# CHAPTER 13
# Public Procurement Review Bodies (including Antifraud Measures)

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## *1. Introduction*

This Chapter considers the review bodies responsible for ensuring that EU and national public procurement laws and practices are respected. They do so by the award of remedies, for example the suspension of the procurement procedure, the award of damages, or by declaring the concluded contract void. These remedies will be discussed in the next Chapter 14 written by Chris Bovis. In contrast, this Chapter will discuss the review bodies, *inter alia* administrative bodies, courts, or procurement review chambers themselves. Section 2 examines the role and importance of national review bodies in ensuring compliance with public procurement procedures. Section 3 examines the role of the Commission in securing respect for the EU public procurement Directives through the EU infringement procedure. Section 4 looks at how the Member States have responded to the requirements of the Directives. Only those countries will be taken into account where recent information was available in French, English, German or Dutch.(1) Finally, Section 5 discusses the related issue of fraud and corruption and the EU's recent initiatives in this field. Whilst fraud and corruption are not integral aspects of the EU Directives, corruption is a prevalent feature of public procurement which also merits consideration in the context of procurement review.

## *2. Review bodies*

The European Union (EU) is a Community based on the rule of law.(2) In a polity under the rule of law, independent bodies must protect rights guaranteed to individuals in the event that those rights are violated. This is espe-

(1) It seems dangerous to take into account research done before 2008 because many of Member States changed their review system after the adoption of Directive 2007/66/EC.

(2) Case C-294/83, *Les Verts* v. *Parliament* [1983] ECR 1339, at [23].

cially the case where those rights are violated as a result of conduct on the part of a government. Effective legal protection is thus one of the foundations of the State under the rule of law. The protection of rights granted by EU law is no exception. Such legal protection should be effective, effective judicial protection. Based on Articles 6 and 13 of the European Convention on Human Rights, the Court of Justice of the European Union (ECJ or the Court) has confirmed the principle of effective judicial protection as a general principle of EU law.(3) The optimum realisation of the internal market is only possible in the presence of such protection. Were it otherwise, Member States could infringe the rights that persons or undertakings possess within the internal market provisions, or sanction infringement of those rights with impunity.

Effective legal protection applies to a violation of any right guaranteed to individuals by the EU. Some of those rights can be found in the EU's public procurement Directives 2004/17/EC and 2004/18/EC, the main subject of the present book.(4) These Directives concern the rules that apply where a contracting authority or entity wishes to award a public procurement contract. They concern the substantive law, discussed in Part I of this collection.

The importance of public procurement contracts to the realisation of the internal market led to separate legislation regarding review and remedies in order to ensure effective legal protection. On the 21st December 1989, the Council of the European Communities (as it was called) approved Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.(5) A second Directive followed soon after for the utilities sector.(6) These texts were recently amended by Directive 2007/66/EC December 11th 2007.(7) The Directives foresee a set of sanction mechanisms which public authorities will apply in accordance with the national legislation of the Member States. The objective is to ensure that participants in contract award procedures are able to gain effective redress in instances where a contracting authority has acted in violation of contract award procedures.

(3) Case C-222/84, *Johnston* [1986] ECR 1651, at [18].

(4) Directives 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors of the European Parliament and of the Council of 31 March 2004, OJ [2004] L 134/1 and 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts of the European Parliament and of the Council of 31 March 2004, *OJ* [2004] L 134/114.

(5) OJ [1989] L 395/33.

(6) Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, [1992] OJ L 76/14–20.

(7) Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ [2007] L 335/31–46.

By implementing adequate procedures of appeal, a more useful application of the substantive law regarding the award of public procurement contracts is achieved.(8)

Effective legal protection necessitates an entity, a body to which people can turn in order to resolve a dispute involving actions by the State. In the abovementioned Directives, Article 2 (9) guarantees the presence of such a review body:

> "Whereas bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measures taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 234 of the Treaty and independent of both the contracting entity and the review body.
>
> The members of the independent body referred to in the first paragraph shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding."

The above provisions give Member States the right to decide how effective legal protection will be safeguarded, in particular identifying the bodies that will be responsible for determining a breach of the public procurement Directives. This expresses the general principle of procedural autonomy in EU law, namely that the national legal order should be the first to designate an entity which is competent to ensure effective protection.(9) The European Commission seems, however, to prefer the solution where an independent specialist entity is responsible for dispute resolution.(10) The Commission encourages the Member States to create such an entity.(11)

According to Article 2 (9) the national system must meet particular requirements or 'guarantees', to which we now turn. These guarantees are considered to be integral to ensuring effective review in the context of public procurement.

(8) Case C-570/08, *Symvoulio Apochetefseon Lefkosias* [2010] not yet registered at [30].

(9) Case C-13/68, *Salgoil* [1968] ECR 661.

(10) Trepte, Peter, *Public Procurement in the EU. A Practitioner's Guide*, Oxford, Oxford University Press, 2007, p. 566-567, nr. 9.86.

(11) Commission Green Paper, *Public Procurement in the European Union: Exploring the Way Forward* COM(96) 583 final.

Article 2 (9) of the Public Sector Remedies Directive 89/665/EEC and the Utilities Remedies Directive 92/13/EEC give Member States the choice between two systems to ensure effective legal protection. The first is that the Member State provides for a procedure with a responsible review body which is not judicial in character (administrative phase), but which also includes the possibility of an appeal to a court (judicial phase). The second is an appeal submitted directly to a court, allowing for immediate recourse to a judicial procedure.(12) Member States retain the choice to determine which system is the most appropriate for their respective national contexts.(13)

Article 2 (9) of the review Directives expressly provides for certain requirements which the review body should meet. These guarantees are only applicable when the Member State provides for a cascade system of legal protection, which can be implicitly deducted from the *Köllesperger* judgment of the ECJ.(14) This seems logical because when there is direct recourse to a judicial procedure, a review body should automatically meet these guarantees. The latter is a result of the general case-law of the Court of Justice regarding the requirements a national court or tribunal should meet.(15)

## 2.1. Administrative phase

As indicated above, the Directives give the Member States the possibility to designate a non-judicial body competent to judge a possible violation of EU law in the context of a contract award procedure. Thus a purely governmental body can be designated to settle a dispute in the first instance.

Such protection corresponds to the requirements that result from Article 13 of the European Convention on Human Rights.(16) Effective legal protection does not necessarily need to be safeguarded by a court.(17) Article 2 (9) of the procurement review Directives 89/665/EC and 92/13/EC contain two additions to this human rights principle: (a) the non-judicial body must give written reasons for its decision and (b) provision must be made to guarantee procedures where judicial review is possible.

The duty of a body judging a dispute concerning the award of a public procurement contract to provide written reasons can be linked to two other

(12) Case C-258/97, *HI* [1999] ECR I-1405, at [16-17].

(13) Case C-103/97, *Josef Köllesperger* [1999] ECR I-55, at [28].

(14) Case C-103/97, *Josef Köllesperger* [1999] ECR I-551, at [30].

(15) See 2.2.1.

(16) Article 13 EHCR: Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

(17) De Bruyn, D., « Le droit à un recours effectif », *in Les droits de l'homme au seuil du troisième millénaire. Mélanges en hommage à Pierre Lambert*, Brussels, Bruylant, 2000, p. 196 and the references in footnote 42.

principles that can be found in the case-law of the ECJ. On the one hand, there is the aforementioned principle of effective legal protection. On the other hand, one expects a public authority to be transparent. Effective legal protection benefits from the fact that the citizen knows all the reasons for which a body takes a certain decision. This gives the citizen the option to decide whether or not he will appeal against the decision.(18) In the context of the award of public procurement contracts, the duty of transparency is a derivative of the principle of equal treatment. The requirement to state reasons for a decision is intended to conclusively guarantee transparency during the procedure and with that guarantee an equal opportunity to be awarded the contract.(19) The duty to provide reasons guarantees equal treatment in the sense that an aggrieved tenderer can assess whether the principle of equality has been properly observed, and thus whether it is necessary to have recourse to a judicial forum.

Access to a judge is necessary to enable a full investigation of whether a public authority has violated EU law and is a fundamental right within a communitarian legal system.(20) The obligation of Member States to guarantee such access results directly from the supremacy of EU law.(21) Moreover, it must be linked to the system of the preliminary ruling procedure. Only courts can refer questions to the ECJ under the preliminary rulings procedure, guaranteeing a uniform and correct interpretation of EU law. It is only through means such as these that the realisation of the internal market is truly guaranteed. The court will then consider whether the review body 'in first instance' erred in its decision or otherwise failed in its duties. This court must meet a number of conditions.

### 2.2. Judicial phase

Whatever choice a Member State makes with regard to ensuring legal protection in the award of a public procurement contract, the possibility for submitting a dispute for judicial resolution must be possible in the final instance. Two

(18) Opinion of AG Kokott of 27 January 2005 in Case C-186/04, *Pierre Housieaux* [2005] ECR I-3299, at [32].

(19) Case C-92/00, *HI* [2002] ECR I-5553, at [46].

(20) Grevisse, F. et Bonichot, J.-Cl., « Les incidences du droit communautaire sur l'organisation et l'exercice de la fonction juridictionnelle dans les états membres », *in L'Europe et le droit. Mélanges en hommage à Jean Boulouis*, Paris, Editions Dalloz, 1991, p. 304; PLIAKOS, A., *Le principe général de la protection juridictionnelle efficace en droit communautaire*, Brussel, Bruylant, 1997, p. 180.

(21) Cassia, P., « Le principe du droit au juge et à une protection juridictionnelle effective », *in* Auby, J.-B. and Dutheil de la Rochère, J., *Droit administratif européen*, Brussel, Bruylant, 2007, p. 420 referring to Simon, D., « Étendue de la protection juridictionnelle », *Lamy procédures communautaires*, 2005, Fasc. 220-15.

questions arise in this respect: what is meant by the notion 'court' and which court should this be?

2.2.1. A court

Article 2 (9) Directives 89/665/EC and 92/13/EC provides a notional description of a 'court'. It must be a judicial body within the meaning of Article 267 TFEU and this body must be independent of both the contracting authority and in the case where a Member State opted for two phases in its review process, the review body which took the first decision.

According to the same disposition the members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.

What exactly constitutes a court or tribunal within the meaning of Article 267 TFEU? The interpretation of the notion of 'court or tribunal within the meaning of Article 267' by the ECJ includes almost all aspects described in the aforementioned Article 2 (9) of the procurement remedies Directives, paragraph 2 and even more. For these reasons the discussion is limited primarily to the case law under Article 267 TFEU.

According to Article 267 the TFEU the ECJ shall have jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and the validity and interpretation of acts of institutions, bodies, offices or agencies of the Union. Only a court or tribunal of a Member State can request the ECJ to give a ruling where such a question is raised. The application of Article 267 TFEU depends partially on the capacity of certain entities to constitute a court or a tribunal. Considering the importance of these notions, they are regularly addressed in the case law of the ECJ. It is only the aspect of 'court' or 'tribunal' of Article 267 TFEU that is relevant in the context of Article 2 (9) of the procurement remedies Directives 89/665 and 92/13.

The ECJ provides an autonomous definition of 'court' or 'tribunal' which is independent of the meaning given to it in the different legal systems of the national states.(22) A different interpretation of the notion would lead to a less efficient internal market, which would jeopardize the objectives of the EU.

(22) Case C-54/96, *Dorsch Consult* [1997] ECR I-4961, at [23]; Case C-203/97, *Köllensperger and Atzwanger* [1999] ECR I-551 at [17]; Case C-182/00, *Lutz e.a.* [2002] ECR I-547, at [12].

It could lead to a different judicial protection of the European citizen in the different EU Member States. The notion 'court or tribunal' is given a functional and broad interpretation. Thus, it is possible that bodies that are seen as a court or tribunal according to national law will not be considered to constitute such according to EU law. Conversely, a national public authority can be considered as a court of tribunal by the ECJ where that public authority would not be so considered pursuant to national law.

Functional and structural (organic) criteria serve to define the notion court or tribunal(23) (see below). According to settled case law, in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 267 TFEU the Court takes a number of factors into account, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.(24) This is a question governed by EU law alone. From the wording of the *Syfait* case it seems apparent that the Court does not regard these criteria to be cumulative.

It is beyond the scope of this Chapter to provide a detailed analysis of the components which make up the term 'court' or 'tribunal'. On the other hand the case law of the ECJ itself cannot be analysed fully in a systematised way, given the lack of unity sometimes.(25)However, the following provides a brief analysis of the Court's case law.

From the case-law of the Court it is possible to discern a number of functional and structural components which the court will consider in order to determine whether the body in question is a court or tribunal.(26)

### 2.2.2. Functional criteria

The body has to be established by law or is at least controlled by a public authority and the jurisdiction is compulsory. The fact that a body is established by law is a primary indication of the classification of a body as a court or tribunal.(27)Control exercised by the government and the compulsory nature

(23) Case C-192/98, *ANAS* [1999] ECR I-8583 at [22]; Case C-440/98, *RAI* [1999] ECR I-8597 at [13].

(24) Case C-53/03, *Syfait* [2006] ECR I-4609, at [29] referring to Case C 54/96, *Dorsch Consult* [1997] ECR I-4961, at [23]; Joined Cases C-110/98 to C-147/98, *Gabalfrisa and Others* [2000] ECR I-1577, at [33]; Case C-195/98, *ÖsterreichischerGewerkschaftsbund* [2000] ECR I 10497 at [24]; and Case C-516/99, *Schmid* [2002] ECR I-4573, at [34].

(25) See also Barav, A., « Tâtonnement préjudiciel. La notion de juridiction en droitcommunautaire », *in Liber Amicorum in honour of Bo Vesterdorf*, Brussels, Bruylant, 2007, p. 82-83 and 87 referring to Opinion of advocate general Ruiz-Jarabo Colomer of 26 October 2006 Case C-17/00, *De Coster* [2001] ECR I-9445, at [14] and [58].

(26) The authors were inspired for this part of the contribution by Naome, C., *Le renvoi préjudiciel en droit européen*, Brussels, Larcier, 2010, p. 95-105 and Kovar, R. (ed.), « La notion de juridiction en droit européen », *in* Kovar, R., *Itinéraires d'un juriste européen*, Brussels, Bruylant, 2010, p. 329-342.

(27) Case C-54/96, *Dorch Consult Ingenieurgesellschaft* [1997] ECR I-4961, at [25].

of the appeal as criteria can be derived in particular from the Court's landmark ruling in *Broekmeulen*.(28)

Mr. Broekmeulen was a doctor of Dutch nationality who held a Belgian medical diploma. Mr. Broekmeulen wished to settle in the Netherlands. The general practitioners registration committee refused to acknowledge the Belgian degree and did not register Mr. Broekmeulen as a doctor (general practitioner). Mr. Broekmeulen appealed against the decision before the Appeals Committee for General Medicine. The question arose as to whether the Committee was a court or tribunal. The Court first considered that the composition of the appeals committee entailed a significant degree of involvement on the part of the Netherlands' public authorities (control criteria). The Appeals Committee was composed of members appointed by the Netherlands medical faculties, by the board of the society and by the ministers responsible for higher education and health respectively. Further, the individual (doctor) whose application is refused by the registration committee is faced with the necessity to appeal against this decision to the Appeals Committee (compulsory jurisdiction).(29) Partly for these reasons, the Court recognised the Appeals Committee as a court or tribunal.

2.2.3. Structural criteria

A national body which refers a question to the ECJ pursuant to Article 267 of the TFEU is a court or tribunal if it is permanent and independent. The permanent nature of a body is self-explanatory. The independent character of a body is one of the essential features of a court or tribunal. The case law of the ECJ has examined the characteristic of independence. In *Wilson* the Court of Justice gives a suitable summary of what it understands by 'independent':

> "The concept of independence, which is inherent in the task of adjudication, involves primarily an authority acting as a third party in relation to the authority which adopted the contested decision..."

The concept has two other aspects:

The first aspect, which is external, presumes that the body is protected against external intervention or pressure liable to jeopardize the independent judgment of its members as regards proceedings before them. That essential freedom from such external factors requires certain guarantees sufficient to protect the person of those who have the task of adjudicating in a dispute, such as guarantees against removal from office.

(28) Case 246/80, *Broekmeulen* [1981] ECR 2311.
(29) See also Case C-54/96, *Dorch Consult Ingenieurgesellschaft* [1997] ECR I-4961, at [28].

The second aspect, which is internal, is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. That aspect requires objectivity... and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.

Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it."(30)

The composition of the body, the method of appointment of members, the term of their mandate and how this mandate expires largely determine whether a body can function independently. Some of these elements are also reflected in Article 2 (9) of the procurement remedies Directives 89/665 and 92/13:

"The members of the independent body referred to in the first paragraph shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary."

The Court has stated that these specific guarantees under the Directives do not apply when the nature of a review body is judicial.(31)

*Dorsch Consult* is a useful example illustrating the criterion of independence in the context of public procurement review. Dorsch Consult (an engineering bureau) appealed to the German Federal Public Procurement Awards Supervisory Board after a review body at first instance had dismissed its claim regarding breaches of public procurement legislation. This Supervisory Board referred a question(32) to the ECJ and the question arose whether this Supervisory Board was a court or tribunal. The ECJ observed first of all that the supervisory board carried out its task independently and under its own responsibility. The members of the chambers were independent and subject

(30) Case C-506/04, *Wilson* [2006] ECR I-8613 at [49] to [53]; see also Case C-517/09 *RTL Belgium SA* not yet registered, at [38] to [40].

(31) Case C-103/97, *Josef Köllesperger* [1999] ECR I-551, at [30].

(32) Is Article 41 of Council Directive 92/50/EEC of 18 June 1992 to be interpreted to the effect that, after 30 June 1993, the bodies set up by the Member States which, under Council Directive 89/665/EEC of 21 December 1989, are competent to review procedures for the award of public contracts falling within the scope of Directives 71/305/EEC and 77/62/EEC are also competent to review procedures for the award of public service contracts within the meaning of Directive 92/50/EEC in order to determine whether alleged infringements of Community public procurement law or of domestic rules enacted in implementation of that law have taken place?

only to observance of the law. The main provisions of the German *Richtergesetz* (Law on the Judiciary) concerning annulment or withdrawal of their appointments and concerning their independence and removal from office applied by analogy to official members of the chambers. In general, the provisions of the *Richtergesetz* concerning annulment and withdrawal of judges' appointments applied also to the lay members. Furthermore, the impartiality of lay members was ensured.(33) Paragraph 57 (c) (2) of the Budget Principle Law provides that they may not hear cases in which they themselves were involved through participation in the decision-making process regarding the award of a contract or in which they are, or were, tenderers or representatives of tenderers.

A second example is the case *Köllesperger.*(34) In this case the question arose as to whether the *TirolerLandesvergabeamt*, which has to settle disputes regarding the award of public procurement contracts, was sufficiently independent. The ECJ looked in particular to the special status of its members. It appeared that the Austrian General Law on Administrative Procedure contains very specific provisions on the circumstances in which members of the body in question must withdraw. Moreover, according to the case law of the *Verfassungsgerichtshof*(Austrian Constitutional Court), failure to comply with that obligation constitutes a procedural defect which may be challenged by the parties concerned. Moreover The *TirolerVergabegesetz* (Procurement Law of the Land of Tyrol) expressly prohibits giving of instructions to members of the *TirolerLandesvergabeamt* in the performance of their duties.

The case law on public procurement applies the more general criteria elaborated by the ECJ regarding Article 267 TFEU.

### 2.2.4. Functional criteria

In order to be characterised as a court or tribunal the organ must have a judicial function. Two elements seem to determine the judicial function of a body: (a) the existence of a dispute and whether the body is called upon to give judgment in proceedings and (b) the decision is intended to lead to a decision of a judicial nature (a binding decision(35)).

The case brought before a body must concern a real dispute. A body will not satisfy the definition of a court of tribunal if the body answers *in abstracto* legal questions of a general nature unrelated to sufficiently specific factual

(33) Case C-54/96, *Dorch Consult Ingenieurgesellschaft* [1997] ECR I-4961, at [35] to [36].
(34) Case C-103/97, *Josef Köllesperger* [1999] ECR I-551.
(35) According to Article 2 (9) the independent review body will render decisions which shall be legally binding.

situations.(36) Neither counsel prior to a government decision nor evaluation reports on actions by the government relate to a (already existing) dispute.(37)

Where a dispute is pending, the body must have the power to deliver binding decisions which apply to rules of law. The fact that a public authority is obliged to take a new decision after a judicial ruling is a confirmation of the binding nature of the decision.(38) In the case of *CS Austria*, the ECJ had to rule on the nature of the *Bundesvergabeamt* (Austrian Federal Procurement Office) and in particular the types of decisions issued by this body. In particular, the Court considered the following as determinative of the binding character of its decisions. First, the *Bundesvergabegesetz* (Austrian Procurement Law) expressly indicates that the *Bundesvergabeamt* may suspend the award procedure as a whole, or only certain decisions of the contracting authority, or order other appropriate measures. Second, the orders made by the *Bundesvergabeamt* in the course of interlocutory proceedings are immediately enforceable.(39) The binding character of these decisions signifies that the body is a court of tribunal.

### 2.2.5. Procedure *inter partes*

In its case law the ECJ consistently lists the condition of the presence of *inter partes* proceedings as one of the characteristics by which a court of tribunal can be identified.(40) However it is generally agreed that this is not an absolute requirement for determining whether or not a preliminary ruling is admissible.(41) Hence, most authors do not consider this a necessary criterion for determining whether the body is a court or a tribunal.

According to Article 2 (9) of the procurement review Directives 2004/17 and 2004/18, the independent body shall take its decisions following a procedure in which both sides are heard. The presence of this characteristic is necessary to ensure effective legal protection under the public procurement Directives and should not be confused with the condition of the proceedings *inter partes*.(42) One can find the same difference when applying Article 6 of the European Convention on Human Rights, where one differentiates between, on the one hand the entitlement to a fair and public hearing, and on the other hand, the right of defense. The right to be heard is the first condition for a fair trial.

(36) Compare Case C-195/98, *ÖstereichischeGewerkschaftbund* [2000] ECR I- 10497, at [15].
(37) Case C-134/97, *Victoria Film* [1998] ECR I-7023; Case C-192/98, *ANAS*[1999] ECR I-8553.
(38) Case C-54/96, *Dorch Consult Ingenieurgesellschaft* [1997] ECR I-4961.
(39) Case C-424/01, *CS Austria* [2003] ECR I-3249, at [22] to [23].
(40) Case C-517/09, *RTL Belgium SA* not yet registered at [36].
(41) Case C-54/96, *Dorch Consult Ingenieurgesellschaft* [1997] ECR I-4961.
(42) Barav, A., « Tâtonnement préjudiciel. La notion de juridiction en droit communautaire », *in Liber Amicorum in honour of Bo Vesterdorf*, Brussels, Bruylant, 2007, p. 111.

In the case, *Steffensen,* the ECJ made a link between the guarantees of Article 6 of the European Convention on Human Rights and the fundamental right to a fair hearing based on EU law, as it must be safeguarded by national courts.(43) According to the Court's case law, where national legislation falls within the field of application of EU law, the Court, in a reference for a preliminary ruling, must provide the national court with an interpretation necessary to enable it to assess the compatibility of that legislation with fundamental rights - as laid down, in particular, in the European Convention on Human Rights, whose observance the ECJ ensures.(44) According to the ECJ in *Steffensen,* account must be taken of the right to a fair hearing before a tribunal.

## 2.3. Which court?

The name 'European Economic Community' expresses the nature of the competences that the Member States primarily wanted to confer to it in 1957. It is evident from the economic nature of this community that rules regarding the organisation of the judiciary were not expressly intended to be one of those competences.(45) Procedural law of this kind remained the sovereign competence of the Member States, a position which is still largely the case today.

In *Salgoil*, a judgment issued in the context of a refusal of an import license, the ECJ provided the first clear ruling on a Member States' competence in the field of judicial organisation. An Italian court requested a determination as to what kind of legal protection a person seeking justice has when claiming compensation based on a violation of EU law. The Court ruled that:

> "[...] it is for the national legal system to determine which court or tribunal has jurisdiction to give this protection and, for this purpose, to decide how the individual position thus protected is to be classified."(46)

The doctrine has come to be known as the principle of national procedural autonomy.(47)Kovar regards procedural autonomy to be a specific application

(43) Case C-276/01, *Steffensen* [2003] ECR I-3735.

(44) Kapteyn and Verloren Van Themaat, *The Law of the European Union and the European Communities*, Alphen aan de Rijn, Kluwer, 2008, p. 429-437.

(45) Case C-158/80, *Rewe* [1981] ECR 1805, at [44].

(46) Case C-13/68, *Salgoil* [1968] ECR 661. See also Case 39/73*Rewe*[1973] ECR 1039; Case C-45/76, *Comet* [1976] ECR 2043.

(47) Rideau, J., *Droit institutionnel de l'Union et des Communautés européennes*, Paris, LGDJ, 1999, p. 799 e.v.; Kilpatrick, C., « The Future of remedies in Europe », *in* Kilpatrick, C., Novitz, T. and Skidmore, P. (eds.), *The Future of remedies in Europe*, Oxford-Portland Oregon, Hart Publishing, 2000, p. 3; Barav, A., « The effectiveness of judicial protection and the role of the national Courts », *in Judicial Protection of Rights in the Community Legal Order*, Brussel, Bruylant, 1997, p. 260; Jans, J.H., De Lange, R., Prechal, S. and Widdershoven, R.J.G.M., *Inleiding tot het Europeesbestuursrecht*, Nijmegem, ArsAcquiLibri 2002, p. 72.

of institutional autonomy,(48) namely the competence of Member States to arrange their administrative organisation. The Court has subsequently affirmed this principle in the context of public procurement:

> "[...] it is for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law. However, 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 to which the classification of certain legal situations based on Community law may give rise in the national judicial system."

Although Article 41 of Directive 92/50 requires the Member States to adopt the measures necessary to ensure effective review in the field of public service contracts, it does not indicate which national bodies are to be the competent bodies for this purpose or whether these bodies are to be the same as those which the Member States have designated in the field of public works contracts and public supply contracts".(49)

Thus the Member States determine which court is competent to ensure effective review in public procurement contracts.

### *3. Infringement procedure*(50)

Article 258 TFEU (formerly Article 226 EC) gives the European Commission the potential to bring a case before the ECJ if it considers that a Member State has failed to fulfil an obligation under the Treaties. All rules of EU law which are binding on the Member States are covered by this Article,(51) including the EU public procurement Directives. In the last few decades, the Commission has played a major role in securing the implementation and the general and individual respect of the public procurement Directives.(52) Several cases brought before the Court were initiated by the Commission pursuant to Article 258 TFEU. The Commission can bring an infringement procedure either of its own motion - through analysis of notices in the Official Journal, through the press, from European Parliament questions or through

(48) Kovar, R., « Le controle de la légalité des actes nationaux en droit communautaire », *in La protection juridictionnelle des droits dans le système communautaire*, Brussel, Bruylant, 1997, p. 160.

(49) Case C-54/96, *Dosrch Consult Ingenieurgesellschaft* [1997] ECR I-4961, at [40] to [41].

(50) Kapteyn and Verloren Van Themaat, *The Law of the European Union and the European Communities*, Alphen aan de Rijn, Kluwer, 2008, p. 441; Chalmers, D. Davies, G. and Monti, G., *European Union Law*, Cambridge University Press, 2010, p. 315.

(51) Lenaerts, K., Arts, D., and Maselis, I., *Procedural Law of the European Union*, London, Sweet & Maxwell, 2006, p. 130-131.

(52) An extended list of literature can be found *in* Arrowsmith, Sue, *The Law of Public and Utilities Procurement*, London, Sweet & Maxwell, 2005, p. 1444, footnote 94.

the monitoring of contracts financed by the Community's structural funds – or as a result of an individual complaint.

The latter possibility is not always appropriate. The role of the Commission is that of bringing offending Member States into line as opposed to satisfying individual interests *per se.*(53) Where the Commission is informed through an individual complaint the formal complainant has the right to be informed on the result of his action. The individual is encouraged to make a written complaint which includes the provision of basic information in order for the Commission to investigate the complaint fully. Once the complaint has been disposed of, the complainant essentially loses all means to influence the Commission's actions and decisions.

The Commission's infringement procedure comprises several stages. Only the pre-litigation phase is relevant for purposes of the present chapter. This pre-litigation phase comprises the following steps:

Sending an informal letter to the Member State regarding a problem or possible infringement. These informal contacts, through the Permanent Representative of the Member State in Brussels, precede the beginning of a formal procedure.

The procedure under Article 258 of the TFEU really begins with a formal notice addressed to the Member State. This letter is intended to delimit the subject matter of the dispute and to invite the Member State to submit its observations, the factors enabling it to prepare its defence.(54) A brief summary of the complaint is sufficient.(55) This procedural requirement is essential. The Member State is allocated a reasonable period of time within which to make its observations.

If after the sending of the observations an agreement between the Commission and the Member State is still not reached, the Commission will issue a Reasoned Opinion. This Opinion gives a coherent and detailed statement of reasons as to why the Commission considers there to be a violation of EU Law. Once again the Member State has the potential to respond within a reasonable time. In *Sankt Pölten*, the ECJ stated that "short-notice" is acceptable in urgent cases.(56) This stage is essential in the pre-litigation procedure. The purpose of this procedure is to give the Member State an opportunity to comply with its obligations and to avail itself of its right to defend itself against the charges formulated by the Commission.(57) Where the Member State fails

(53) Craig, Paul. and de Burca Grainne, *Eu Law*, Oxford University Press, 2008, p. 430.
(54) Case C-211/81, *Commission* v. *Denmark* [1982] ECR 4547, at [8].
(55) Case C-274/83, *Commission* v. *Italy* [1985] ECR 1077 at [21].
(56) Case C-328/96, *Commission* v. *Austria* [1999] ECR I-7479, at [53-56].
(57) Case C-350/02, *Commission* v. *Netherlands* [2004] ECR I-6213, at [18].

to comply with the Reasoned Opinion, the Commission can decide to bring the matter before the ECJ. However, most cases are settled at the administrative stage.(58)

After the administrative stage and if an agreement is not reached with the Member State, the Commission has discretionary powers to bring a case before the ECJ:

> "The Commission alone is competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations and to determine the conduct or omission attributable to the Member State concerned on the basis of which those proceedings should be brought. It may therefore ask the Court to find that, in not having achieved, in a specific case, the result intended by the directive, a Member State has failed to fulfil its obligations".(59)

Once the Commission decides to take action it does not have to show that there is a specific interest in bringing an action. Article 2(7) of Directive 89/665 and of Directive 92/13(60) cannot affect an action brought under Article 258 TFEU.(61) Those Directives, by requiring the Member States to take the measures necessary to ensure that decisions taken by the contracting authorities may be reviewed effectively, cannot be regarded as also regulating the relationship between the Member States and the Union and thus affecting the application of Article 258 TFEU.(62)

Often it will be clear that national authorities cannot protect the rights of individuals in an adequate manner. The intervention of the Commission in such a situation could be efficient. Otherwise a Commission's action could urge national bodies to give effective protection.

(58) Trepte, Peter, *Public Procurement in the EU. A practioner's Guide*, Oxford University Press, 2007, p. 578.

(59) Joined Cases C-20/01 and C-28/01, *Commission* v. *Germany* [2003] ECR I 3609 at [30]; Case C-199/07, *Commission* v. *Greece* [2009] not yet registered at [23].

(60) Article 2 (7) : Except where provided for in Articles 2 (d) to 2(f), the effects of the exercise of the powers referred to in paragraph 1 of this Article 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 in accordance with Article 1 (5), paragraph 3 of this Article or Articles 2 (a) to 2 (f), the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.

(61) Case C-503/04, *Commission* v. *Germany* [2007] ECR I 6153, at [34].

(62) Case C-275/08, *Commission* v. *Germany* [2009] not yet registered at [33] and [35].

## *4. Compliance at national level*(63)

A common feature of a Directive is that it has yet to be converted into national law. Questions arise on how the different Member States have transposed the Directives on public procurement and more specifically what kind of national courts have jurisdiction over disputes arising from the award of a public contract. Disputes arising from the execution of the contract are not part of the study, because the Directives do not cover this phase. As mentioned earlier, not all Member States are being looked at (see Introduction). The countries that are being researched are grouped according to their choice of either one competent court or of a specialised public procurement review body or a dual system.

### 4.1. One court

In England, Wales, Scotland, the Netherlands, Portugal, Italy and Greece, a single court has jurisdiction to adjudicate in first instance on disputes arising in connection with the award of a public contract. In some countries, only the civil court has jurisdiction, while in other countries the administrative court has exclusive jurisdiction. *The legal system that is outlined, does not apply in all countries for contracts below the thresholds.*

In the Netherlands, civil courts have jurisdiction in disputes arising from the award of public contracts. The judge rules on cases in summary proceedings. In urgent cases, the interested party may address the *Council of Arbitration for Construction*, if the parties have reached an agreement on this. These courts possess the necessary safeguards for effective judicial protection.

In England and Wales, a dispute in the context of the award of a public contract has to be initiated in the High Court. In Scotland, the Court of Session has jurisdiction over this matter. The parties will also appear in front of a review body that in principle guarantees effective judicial protection. However, experience shows that for example in Scotland very few cases are brought to court and that some lawyers complain about the inexperience of the judges with the field of public procurement.

(63) The present Chapter is based on the following articles or contributions: Bovis, Christopher, *EC Public Procurement: Case law and Regulation*, Oxford, OUP, 2006, p. 482-504; OECD, *Public Procurement Review and Remedies Systems in The European Union*, Sigma Papers n° 41, http://www.oecd-ilibrary.org/docserver/download/fulltext/5kml60q9vklt.pdf?expires = 1347118551&id = id&accname = guest&checksum = C73E74CB3A7D1977C615F2E1857BC484; Wauthier, S., and Wauters, K.ris, « La Directive “recours” 2007/66/CE: aperçu de transposition en droit français, néerlandais et belge », *in Attribution de marchés publics et exigence europeénne de recours efficace. En hommage à Maurice-André Flamme*, Bruxelles, Entreprise et le Droit, 2010, p. 66-104; Treumer, S. and Lichère, F. (eds.), *Enforcement of the EU Public Procurement Rules*, Copenhagen, DJOF Publishing, 2011, p. 336; « Le contentieux des contrats publics », *Revue Francaise de Droit Administratif*, 2011, p. 1-88.

In Portugal, the administrative courts have jurisdiction in disputes in the award of a public contract. These courts meet all requirements of a review body as set out by European Union law. In addition, the parties also have the option to submit their dispute to an arbitrator. Identical possibilities present themselves for the companies that participate in a public contract in Italy. Only the administrative court is competent regarding public contract disputes. In Greece a similar pattern is noticeable. The Council of State is competent for disputes in the pre-contractual phase.

### 4.2. Specialised review body

Of the countries that are researched only Romania, Germany, Hungary and Denmark chose to use a Specialised Review Body. Such a body is, in principle, independent of the existing system of legal protection. In principle, this system was also preferred by the European regulator.

In Hungary, disputes concerning the award of public contracts are judged by the Public Procurement Arbitration Board. It is an independent review body. It is an administrative body which possesses all the necessary guarantees to ensure effective legal protection. Appeals against its decisions must be put in front of the ordinary courts. (Budapest Municipal Court)

In Germany, a company must address the Public Procurement Chambers in the event of a dispute about the award of a public contract. These chambers are not considered courts in the German legal system. However, they should be considered as review bodies, providing adequate guarantees. (64)

Under EGO No. 76/2010, in Romania, the Council is the competent review body for disputes concerning the award of public contracts. It is an independent, administrative-jurisdictional review body. Thanks to the recent reforms the Council complies with all conditions in order to be compatible with the principle of effective judicial protection.

In Denmark, the Complaints Board for Public Procurement became the obligatory first instance in procurement disputes consistently the standstill period. It is an administrative body and is not part of the judiciary. This body is compliant to the necessities of a review body under EU law.

### 4.3. Dual legal system

Based on the French legal system, several Member States have a dual system. However, given the specific system of legal protection for the award of

(64) Burgi, M., « EU Procurement Rules – A Report about the German Remedies System », *in* Treumer, Steen and Lichère, Francois (eds.), *Enforcement of the EU Public Procurement Rules*, Copenhagen, DJOF Publishing, 2011, p. 111.

public contracts, fewer countries held on to this dual system in that context. This is still the case for Belgium and France.

In Belgium, the Council of State or the ordinary courts have jurisdiction, depending on whether the award decision was taken by an administrative authority. After all, not all contracting authorities are under the jurisdiction of the Council of State (Conseild'Etat). The Council of State is only competent for award decisions made by administrative authorities. The civil judge is competent for the other contracting authorities. Both judges comply with the safeguards of a review body, as required by European Union law. In France, the Council of State usually has jurisdiction in disputes relating to contract award decisions. Some contracting authorities have a private nature. In that case, the civil court has jurisdiction. These courts also provide adequate safeguards.

## 5. *Anti-fraud measures*

It may appear strange to talk about anti-fraud measures in this Chapter involving review bodies. Corruption is a widespread phenomenon surrounding the award of public contracts.(65) The economic influence of those contracts in the different Member States and in the EU as a whole explains the close relation between fraud and public procurement. Public procurement procedures involve the exercise of discretion by public authorities, often in relation to transactions of a high commercial value. This may in certain circumstances provide an opportunity for tenderers to influence the decision making process. Paragraph 1 of Article 1 of the PIF Convention(66) defines the concept of fraud in EU law. To counter fraud affecting community budget, the Member States framed the PIF Convention.

Directive 2004/18/EC does not address the many well-known risks of fraud.(67) Its central anti-crime measure is the possible exclusion of 'criminal' tenderers. These rules are discussed in Chapter 14 and do not require elaboration here. Anti-fraud measures are necessary in order to ensure a single European public procurement market. Fraud distorts free movement and the equal treatment of European citizens and attempts should be made to adapt Direc-

(65) See Report OECD, Collusion and Corruption in Public Procurement, 2010, http://www.oecd.org/competition/cartelsandanti-competitiveagreements/46235884.pdf.

(66) Convention of 26 July 1995 on the protection of the European Communities' financial interest' [1995] OJ C316, 27 November.

To read the text see http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995F1127(03):EN:NOT.

(67) Davies, D., « Purchasing and procurement fraud », *Journal of Financial Crime, JFC*, 1995, p. 322-330; Hors, I., « Shedding light on corrupt practices in public procurement », *PPLR*, 2003, NA101-108; Dorn, N., Levi, M. and White, S., « Do European procurement rules generate or prevent crime? », *Journal of Financial Crime,* 2008, p. 243-260.

tive 2004/18/EC in order to reduce the potential for fraud in the award of public contracts.

Nonetheless bodies were established at the national and European levels in order to prevent and fight fraud. It is beyond the scope of this chapter to provide an overview of all measures taken at the national level within the Member States. This section focuses on European organisations.

Articles 317 and 325 TFEU provide the primary legal basis for combating fraud. Article 325 TFEU provides the Commission and the Council of the EU with the power to take appropriate measures in order to prevent or combat fraud. In 1999 a Commission Decision established the European Anti-Fraud Office (OLAF)(68). OLAF was granted operational independence and given its own budget. Nevertheless it is still part of the European Commission.(69)

The organisation has two tasks to fulfil. It is responsible for conducting internal investigations within the institutions and other bodies of the EU, which have an obligation to fully cooperate with enquiries. OLAF also assists Member State agencies in their fraud and irregularity investigations. The role of OLAF is to increase the effectiveness and efficiency of national investigations. These checks can lead to administrative and criminal sentences by EU and national courts functioning under an un-harmonised set of rules. OLAF's activities are supervised and monitored by a Supervisory Committee, composed of five independent members nominated jointly by the Commission, the Council of Ministers and the European Parliament.

Problems arise in external investigations. OLAF and national agencies need to co-operate harmoniously: national rules and regulations must be followed; effort and resources should be shared. OLAF cannot enter a Member State and undertake a fraud investigation, nor hear witnesses and gather evidence. There will be a need for OLAF to be in cooperation with the local (national) authorities, otherwise its functions cannot be properly exercised. At national level, OLAF encounters a whole range of different systems with their own anti-fraud regulations and their auditing institutions, which have a different character, specialised – not specialised, judicial – non-judicial. The reality is therefore that there is a high risk of fragmentation in approach and its ability to combat fraud remains doubtful.(70)

(68) Decision of 28 April 1999 *OJ* [1999] L136 – Organisation pour la lutte anti-fraud.

(69) The independence and legitimacy of OLAF is regulary questioned: Quircke, B, « OLAF: the fight against EU fraud », *Journal of Financial Crime, JFC*, 2007, p. 182-183.

(70) Xanthaki, H., « What is EU fraud? And can OLAF really combat it? », *Journal of Financial Crime, JFC*, 2010, p. 135-138.

For the sake of completeness, the Community procurement early warning system should be considered (Commission Decision of December 2008(71)).(72) This system aims to help the Commission to combat fraud which could affect the financial interests or reputation of the Union. Third parties, potential contractors or recipients of funds, who might endanger these interests or reputation, are listed. The list is only available to administrators in the Commission and the agencies responsible for contracting. The list is divided into five categories of grades of ever-increasing risk to the Community institutions. (W1 tot W5) O'Connor questions the effectiveness of this system as it does not seem to achieve the objectives set out.

Specific bodies and mechanisms at EU level exist to combat fraud and corruption in the public procurement field. One hopes these bodies and mechanisms have full effect. The internal market will benefit from it.

## 6. *Conclusions*

In the context of the award of a public contract it is not sufficient that European Union law guarantees the principle of equal treatment. This law should also ensure that in all Member States there is a sufficiently effective system of legal protection. The contracting authorities will only award a public contract in a lawful manner if judges have a proper sanction mechanism at their disposal.

The European regulator finds public contracts to be of such importance that specific Directives were issued to guarantee a detailed system to ensure legal certainty in the various Member States. Such effective judicial protection is only possible if the judging body is a court or tribunal as stated by Article 234 TFEU.

Both the principle of effective judicial protection as well as the Directives 89/665/EC and 92/13/EC ensure the presence of such court or tribunal (a review body). Since the entry into force of Directive 2007/66/EC, most Member States seem to conform to this requirement. However, the Member States apply this requirement in their own legal system, which does not generate equal solutions. However, the citizen can in principle turn to an independent and impartial judge to settle his dispute with a contracting authority. Besides this guarantee of legal protection, there is also a system in which the European Commission may initiate proceedings before the Court of Justice in the event

(71) Commission Decision on the Early Warning System for the use of authorizing officers of the Commission and the executive agencies [2008] OJ L344/125.

(72) O' Connor, B., « The Community procurement early warning system », *Public Procurement Law Review*, 2009, p. 241-254

of an infringement by a contracting authority of the public procurement directives. Evidence shows that this mechanism has worked very well for the last ten to 15 years.

Finally, there is a specific system by which OLAF, a European institution, may adopt measures if it finds that there is fraud committed in a Member State in the award of a public contract. It remains to be seen, however, whether the proposed mechanisms are effective.

All guarantees are thus available to companies who wish to participate in a public contract, to fully protect against malpractice. A present legal system alone cannot fully ensure that citizens enjoy full legal protection. Also the people present in the legal system and who determine its operation, must be fully aware of the importance of effective legal protection. Only then will the rule of law prevail.