewees described as outsiders firms that do not work normally in that market or country, for example, foreign firms, firms that usually work for the

private sector or firms that usually undertake types of construction different from the one that the award concerns.

We will first examine the case of foreign firms[864]. 10 interviewees said that foreign firms only bid in Greece for very few big works, when the expected profit from the contract makes the effort to move staff and equipment worthwhile. The interviewees said that the majority of works in Greece are not sufficiently big to be worth the effort[865].

Foreign firms are more likely to sue for several reasons.

First of all, the 10 interviewees said that, since foreign firms make the effort only for specific contracts, they are determined to win them and will, therefore, exhaust all courses of action available to them to achieve that, including litigation. Secondly, the interviewees mentioned that foreign firms are not afraid of the effects litigation may have on their business relationships. As they are outsiders to the market, they have no established business links to harm and are not interested in maintaining a good relationship with the authority, as they usually do not remain in the market after the contract is completed and may never bid for another contract there again –since the contracts they bid for are rare. Thus, due to their determination and lack of fear of retaliation, foreign firms are often willing to sue, if a breach occurs.

4 interviewees maintained that foreign firms of other Member States often prefer to take their complaints to the Commission rather than to the national courts. According to the interviewees, foreign firms believe that the Commission

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[864] Subsidiaries of foreign firms that have been set up on a fixed basis in Greece participate in national procedures and operate in the market in the same way as a national firm. For the purposes of this discussion, they are considered as national firms.

[865] **Foreign firms often form consortia with Greek firms to bid for contracts. Such consortia are based on an exchange of complementing qualities. As most interviewees said, foreign firms offer money, know-how, reliability and their reputation, which is often superior to that of the national firms. In return, the national firms offer locally based infrastructure, both human and mechanical, their knowledge of the market and their established presence in it –including their contacts. National firms also know better the characteristics of the work and the needs it aims to cover and may be more familiar with the area where the work will be built or more aware of the use that will be made of the work, for example because of certain consumer attitudes. In consortia, according to**

can be persuaded to intervene, because of the usually big size of the contracts and of the Community element of the case (since they are bidding in an E.U. country other than their own) and consider that the Commission may be able to resolve the dispute.

According to 8 interviewees, other outsiders to awards also only enter a part of the market, where they do not usually operate, for specific projects, and thus are likely to sue, as they are, first of all, determined to win the contracts and, secondly, are not concerned about their relationship with the authority.

3 Conclusions of section 4

According to almost all interviewees, firms are likely to sue over contracts that they consider important. Many (but not most) interviewees said that outsiders to public works awards are also likely to sue, as they are usually determined to win the contract and are not afraid of being blacklisted.

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most interviewees, the approach to litigation is oriented by the Greek participants and so is dependent on all the factors discussed here.

SECTION 5

THE EARLY OPTIMISM FOLLOWING THE ADOPTION OF LAW 2522/97

The adoption of a new law on remedies had an impact on firms' approach to litigation, as regards interim measures. This impact is examined in a separate section, since it is has limited temporal validity and is not a factor normally taken into account by firms when they decide whether to sue.

1 Impact on litigation

According to 12 interviewees, the adoption of law 2522/97 and the introduction, for the first time, of interim measures in administrative law created a climate of optimism about bidders' chances to get relief. For that reason, interest in remedies and the number of applications for interim measures increased after the adoption of the law. However, as the interviewees said, it soon became apparent that the case law under law 2522/97 continued to be strict for the applicant and that the majority of applications were rejected. As a result, the firms' interest diminished and the number of applications accordingly decreased –though many are still lodged. In this respect, Gr#LA9 mentioned that, though he works almost exclusively in procurement and has many construction firms as clients, he had not applied for interim measures in 6 months at the time of the interviews. 4 interviewees said that the law is currently used by firms more to coerce arrangements.

3 interviewees said that the law retains a preventive function, since authorities are aware that there is a small risk of interim measures being granted and, thus, are more careful to comply with the rules.

2 Conclusions of section 5

As many interviewees said, applications for interim measures under law 2522/97 increased, when the law was first adopted, due to the fact that firms were initially optimistic about their chances of being awarded relief. They were however subsequently disappointed by the high number of rejections of applications, which is mainly due to the reluctance of the courts to grant relief. 3 interviewees said that the law retains a certain preventive power.

Conclusions of chapter 9

Almost all interviewees maintained that the relatively low legal costs are the main reason that firms use remedies to solve their disputes with authorities. The impact of the low legal costs shows from the fact that firms sometimes sue even when they do not have a strong case and, occasionally, on the basis of unmeritorious claims, hoping for an unexpectedly favourable outcome. The interviewees suggested that firms would not take legal action in such cases, if legal costs were significant. The low legal costs encourage in the same way what we have called emotional and assertive litigation, as they make such uses of remedies financially feasible.

If we attempted to "rank" the rest of factors which determine firms' decision to start proceedings according to the findings of the interviews, arguably firms would, first of all, take action if the contract was for any reason particularly important for them (a relevant consideration here is whether the firm entered that part of the market or country only for that contract) and secondly, if their chances to win the case appear to be good. The mentality of the firm was mentioned by many interviewees as relevant to the decision to sue.

Regarding factors deterring or preventing firms from attempting litigation, again in a sort of order, the first appear to be the low chances at trial (and, to a lesser extent, the length of proceedings), the second are arrangements between firms (and, to a lesser extent, between authorities and firms), which prevent disputes from reaching the courts, the third firms' fear of retaliation from authorities (and, to a lesser extent, from other firms), especially from local authorities, for which almost all interviewees agreed that they have blacklists.

We have seen that the power of remedies to prevent breaches is not strong in Greece, as authorities consider the risk of a case against them being successful relatively small.

Chapter 10

Conclusions

In this chapter, we will summarise the results of the study and discuss their policy implications. First, we will briefly compare the empirical findings in the UK and Greece and examine the theory developed on their basis, regarding the approach of bidders to legal action and the effectiveness of remedies as enforcement mechanisms, in their present form in the UK and Greece. Then, we will mention the policy considerations arising from our results.

1 Similarities and differences regarding the use and impact of remedies between the UK and Greece

The major difference between remedies in the two countries, which, at the same time, is the major factor affecting bidders' willingness to sue, is the level of legal costs. In Greece, they are insignificant, which means that litigation is an affordable option for firms that have reasons to start proceedings, while, in the UK, legal costs are extremely high and are the most important cause of litigation avoidance.

Other than legal costs, the considerations that lead firms to sue or not follow roughly the same patterns in the UK and Greece (as is shown by the similar subheadings into which factors encouraging or discouraging firms are divided in each country), though they do not always have the same weight in the two countries. In both, firms are willing to sue, if a blatant and unfair breach occurs, as well as over a specific important contract or a contract for which the firm exceptionally entered the country or market. These are the major reasons for litigation in the UK and very important incentives, after the low legal costs, in Greece. As regards factors discouraging from litigation, the low chances of winning are the strongest disincentive in Greece and, in

the UK, they are the major deterrent after the high legal costs. Fear of blacklist, on the other hand, though a consideration in both countries, seems to carry more weight in the UK.

There are, however, factors that are specific to each country. In the UK, an important reason of the low rates of litigation is the national legal culture of litigation avoidance, which, on the basis of the collected answers, seems to follow legal costs and low chances at trial in the ranking of deterrents from the use of remedies. In Greece, firms sometimes do not sue, because they have reached an arrangement with each other, which was not mentioned as a dispute resolution in the UK. Also in Greece, firms sometimes sue even if they do not have a strong case, hoping for an unexpectedly favourable outcome, which is never the case in the UK due to the amount of legal costs. Firms in Greece sometimes also use litigation to show their interest in the contract and determination to be treated fairly to authorities and competitors, knowing that such a course of action is affordable. In the UK, such a course of action would be very expensive and, in any event, litigation is not viewed as a vehicle to set a precedent, project an image or make a point.

The preventive power of remedies is small in both countries, as authorities consider that the likelihood of a case against them being either brought (this was raised mostly in the UK) or won (this was raised mostly in Greece) is very low.

2 Empirical findings and the emergence of a theory on the use and effectiveness of bidder remedies

In the empirical investigation we used theoretical sampling to discover, build and test theoretical conclusions concerning bidders' approach to litigation and the power of legal remedies to enforce the law, in the UK and Greece.

Sufficient convergent data were found in the interviews to support an emerging theory on use and effectiveness of bidder remedies, which applies to both review systems.

This theory, as regards, first of all, the approach of bidders to remedies, is that their reluctance or willingness to react to a perceived breach with litigation depends predominantly on the features of the review system and, in particular, first and above all, on the amount of legal costs and, secondly, on procedural or case law difficulties that render the chances of winning at trial small. Thus, in the UK, the empirical findings indicate that bidders would be more willing to sue, if litigation were more affordable, while in Greece the low legal costs have been put forward as the major reason recourse to litigation is considered. Likewise, the findings indicate that if the conditions for obtaining relief were favourable, bidders would be more likely to sue, as the benefits expected from litigation would justify spending resources on it or risking jeopardising business. According to our data, even national culture, such as the negative UK approach to the use and usefulness of litigation as a dispute solution mechanism, may change, if litigation appears to be advantageous for bidders –though aspects of legal culture unrelated to the features of the review system, such as trust in the integrity of the public sector would probably remain.

The theoretical conclusion as regards, secondly, the effectiveness of a national review system to enforce the law, is that this also depends on the features of the system, on their own but also as far as they influence bidders' use of remedies.

On their own, the features of a review system, to the extent that they affect adversely bidders' likelihood of obtaining relief in cases where they have a valid claim, impede, first of all, the correction of breaches, and thus *ex post* enforcement of the law or compensation of sustained harm. In this respect, interviewees in both countries mentioned that relief is sometimes refused, not on the merits of the case, but because of procedural difficulties or judges' lack of familiarity with procurement law or

reluctance to intervene in awards. Secondly, the low rate of successful actions affects adversely the power of remedies to deter breaches and thus ensure *ex ante* enforcement of the law. The empirical findings indicate that authorities do not take remedies seriously into account, as they consider the risk of a case against them being successful relatively small, and that, thus, remedies would not be a reason for them to comply with the law. This point applies mostly to Greece where remedies are frequently used. In the UK, the extent of preventive power of remedies is related to the infrequency of their use, as we will see in the next paragraph.

The features of a review system affect its effectiveness to enforce the law also through their impact on the use of remedies. First of all, the extent of use of remedies influences directly their corrective power, as the courts may correct irregularities or make amends to harmed firms only when seized. The empirical findings show that authorities are unlikely to correct irregularities of their own accord, on the basis of bidders' informal or formal complaints, and that alternatives to litigation are not frequently used or are not effective in correcting breaches. *Ex post* enforcement is mainly dependent on legal action. Secondly, the empirical findings show that the preventive power of remedies is also dependent on their use. Thus, we saw that, in the UK, where litigation is infrequent, authorities do not usually take remedies into account when awarding contracts, as they are complacent in the knowledge that the firms do not, as a rule, challenge their procedures. Thus, authorities do not hesitate to breach the law to make their procedures more efficient, often in what they consider to be a not unfair way, as they believe that the risk of being sued can be discounted. This means that the preventive function of remedies is limited when their use is small.

3 The results of the study

We have examined the principles by which national remedies to enforce EC law are required to abide, namely non-discrimination and effectiveness, and have seen how

they may apply in the case of procurement remedies. We have argued that the principle of effectiveness, in particular, may be interpreted to require detailed implementation of the Remedies Directives, may apply to a review system as a whole and require that remedies complement each other and arguably entails for the Member States the obligation to provide for speedy proceedings and effective interlocutory relief. We have discussed the provisions of Directive 89/665 on public sector bidder remedies and how they may be interpreted. The procurement review systems in the UK and Greece, put in place to implement Directive 89/665, were also examined. We have seen that remedies in the UK are not frequently used, whereas litigation, at least for interim measures, is usual in Greece and has increased under the law implementing the Remedies Directive. Interviews with bidders, awarding authorities and procurement lawyers in the construction sector in the UK and Greece lead to the theoretical conclusion that the features of the review systems, especially the level of legal costs, are the major factors that affect bidders' approach and influence the effectiveness of each system to correct and prevent breaches, on their own and through their impact on the use of remedies. Bidders' perception and use of remedies is also determined, to an extent, by the national legal culture, aspects of which, such as trust in the fairness of awards in the UK, are partly independent from the features of the system.

4 Policy implications of the results of the study

The findings indicate, first of all, that remedies are not in principle incapable of assisting enforcement. They can lead to the correction and prevention of breaches. Bidders often monitor award procedures, are interested in seeing their rights observed and, even in the UK, where legal action is rare, firms do not dismiss it completely but would probably sue if they have a good case.

Secondly, the findings show that the two review systems can and need to be improved, for their use and effectiveness to increase. Unnecessarily stringent or flawed procedural rules and conditions need to be amended and made clearer, more lenient and coherent, in order to allow the easy correction of breaches or compensation of harm and, at the same time, provide firms with incentives to use remedies and contribute to enforcement. The duty to improve the system lies with the Member States, which are competent for adopting and applying the necessary procedures to give effect to the Remedies Directive. Most procedural defects are due to gaps or imperfections of the implementing measures or the omission of the national judge to fulfil his obligation to ensure the enforcement of EC law and not to imperfections of the Directive, which is not, as we have seen, a legal instrument with detailed rules. We have discussed in detail what these imperfections or gaps are and how they could be amended in the chapters on the two review systems. On the basis of the empirical research, we stress here especially the need for trained judges and for clear rules -we have seen that, in Greece, uncertainty about the law and case law may lead to speculative litigation. It is, however, difficult to see how the amount of legal costs would lessen, since this is decided by the market, not the state, unless radical procedural changes are undertaken.

The effectiveness of legal remedies has probably inherent limits; factors such as legal culture and, possibly, fear of retaliation are, to an extent, unaffected by the features of the system, though we have seen that a good chance of winning at trial may help firms to overcome their hesitation to sue.

The desirability of improving procurement remedies is based on the current policy and position of the Community institutions, and especially of the Commission, which has stated its views in its published papers and communications, that enforcing EC procurement law in detail is wanted. We have seen, however, that use of remedies often leads to delays and cancellations of

awards and we have found, in the empirical research, that bidders as well as authorities would often prefer procedures to go ahead unhindered, even if they are flawed. A relevant point is that, in the UK, awards are perceived to be already fair, which (in case the perception of the market corresponds with reality) raises the question if detailed technical compliance is desirable, when the basic objective of the EC procurement rules of ensuring the equal and fair access of bidders to awards is achieved. We have also seen that authorities, if threatened with legal action, may agree to unlawful arrangements, often consisting in promising a future contract to the complainant. Such arrangements are due to authorities' wish to avoid the disruption that litigation may cause in their procedures and not only fail to correct but actually perpetuate breaches, by multiplying the instances where contracts are awarded irregularly. The decisions of whether, in view of the aforementioned concerns, strict enforcement of EC procurement law is desired or necessary and of whether the advantages of having effective remedies are not outweighed by other considerations have to do with policy choices at European, not national, level –Member States are currently still required to ensure the full force and effect of the remedies rules, as long as the Remedies Directive(s) apply in their present form. EC policy questions have not been examined in this study. Neither have we discussed whether there are means of enforcement other than bidder remedies that would be less disruptive of awards and/or more effective in enforcing the law. Such issues should, however, be considered at European level to decide if reliance on bidder remedies is appropriate or wished for. If the answer is positive, then our conclusions on the importance of the features of the review systems and suggestions on how they may be improved are relevant.

Appendix

Interview guide

The questions in the interview guide are divided according to the research premises. The formulation, coverage and number of questions actually asked is not identical or restricted to those listed here. Where a question is directed to only one or two of the three categories of interviewees (bidders, warding authorities and lawyers), these categories are mentioned in parenthesis; otherwise the question is addressed to all interviewees.

1 General introduction

1 What is your experience in procurement?

2 Are there breaches during awards?

2 Ignorance of the law

1 Are firms acquainted with procurement law? On what does their knowledge depend (for example, legal advice, experience in public works awards)?

2 How do firms detect breaches?

3 If a firm has a complaint, what would it do?

4 Are firms aware of the remedies available to them? Would they take legal advice to find out? How often?

4 Do firms have in-house lawyers dealing with procurement queries?

5 Has recent case law prompted more queries/ increased firms' interest in remedies? Do they know about it?

3 The features of the review system

1 How do firms assess, when deciding whether to sue, the time and cost involved in litigation, their chances of winning and the redress available? Are all these considerations equally important or is there one or more that have an increased importance?

2 How much do lawyers charge per hour/ per case?

3 How much does an average case cost? On what do costs depend (for example, complexity of the case, stage of the award procedure, what remedy is sought, good evidence)?

4 Does the firm's decision depend on the strength of the case? To what extent?

5 Do firms have an interest in setting a precedent when the law is unclear for future use and under what circumstances?

6 Which remedy firms apply for more often? For what reason? Would they use the other remedies more if they were designed or applied differently?

7 Do firms feel that all/any of the traits of remedies are very burdensome (for example, difficulties in adducing proof, the undertaking in damages in the UK)? To what extent do they influence their decision to proceed? Do they deter them?

8 Has the national legislation implementing the Remedies Directive improved the situation in relation to remedies? In which way?

9 Has the introduction of procurement remedies increased (the interest in) litigation?

10 How could the procedural rules be improved?

4 The role of legal culture

1 How often do lawyers get queries on procurement disputes?

2 Have you (firm/lawyer) used legal remedies to solve procurement disputes? If yes, how often? I s your use of remedies recent?

3 (For lawyers) Would you describe your clients as regards their approach to litigation as taking risks, avoiding risks or neutral?

4 Do firms litigate against public bodies more in other areas of law (for example, breach of contract)?

5 (UK) Why aren't there many cases? Is it a special trait of procurement to avoid litigation?

6 (UK) lf remedies were designed/applied differently (and how), would firms be more interested in them?

7 (UK lawyers) There are more cases recently. Why is that? Is this phenomenon likely to continue and what is its impact (for example, encouragement of litigation

through creation of a more litigious climate, through the clarification of the case law and diminution of the unpredictability of the trial outcome or through increasing firms' awareness of t remedies).

5 Fear of retaliation

1 Do authorities have firms they award contracts to regularly? Why? Do they switch easily to new firms?

2 When firms decide whether to sue, do they consider the possibility of losing future business? If yes, to what extent does this possibility affect their decision to proceed?

3 Which type of firms are more likely to worry about being blacklisted, for example firms with established business links or currently executing another contract with the same authority, big firms, firms dependent on that particular contract?

4 Would authorities avoid awarding a contract to a firm that has challenged their procedures in the past?

6 Outsiders to the market

1 Would firms sue when in a new market, more or less than in their usual market and why?

2 Are firms afraid of retaliation in a market/state other than the one where they usually bid, if they sue? If yes, does this fear concern the possibility of deterioration of its relationship with the particular authority or other business repercussions and what are these?

7 Importance of the contract

1 Does the decision (not) to sue depend on the importance of the contract for the firm? To what extent?

2 For which reasons may a contract be deemed to be particularly interesting for a firm, for example, because of its profit margin, its potential to help the firm build a reputation/establish links for future contracts, its importance for the survival of the firm?

8 Out-of-court arrangements

1 Are there out-of-court arrangements and why?

2 In what do they consist? Are they frequent? What is their advantage in relation to litigation, for example, saving time and/or legal costs, obtaining something concrete rather than risk litigation?

3 (For firms/lawyers) When you challenge a procedure, are you willing to take it to court at all? If not, what do you expect as a result of the challenge?

4 Do firms warn that they may institute proceedings aiming thereby to achieve an out-of-court settlement? Is this warning effective? If no settlement is obtained, do the firms still sue?

5 (For firms/lawyers) If firms' chances to win in court were good, would they prefer to proceed instead of reaching an agreement? Would they at least seriously consider it?

6 (For authorities) How do you deal with complaints?

7 (For authorities) Why do you agree to settlements? Does the possibility of being sued influence your decision?

8 Do the firms' chances of winning in court play a role in an out-of-court settlement?

9 Which remedy is more inconvenient for authorities?

11 (For lawyers/firms) Do you know of past settlements agreed to by the same authority? Does that encourage you/your clients to try to settle as well? Does it influence the negotiation process?

12 Do firms have specific proposals concerning the settlement?

13 Do firms' connections within the authority help to achieve a settlement and to what extent? Do other connections, for example, political, with the media, play a role and to what extent?

9 Alternatives to litigation

1 Are there alternatives to litigation?

2 Are complaints to the Commission an alternative?

3 Do firms threaten to involve the Commission to find/speed up the solution to a problem?

10 Interdependence of the factors determining firms' decision to sue/ factors not included in the questions

1 Would firms decide to start proceedings for any of the factors on its own? Which one is that?

2 If more than one factors play a role, could you assess the relative importance of each?

3 Are there any other factors firms take into account when deciding to sue?

11 Effectiveness of the system

1 Do you consider that the review system is effective?

2 What do you think are its major strengths and weaknesses?