



Towards an EU Law of Damages

Damages claims for violations of EU public procurement law before national and European judges.

Hanna SCHEBESTA

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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European University Institute
Department of Law

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Examining Board

Prof. Hans-Wolfgang MICKLITZ, European University Institute

Prof. Giorgio MONTI, European University Institute

Prof. Alexandra (Sacha) PRECHAL, Court of Justice of the European Union

Prof. Laurence W. GORMLEY, University of Groningen and College of Europe

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SUMMARY

While the law is often highly harmonized at EU level, the ways in which it is realized in the various national courts are not. This thesis looks at enforcement through damages claims for violations of EU public procurement rules. Despite important recent amendments to the procurement remedies legislation, the damages provision remains indeterminate. The legislative inertia pressures the CJEU to give an interpretation and raises the question as to how the Court should deal with damages.

The requirements on damages claims are clarified under both general and public procurement EU law. The action for damages is conceived as a legal process which incorporates the national realm. Therefore, a comparative law part (covering England, France, Germany and the Netherlands) examines national damages litigation in public procurement law.

A horizontal discussion of the legal issues which structurally frame damages claims is provided. The remedy of damages is analyzed as a bundle of rules and its constitutive and quantification criteria are studied, thereby refining the Member States' common conceptual base of damages claims. Functionally, the lost chance emerges as a compromise capable of mitigating the typically problematic nature of causation and uncertainty in public procurement constellations.

An adjudicative approach to damages in EU law is developed through Member State liability and the procedural autonomy doctrine. Member State liability is construed as a form of constitutional liability which is distinct from damages arising under the 'effectiveness' postulate of procedural autonomy. Procedural autonomy as currently used is legally indeterminate and inadequate from the point of view of procedural theory. The thesis proposes to sharpen the effectiveness test in three dimensions: material, based on the intrinsic connection between enforcement rules and substantive law; vertical, in delimiting the spheres of influence of national and EU courts; and in terms of institutional balance vis-à-vis the EU legislator.

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By Hanna SCHEBESTA¹

“A SYSTEMATIST who would fit the living body of the law to his logical analytical scheme must proceed after the manner of Procrustes. Indeed, this is true of all science. In life phenomena are unique. (...) Organization and system are logical constructions of the expounder rather than in the external world expounded. They are the means whereby we make our experience of that world intelligible and available. (...) the continual juristic search for the more inclusive order, the continual juristic struggle for a simpler system that will better order and better reconcile the phenomena of the actual administration of justice, is no vain quest. Attempts to understand and to expound legal phenomena lead to generalizations which profoundly affect those phenomena, and criticism of those generalizations, in the light of the phenomena they seek to explain and to which they give rise, enables us to replace them or modify them or supplement them and thus to keep the law a growing instrument for achieving expanding human desires.”

Roscoe POUND²

¹ PhD candidate at the Department of Law, European University Institute (EUI), Florence.

² R. POUND, *An Introduction to the Philosophy of Law* (Yale University Press, 1922), Chapter IV: Liability.

1 INTRODUCTION: DAMAGES FOR BREACHES OF EUROPEAN PUBLIC PROCUREMENT LAW

1.1 PROBLEM DISCOVERY

The research for this doctoral thesis started out with the proposal of surveying the then recently adopted Directive 2007/66 which introduced major changes to the existing secondary law remedies regime in the field of public procurement. The Directive introduced, for example, the remedy of ineffectiveness for unlawfully concluded contracts, and as such was quite a revolutionary intrusion into the Member States' remedial world in the field. That dissertation would, presumably, have been a rather straightforward comparative law overview of the legislative implementation measures undertaken in several Member States. During the precursory research, I became quickly convinced that it was much more worthwhile to study what, in fact, had *not* been changed with the recent amendment: the damages provision, which was but a bare postulate that damages had to be made available to persons harmed.

I took this damages provision as a fix point to survey how EU law migrates to the national legal orders, and how ultimately it is realized in domestic courts. Simply put, while the law regulating public procurement procedures is highly harmonized at EU level, the enforcement in national courts of an identical EU right may be subject to very divergent modalities across the EU.

For example, a tenderer in the UK is barred from claiming damages after 30 days, while this is four years in France. While the underlying right is identical, these modalities seem to alter the nature of the right itself. A specific connection between the availability of damages and the violation of EU law exists, and has remained theoretically underdeveloped. Damages are a form of secondary protection of EU rights. Not only *whether* but also *the extent to which* damages may be claimed have become measures of the realization of EU-derived rights in national courts.

Bringing successful damages claims is decried as notoriously difficult. The EU public procurement directives are hidden to most relevant actors behind the veil of the transposing

national law. As a result the problem of unavailable damages remains defined by the national perspective. While considering the same problem, this thesis shifts perspective to *the point of view of EU law*.

The open texture of the damages provision has important institutional implications. The indeterminacy of the details of damages awards first affects national courts and then triggers cases demanding interpretation before the European Court of Justice.

The thesis relies on an overall understanding taking damages adjudication as a legal process. This process encompasses claims in front of both the national courts and the CJEU, i.e. it integrates the national and the European levels of adjudication. From an institutional perspective, this thesis is committed to a court-centered approach, in the search for an adjudicative approach to the question of damages for violations of specific areas of EU law.

An adjudicative mechanism is needed in order to enable the CJEU to ground decisions on damages when entering this judicial policy making space – be it in an intrusive or deferential manner towards national courts.

1.1.1 What does the field know?

The topic comes within the ambit of several branches of independent literature. The perspectives on EU law can most broadly be divided into EU law generalist and public procurement specialist accounts. The generalists look at damages through a unified European outlook, most commonly focusing on the enforcement or remedies perspective, and rarely on damages in particular. Next to this is a large body of highly technical, and often national, procurement literature. Neither view communicates with the other. The thesis attempts to establish a bridge between the different circles of literature and to contribute to a European debate on the topic by reconciling general EU law assumptions with those of subject-specific procurement approaches at both national and EU levels.

Most frequently, damages have been dealt with under the umbrella of remedies.³ This literature does not deal with the particular nature of damages as opposed to other

³ Notably in the contribution by W. VAN GERVEN, 'Of Rights, Remedies and Procedures', (2000) 37 *Common Market Law Review*, 501, A. WARD, *Judicial review and the rights of private parties in EU law* (Oxford University

remedies. The literature on remedies has received increasing attention in the headlights of the notion of 'procedural autonomy', which has led to significant academic discussion on the topic.⁴ Further, the literature on remedies overlaps significantly with enforcement literature, even though the former tends to be doctrinal in character, emphasizing the national/European competence dichotomy,⁵ whereas the latter perspective focuses on the processes of enforcing EU law in terms of efficiency.

The topic of damages itself in EU law is comparatively lacking and largely descriptive. One notable contribution has been compiled by Oskierski, who provides a comparison of damages provisions in EU legal instruments and damages claims under the ECHR with the aim of studying common principles.⁶ The remaining contributions fall into the two rather large substantive strands of literature: First, Member State liability⁷; and secondly, competition law⁸. In comparison to these, public procurement damages are less well researched from the point of EU law.

From a comparative point of view, public procurement damages have been dealt with by a number of SIGMA (OECD) studies.⁹ In addition, there are several national articles in the *Public Procurement Law Review*. Damages in public procurement have also been the topic of

Press, 2007), and most normatively in M. DOUGAN, *National remedies before the Court of Justice : issues of harmonisation and differentiation* (Hart, 2004).

⁴ H.-W. MICKLITZ & B. D. WITTE, *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2011).

⁵ H.-W. MICKLITZ, *The ECJ between the individual citizen and the member states : a plea for a judge-made European law on remedies* (European University Institute, 2011).

⁶ J.-T. OSKIERSKI, *Schadenersatz im Europäischen Recht : Eine vergleichende Untersuchung des Acquis Communautaire und der EMRK* (Nomos, 2010). Another contribution is A. BIONDI & M. FARLEY, *The right to damages in European law* (Kluwer Law International 2009), but covering much fewer legal instruments.

⁷ P. P. CRAIG & G. DE BÚRCA, *EU law : text, cases, and materials* (Oxford University Press, 2011), 241-254.

⁸ As discussed in the relevant policy documents published by the Commission, see <http://ec.europa.eu/competition/antitrust/actionsdamages/>. See also V. MILUTINOVIC, *The 'right to damages' under EU competition law : from Courage v. Crehan to the White Paper and beyond* (Kluwer Law International 2010).

⁹ SIGMA, *Public Procurement Review Procedures*. Sigma Paper No 30. (OECD 2000), SIGMA, *Central Public Procurement Structures and Capacity in Member States of the European Union*. Sigma Paper No 40 (OECD 2007), SIGMA, *Public Procurement Review and Remedies Systems in the European Union*. Sigma Paper No 41. (OECD 2007).

a dissertation by Pachnou.¹⁰ Two edited books also deserve further attention, one concerning the enforcement of public procurement,¹¹ the other, a collection on damages in public procurement¹².

The general EU public procurement literature itself is manageable, although several textbooks have been published.¹³ The national perspective on public procurement, as one can imagine, is highly developed but deeply.

The different national discourses remain isolated, which has thus far resulted in an inability to connect the EU law discourse with the EU legal orders in the plural, rather than with particular national systems. Where damages are discussed from the European point of view, the individual components often lack a unifying perspective and end up being mere parallel descriptions of damages claims.

1.1.2 Contribution of the thesis

An overarching theory of the role of damages in EU law and the question of how particular damages regimes relate to the general EU legal framework can be identified as a gap in the literature. This thesis sets out to go beyond the existing body of knowledge in terms of the *theorization of damages from a general EU law perspective*.

While embedding procurement within the broader framework, the research undertaken also goes further than previous accounts with respect to the *particular*, namely public procurement damages claims. The thesis has a ‘deeper’ understanding of damages, as it goes beyond the study of constitutive criteria of damages liability, to include the quantification ‘stage’ and comparisons of the net outcomes of damages claims.

¹⁰ D. PACHNOU, *The effectiveness of bidder remedies for enforcing the EC public procurement rules: a case study of the public works sector in the United Kingdom and Greece* (University of Nottingham, 2003).

¹¹ S. TREUMER & F. LICHÈRE, *Enforcement of the EU public procurement rules* (DJØF Publishing, 2011).

¹² D. FAIRGRIEVE & F. LICHÈRE, *Public procurement law : damages as an effective remedy* (Hart, 2011).

¹³ A confident authority in the field of EU public procurement is Arrowsmith, see S. ARROWSMITH, *The Law of Public and Utilities Procurement* (Sweet & Maxwell, 2005), although this has not yet been updated. Other EU procurement books include C. BOVIS, *EU public procurement law* (Edward Elgar, 2012).

To give an example of the importance of the quantification stage: In a famous case against the Dutch cadastre, the plaintiff made a highly enthusiastic estimate of the commercial success of the software licenses they would have sold and claimed € 22 million in damages. Apparently the defendant did not sufficiently rebut this allegation and the court was left without indication as to the actual losses sustained. *Ex aequo et bono*, the court awarded € 10 million. If we think about damages awards as pecuniary manifestations of rights, then without much ado the court ‘halved’ that right.

1.2 METHODOLOGY

In addition, the thesis engages some further-reaching propositions. As a maker of law, the CJEU does not only need to deal with one particular national legal system in a given case, but instead must make use of a fiction: in some respects, the CJEU is required to connect with the EU legal orders *in the plural*. Its interpretation of EU law is of relevance in *all* of the Member States. This presupposes a common conceptual base that is ‘comprehensible’ in all legal orders in the EU.

This common conceptual base is insufficiently understood for damages claims. In addition to a mere statement of the law(s) on damages, the thesis provides a conceptual analysis of damages and a refinement of the *common conceptual base of damages claims*. By better understanding damages, one can also better understand the role that damages can play in EU law. One part of the comparative law endeavor is to build a European vocabulary that enables us to talk about damages and their structures in a more comprehensive way than is currently the case. The legal orders selected are those which are seen to be constitutive of this fiction in the praxis of EU legal scholarship.

The topic of the present thesis is damages claims for EU public procurement law violations. It takes the reader on a journey covering EU doctrines in general and EU public procurement legislation, to the implemented versions in national laws, in order to finally alight in the national court arena encountering a judge, a real person who, based on a subjective estimate, fixes a sum of money as damages to be awarded. The contribution is

unique in its integration of the general and the highly specific. This connection between the specific and the particular relies on a process-based view and reserves a special role for comparative law, in a way that is set out below.

1.2.1 Approach

This contribution serves to examine damages claims in a complex account of the EU legal system in which units of analysis of environmental, structural, actor/capacity, and legal process are combined. The purpose of this thesis is not to elaborate a theoretical account of the EU legal system, however, I do want to briefly state some of my presumptions on the functioning thereof. Without a doubt, some of these would deserve a more technical treatment, but I cannot afford to provide this as they are not the principal claim of the thesis.

The EU is founded on Treaties, the *structural rules* and legal processes holding together and constraining the relevant actors, such as the CJEU or the European Commission, which they brought into being. However, although I understand *actors* as being constrained by structural rules, they have independent lives of their own. In particular, actors in the EU legal system are pragmatically shaped by reality, by their *capacities*. These constraints could be institutional characteristics such as resources, but also actors' *roles* within the overall system or their *role* in a particular legal process at hand.

The structural rules of the Treaties foresee different *legal processes*. One of the more widely explored examples is that of legislation making. Formerly, in the four different versions of lawmaking, different roles were reserved for different actors – varying most notably with the involvement of the parliament. However, the same is true for the CJEU. Within different proceedings, the CJEU has a different role assigned to it. For example, in the preliminary ruling procedure, it is one of interpretation, not application. Thus, *role* is understood to mean the assigned (through structural rules) place of an actor within a legal process.

This thesis analyzes damages in the EU legal order from the point of view of EU integration as set within a network of (legal) processes. The legal process view offers a more holistic perspective as it encompasses the national level of damages adjudication. For this

reason, the thesis includes four jurisdictions to provide examples of national damages claims. The second element of the thesis is what can broadly be described as a comparative law part, which deserves some words in explanation.

A holistic approach to legal EU processes necessitates the inclusion of the national level. The ‘vertical’ national comparisons are supplemented by a ‘horizontal European conceptualization’. In this part, selected issues that emerged from the overviews of the four isolated national jurisdictions are framed by theory in order to provide a form of representation of the national processes in their plurality. The horizontal analysis helps to build a common conceptual basis through which to understand an issue from “the national perspective”, and builds a conceptual spectrum within which a specific national rule can be placed.¹⁴

Comparative law can be utilized within the legal process idea (taking a more holistic view of the legal process by including national court adjudications). The language of the CJEU judgments acts as an interface, from which the national courts draw their input for the national adjudication process. Usually this happens in a top-down fashion, and is often dislocated from national practices on the grounds that the ECJ is supposed to furnish an autonomous *European* answer. According to the understanding developed, comparative law can be conceived of in a bottom-up direction that feeds into the language and conceptual practice of the CJEU in the field of damages. In this construction, one must distinguish the *conceptual* contribution from the *substantive content* uncovered in the comparisons of Member States’ regimes. Comparative law then serves as a basis for the conceptual construction of an EU law of damages. In terms of adjudication, such use of comparative law gives ‘voice’ to the Member States’ national perspectives, which is warranted by the fact that the effect is not only felt in one legal order, but in all Member States.

1.3 OUTLINE OF THE ARGUMENT

¹⁴ Far from being radical, this idea represents a factually accurate description of the ‘method’ deployed in most chambers at the ECJ. The problem is that as a basis it is not formally included in the reasoning of the Court, and oftentimes not even of the Advocate-Generals.

The thesis first sets out the current EU law requirements on damages claims deriving from general EU law and the public procurement directives. From the legal process point of view, the nature of damages claims integrates the national and European levels. The thesis therefore examines several national legal orders and their respective possibilities for damages claims in detail. From these concrete research findings, an abstraction is undertaken: damages claims are unbundled in the course of discussing different aspects such as time limits, causes of actions and so forth from a theoretical point of view. These findings are used to formulate points of critique on the current damages adjudication at EU level. Ultimately, a refinement of the current EU legal doctrine for dealing with damages claims is proposed.

1.3.1 Damages claims in general EU law and public procurement specifically

The thesis first provides an account of EU law requirements on damages claims for violations of EU public procurement rules. It exposes the current state of the law through an examination of public procurement legislation and damages claims in front of the CJEU with regards to both general EU law and public procurement law specifically.

Chapter 1 sketches the development of public procurement regulation in the EU. The substantive procurement directives are accompanied by a secondary legislative regime that specifically addresses remedies for public procurement violations, which is unusual. While damages are formally addressed in the Remedies Directives, over time that provision has remained opaque, even despite the amendments made by Directive 2007/66 which reformed the remedies legislation. Looking at the current procurement policy process, the EU Commission does not intend, at least in the foreseeable future, to address the damages gap further through legislation. As a result, it will be the CJEU which will increasingly be asked to provide interpretations of the requirements regarding damages stemming from EU law.

Chapters 2 and 3 adopt an EU level court-centered perspective. Chapter 2 features a discussion of Procedural Autonomy and Member State liability as the prime reasoning tools with which the CJEU addresses damages under general EU law. I show that the ‘effectiveness’ limb of the procedural autonomy doctrine has been applied by the CJEU

in different forms, namely effectiveness as a standard, as a balancing exercise and the fundamental right to effective judicial protection. Member State liability equally emerges as an unstable doctrine, both from an internal point of view and with regards to its relation to parallel remedies at EU and national levels.

Chapter 3 deals with EU public procurement law specifically. It presents the remedies directive and the way in which the amendments made by Directive 2007/66 indirectly affected damages claims by reshaping the surrounding remedial landscape. I further examine how, in the field of public procurement, the doctrines of Member State liability and Procedural Autonomy have been applied to damages claims. The current state of the law is very uncertain. The CJEU is shown to exhibit a tendency towards conflation by confounding the two doctrines and increasingly uses spill-over interpretation to fill the gap in the law.

National courts damages awards for violations of EU public procurement law

Next, damages claims in four jurisdictions are discussed from an internal point of view. Chapter 5 clarifies how and to what end comparative law is used. The chosen jurisdictions are France (Chapter 8), Germany (Chapter 7), the Netherlands (Chapter 6) and England (Chapter 9). The following criteria are explored: the general system, actions for damages, constitutive criteria, heads of damages, quantification of damages, and judges' discretion. The findings are briefly summarised as interim conclusions in Chapter 10.

Horizontal, issue-based discussion of damages

On the basis of the country studies, a horizontal discussion of the legal issues which structurally frame damages claims is provided. This is an abstraction based on the jurisdictions surveyed. In this discussion, comparative law serves to further a conceptual analysis that refines the understanding of the structures of damages claims on a theoretical level. On a functional level, it provides a tool for the identification of problematic issues and possible options for solutions. Thematically, the issues discussed are grouped into rules relating to organizational nature, the problem of causation and the lost chance, and quantification. Issues of an organizational nature (Chapter 11) include the national public procurement policy space, the institutional framework, questions of jurisdiction and applicable law, causes of action, and the justiciability of norms. The quantification issues

discussed (Chapter 12) comprise the quantification of damages, heads of damages, the burden of proof and law of evidence, valuation methods for damages and the discretion of the judge.

The problem of causation emerges as particularly acute (Chapter 13), and in all jurisdictions the question of the loss of chance doctrine (as causality, burden of proof or head of damage) becomes apparent as one of the prime doctrinal obstacles to claiming damages. The lost chance is discussed as a functional solution capable of bridging over some of the particular difficulties encountered with regards to damages claims in public procurement situations. This raises the question of how far such functional solutions can be operationalized at EU level by the CJEU.

Elaborating an adjudicative theory of damages

In Chapter 14, the 'effectiveness' postulate is connected to two different purposes of damages claims. This leads to a distinction between a public law of torts in the form of Member State liability, and damages for breaches of specific EU legislation under the effectiveness postulate of procedural autonomy (the 'Separation Thesis'). Member State liability serves as a 'constitutional' guarantee for the uniform validity of EU law.

Damages for breaches of specific legislation, on the other hand, are dealt with under the procedural autonomy doctrine, which is considered in Chapter 15. The doctrine is currently unstable and in development and I draw attention to several critical effects of its current application. The substance/procedure dichotomy emerges as illusory, since such categories of law cannot be meaningfully identified. In addition, the doctrine gives rise to large trans-substantive spill-over effects of legal interpretations across areas of law. The doctrine also covers the fact that procedural law intrinsically contains a balancing of competing values and emerges as not value neutral.

To conclude the argument of the thesis, Chapter 16 provides a reconstruction of the procedural autonomy test, which is then applied to public procurement. It is argued that an adjudicative theory of damages for breaches of EU law needs to answer to three dimensions of argument, concerning the material, structural, and institutional role.

In material terms, I argue that the scope of application of procedural autonomy should be judged through an effect-based approach. This approach can distinguish between the more procedural and less procedural enforcement rules, and shapes the margin of appreciation left to the Member States.

Structurally, as the Court emerges as a law maker, it is subject to and constrained by the principles of subsidiarity and proportionality. I put forward three techniques to fill the rather abstract allocations with meaning. First, a strong interpretation of the pertinent EU law provides a mechanism for differentiation between substantive areas. This relies on a closer connection between substance, procedure, and remedy in given fields and the degree to which violations and the factual situations giving rise to claims are streamlined at EU level. Comparative law, on the other hand, serves the function of taking national perspectives into account.

In institutional terms, procedural autonomy can be an adjudicative method of institutional choice in both horizontal and vertical directions. As a method of interpretation, it contains a distinction between adjudicative and legislative competence. In the vertical direction it provides indicators so as to determine the jurisdiction which may specify the conditions for damages awards. We put forward that this determination can be made along the lines of law and facts.

2 THE EU PUBLIC PROCUREMENT POLICY FIELD

Public procurement regulation is essentially a body of rules governing ‘purchasing’ carried out by a State and its regulated entities; it is the law of how to tender public contracts, the law of how a State buys.

In the course of the EU integration process, public procurement became densely regulated by means of several directives. It was introduced under an internal market logic with the aim of opening up national procurement markets. However, public procurement actually shapes domestic governance and policy making by regulating purchases financed through national budgets. Effectively, EU law not only controls how national budgets are spent, but - by prescribing permissible secondary considerations - also constrains domestic policies that may be pursued through government spending. More than a mere administrative formality, public procurement structures governmental organization and incorporates many political choices.

This Chapter traces how procurement became regulated over time. It became an important cornerstone within the EU as part of the creation of the internal market, marked by the adoption of substantive procurement directives, which are matched by a remedies regime. Although damages are addressed in the remedies regime, the texture of this provision is very open. As the Commission does not intend to take action on this particular point, the CJEU is coming under increased pressure to clarify EU law requirements on damages in public procurement.

2.1 THE EARLY DEVELOPMENT OF PUBLIC PROCUREMENT REGULATION

Public procurement purchases and the formalization thereof are important political instruments. Regulation of the relations between the market and political entities¹⁵ creates

¹⁵ Political entity here is meant to refer to a ruling body, in a weak rather than strong politically philosophical sense, in order to capture the fact that procurement is a form of organization not only in a nation state context,

the framework for public purchasing and presupposes some elements of a market society.¹⁶ Where contracts are procured, a political entity is externalising its purchases, rather than producing necessities through internal processes. Additionally, by procuring, a political entity does not satisfy its demands through acquisition by force or duty, but through the market in a relationship of exchange. Public procurement regulation is political, in that it creates a specific allocating mechanism for resources and the satisfaction of institutional demands. At the same time, purchases are governed by a formalized process, rather than by arbitrary means or through favoritism. Depending on the purpose assigned to public purchasing, different process designs have historically been deployed. For instance, most domains of the Holy Roman Empire satisfied public demand through internal production or unfree labor, thus there was no contestable market. Purchases were often made through fixed agreements, for example in arrangements with so-called court suppliers. Here the public contract was simply not open to competition and hence there was no need to devise procedures for supplier selection.

Public procurement has served as an instrument to satisfy 'public' demand in very different organizational forms which have varied the exercise of public authority over time. Historically, procurement is also tied to the emergence of the nation state and codification movements. Public procurement regulation has a long tradition, for example in German law, where public contracts have been procured through private law since the beginning of the seventeenth century. Provisions on the regulation of government purchases were contained in the *Hamburgische Baulieferordnung* of 1617 and the *Preußische Baureglement* of 1724.¹⁷ In 1751, Frederick the Great ordered all works and reparations to be carried out through the procedure of licitation.¹⁸ The spirit of the French Revolution, and the accompanying

but also in other political entities, such as the Greek city state, the Roman Empire, and probably even under 'tyrannical rule'.

¹⁶ This is contingent on the political system. A tyrant will assign a contract, or take without reciprocal compensation. A planned economy, on the other hand, intrinsically denies the possibility of exchange. Similar effects can be achieved not by the political system as a whole, but through the way that 'purchasing' is regulated, i.e. the creation of legal duties. For example, under the Third Reich, price controls were imposed obliging suppliers to deliver at the cost of production; similarly in the courts of kings who disposed of the power to impose purchasing prices on fixed court suppliers.

¹⁷ C. RIESE, *Vergaberecht. Grundlagen - Verfahren - Rechtsschutz* (Springer Verlag, 1998), 2.

¹⁸ M. MARTINI, *Der Markt als Instrument hoheitlicher Lenkung* (Mohr Siebeck, 2008), fn 528.

reconceptualization of the relationship between the State and the economy, also impacted on the regulation of public contracts. The institutional organization of public contracts through crown and court suppliers - that is, fixed contract awardees - were seen as increasingly critical.¹⁹

The way in which the procedures are designed impacts greatly on outcomes, and in our time this has come under scrutiny, for example in economics, under the term “auction design”. Special procedures for the awarding of public contracts were devised in Ancient Greece and the Roman Empire: for example, in the Roman Empire, most infrastructural projects were undertaken not by public officials themselves, internally, but instead they were procured. For specific political positions, Roman law conferred the power to procure using the *auctio licitatio* – a reverse auction in which bids which spiralled downwards were put forward orally. One specification was the *leges locationes*, according to which the procuring entity could accept a bid under a reservation to accept subsequent lower bids.²⁰

Different mechanisms of purchasing mean greater variety in the ways that competitive conditions are created for (potential) bidders, and different mechanisms for their selection. In other words, public procurement regulation creates the market, and in the modern conception this is increasingly under considerations of competition aiming to emulate free market conditions. From the end of the 17th until the middle of the 19th century, licitation emerged as a very common procedure. This was a purchasing mechanism by which public contracts were auctioned to the lowest bidder. The practice involved an oral, publicly negotiated procedure, through which the contract would be given to the lowest bidder. “*Emotionalität, Geltungstreben und Irrationalität*”²¹ certainly characterize the dynamics of licitation, which often resulted in spontaneous, unrealistic and ruinous bids. The effect of these psychological dynamics in the momentaneous decision was to produce an undercutting spiral of bids, hence achieving a lower price for the contracting authority. This could be to the detriment of foresight, rational calculation, and ultimately the viability of the offers.

¹⁹ W. IRMER, *Sekundärrechtsschutz und Schadensersatz im Vergaberecht* (Peter Lang, 2004), 55.

²⁰ M. MARTINI, *Der Markt als Instrument hoheitlicher Lenkung* (Mohr Siebeck, 2008), 274.

²¹ M. MARTINI, 'Mit Hammer und Zunge', (2007) *Bucerius Law Journal*, 68, 77.

In view of its negative side effects, the licitation procedure gave way to the procedure of submission. In response to a written invitation to express bids, those wishing to tender submit written -and secret- offers. The Public Award Ordinances of Bavaria (1833) and Prussia (1834),²² for example, laid down the principle of public and written procurement. The principle of submission, i.e. of handing in bids in writing, alleviated some but not all of the perceived problems. For example, awards that were based on price alone often resulted in lower quality levels. Gradually, one acknowledged that the lowest is not necessarily the most economical bid. This new approach was, for example, enshrined in the *Circular Erlaß* of the Prussian Minister for Public works of 1885, which prohibited the awarding of tenders to anyone incapable of guaranteeing the “*tüchtige, pünktliche und vollständige Ausführung*”²³ of an award.

Procurement is a formalization of purchasing relations between private parties and public authorities, and as such is closely bound to the emergence of the nation state and the centralization of public power. It has also been used in attempts to unite public power and has played an important role in the legal integration of political entities. In order to remedy the fragmentation of procurement regulation across different levels of regulation in the German Reich, and to accommodate the harsh criticism on the procedure of submission, a unitary approach for the German Reich was tabled in 1914. This was, however, abandoned with the beginning of World War I,²⁴ but was followed up in 1921 with another attempt.²⁵

For any governing entity, public procurement regulation is an important legal instrument of policy making. In a domestic setting, the underlying rationales of procurement can be diverse. The State acts as a buyer and satisfies its needs in a market transaction. During the Third Reich, procurement regulations remained in force. However in 1936, the “*Verordnung über das Verbot von Preiserhöhungen*”²⁶ ordered prices and salaries to conform

²² For a concise historical overview in C. RIESE, *Vergaberecht. Grundlagen - Verfahren - Rechtsschutz* (Springer Verlag, 1998), 1-7.

²³ W. IRMER, *Sekundärrechtsschutz und Schadensersatz im Vergaberecht* (Peter Lang, 2004), 57.

²⁴ W. IRMER, *Sekundärrechtsschutz und Schadensersatz im Vergaberecht* (Peter Lang, 2004), 58.

²⁵ For details on the political procedure leading to the adoption of the VOB and VOL, see in particular: W. IRMER, *Sekundärrechtsschutz und Schadensersatz im Vergaberecht* (Peter Lang, 2004), 58 and following.

²⁶ Verordnung über das Verbot von Preiserhöhungen vom 26. November 1936.

to the needs of an economy in service of war.²⁷ Thus, replacing the principles of competition with an obligation to supply purchases at production costs *de facto* put a hold on the application of the public procurement regulation.²⁸ Legally, post-war Germany went back to economic principles under the “*Gesetz über Leitsätze für die Bewirtschaftung und Preispolitik*”.²⁹ “*Zwangsweise Beschaffung*” (coercive acquisition or procurement) is again limited to situations of emergency and war, whereas public contracts generally fall under the considerations of private law.³⁰ This is in contrast to the ex-German Democratic Republic where, due to its characteristics as a planned economy, public procurement did not play a role.³¹

Modern procurement regulation often focuses on budgetary policy aspects related to the minimization of costs and public spending through competition. But in the Member States it is also an instrument for steering the economy and policy making, in the sense of directing public spending, for example, to encourage local businesses, employment schemes and so on. The national policies across the Member States were diverse, with different weight and degrees of formalism in their respective systems of public purchasing. The European rules institute a specific economic approach which makes the choice of awarding contracts contingent on price considerations only, or on the economically most viable option. The rules only to a limited extent allow for non-economic award criteria, with only limited acceptance for environmental, employment and social considerations. Policy making *by means of* public procurement has moved from the national to the European level.

2.2 EU PUBLIC PROCUREMENT POLICY

²⁷ A „*kriegsverpflichtete Wirtschaft*”, Verordnung über das Verbot von Preiserhöhungen vom 26. November 1936, §22.

²⁸ W. IRMER, *Sekundärrechtsschutz und Schadensersatz im Vergaberecht* (Peter Lang, 2004), 59.

²⁹ *Gesetz über Leitsätze für die Bewirtschaftung und Preispolitik nach der Geldreform*, 24. Juni 1948.

³⁰ C. RIESE, *Vergaberecht. Grundlagen - Verfahren - Rechtsschutz* (Springer Verlag, 1998), 2.

³¹ W. IRMER, *Sekundärrechtsschutz und Schadensersatz im Vergaberecht* (Peter Lang, 2004), 60.

Public procurement is a highly significant area of law for the EU integration process. Financially, it makes up almost one fifth of the EU Member States' combined GDP.³² From the point of view of the Internal Market, Member States' procurement markets are peculiar, as the markets are not constituted by private transactions. Procurement rules actually create the procurement market by creating a law of public contract. This potentially contestable element of Member States' markets is traditionally subject to a high degree of protectionism, which is one reason why it became targeted through secondary EU legislation early on in the integration process. In addition to the procurement market constitution, the design of public procurement regulation has important structural and systemic implications in any political entity, especially when there are different levels of government, as in the EU. The competence over procurement regulation exerts ownership over budgets allocated under those rules. Through increasing procurement regulation by way of legislation, the control exerted at EU level over national spending has tightened. While national budgets can be said to be drawn up independently in national processes, the question of how national governments may spend their budgets is increasingly being answered by EU procurement regulation. This side of procurement regulation is related to EU State Aid law, which governs the issue of which kinds of expenditure are unlawful (because they constitute illegal state aids). Public procurement institutes formal procedures through which national budgets must be spent. These procedures guarantee transparency and competition among bidders, to varying degrees, in terms of regulating access to public markets and the conditions of the 'playing field'. However, procurement regulation also sets out the substantive criteria which determine how public budgets may be spent. This defines the policy making space which is left to the Member States in instrumentalizing their national budgets for policy making purposes. EU public procurement is therefore a field of law constitutive of structural rules governing the EU-Member State relationship.

2.2.1 Public procurement policy: governance, competition law, budget law, or private law?

³² The figure is quantified as over €2,100 billion public expenditure on goods, services and works, or around 19% of EU GDP. See Commission Staff Working Paper Evaluation Report. Impact and Effectiveness of EU Public Procurement Legislation, SEC(2011) 853 final.

By moving public procurement regulation to the European level, a new policy dimension was introduced – the creation of an internal market for public contracts. The legislation does not just guarantee non-discriminatory access to national procurement markets. Procurement regulation is itself highly harmonized, with the aim of creating an EU-wide level playing field, with equal competition for public suppliers. The European influence clearly strengthened the competition rationale of procurement law by stressing the role of procurement regulation in ensuring fair competition among bidders for public contracts. It is not meant merely to ensure fair competition in ‘public markets’: the opening of the European market, in theory, results in *structural* changes to the market. Monopolies are dissolved because for a national operator that produces goods which have traditionally only been purchased by an entity as large as the State (“the” national State), the demand side has the potential to increase. Monopolistic providers, on the other hand, are now subject to competition from providers from other Member States. “The principal objective of the Community rules in that field is the opening-up of public procurement to undistorted competition in all the Member States.”³³

2.2.2 The opening up of public procurement markets: European and plurilateral efforts

At the inception of the Community, procurement was not specifically addressed and was subject only to the general internal market Treaty provisions. During the EU integration process the sector was soon identified and framed by all major policy making processes (and still is, for example, the Single Market Act adopted in April 2011 to achieve the Europe 2020 Strategy). Consequently, public procurement regulation took the form of special secondary legislation. The legislative process has since been marked by an ever broadening scope of application. Increasingly, industry sectors³⁴, types of contracts, levels of procuring bodies, thresholds and details of the procedures to be followed both for procuring and for remedying violations of procurement rules are regulated at EU level. In contrast to European

³³ C-450/06 *Varec* [2008] ECR I-581, para 34, confirming Case C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1, para 44.

³⁴ The defense sector is regulated by a special regime, Directive 2009/81/EC of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, OJ L 216, 20.8.2009, p. 76.

private contract law, EU public contracts have become so highly harmonized that one could speak of a European code of public contracts.³⁵

In 1971 the first procurement directive on public works was adopted, followed by a directive on public supply contracts in 1976. After several punctual amendments, a wave of new directives was adopted in 1988 and 1989 and complemented by the first utilities directive. In 1992, a public service directive further extended the material scope of EU procurement rules to cover service contracts. Another modernization of the procurement rules followed in 1993, again this was subject to several amendments and a major reform in 2004 which consolidated the previous works, supplies and services directives.

The European rules on public procurement do not operate within an international legal vacuum. Under the GATT, originally negotiated in 1947, government procurement was explicitly excluded, but plurilateral agreements followed in 1979.³⁶ With Decision 94/800/EC concerning the conclusion on behalf of the European Community on agreements reached in the Uruguay round, the Council concluded the Agreement on Government Procurement.³⁷ To a certain degree, the European public procurement rules are contingent on the Agreement on Government Procurement (GPA), which was concluded as a plurilateral agreement under the auspices of the WTO. One of the objectives of the EU public procurement regime is to allow the contracting entities to comply with the obligations laid down in the Agreement. The directives in their broad structure encompass the rules agreed under the GPA.³⁸ Disputes between parties are to be submitted to the WTO dispute settlement mechanism (DSU), and so-called cross-retaliation must be allowed for. Article XX

³⁵ Directive 2004/17/EC of 31 March 2004 coordinating the procurement procedures of entities in the water, energy, transport and postal services sectors and Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114.

³⁶ The first Agreement on Government Procurement was signed in 1979 and entered into force in 1981.

³⁷ Council Decision (of 22 December 1994) concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994).

³⁸ A study on the correlation between the two legal regimes is beyond the scope of this paper; nevertheless it is worth briefly mentioning the articles dealing with enforcement. A comparison between the revised GPA and the modernization package recently proposed by the Commission seems a particularly promising area of future research.

GPA lays down mandatory requirements for the establishment of a domestic bid challenge system.

Remarkably, EU substantive public procurement law was also matched by secondary legislation addressing the mechanisms of enforcement thereof. At EU level, the review mechanisms were regulated first in 1989 for the public sector directives³⁹, followed by a very similar legal framework for utilities in 1992.⁴⁰ This rather general remedies regime, on the other hand, remained largely unchanged until a major legislative extension under the amendments made by Directive 2007/66.⁴¹ The new amendment introduced detailed provisions on interim relief, set-aside, and ineffectiveness of public contracts. While for the first time these remedies are spelled out to a great degree, the ability to claim damages in the directive takes the form of a bare postulate. The conditions for claiming damages for violations of procurement rules remained only superficially addressed.

2.3 ENFORCING PUBLIC PROCUREMENT POLICY THROUGH DAMAGES

The enforcement of EU law is commonly conceptualized as made up of two components, public and private enforcement. Damages claims by private parties are widely understood to form part of the private enforcement of the respective policy fields. The Commission, on the other hand, has public enforcement powers through which it acts as a guardian of the Treaty, but according to political motivations.

The enforcement of policy fields by means of Commission infringement action induces compliance by Member States but this is not a valid alternative to private enforcement. It is

³⁹ Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ L 395, 30.12.1989, p. 33.

⁴⁰ 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 telecommunication sectors, OJ L 76, 23.3.1992, p. 14.

⁴¹ 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 L 335, 20.12.2007, p. 31.

true that there are some advantages to the procedure, for example the fact that it is essentially free of charge and risk, and that it guarantees the anonymity of complainants. However, at the very heart of it, the Commission infringement action is a political mechanism and the interest protected is not primarily that of the individual tender.

In addition, the Remedies Directive carries a specific mechanism of public enforcement which is a sharpened version of the regular 258 and 260 TFEU infringement proceedings. Article 3 of Directive 89/665 provides for a 'corrective mechanism', which implies a simplified procedure.⁴² As the Treaty correlative, this is a political mechanism which is at the discretion of the Commission. The political guidelines for enforcement proceedings put particular emphasis on public procurement, a political strategy which is effectively pursued as the numerous cases against Member States for violations of public procurement rules illustrate. In addition, the Commission has discretion as to the cases it chooses to pursue, and this discretion is increasingly exercised in pursuing systemic or particularly grave infringements of EU law.

A very large number of complaints reach the Commission on public procurement, all of which it is obliged to examine. Limited resources put severe limitations on the number of complaints that can be actively pursued. Increasingly, and not only for procurement policy, the tendency is to pursue cases of general and systemic interest or manifest infringements over isolated single instances of violation. The fact of the immensely high number of complaints to the Commission in the procurement sector⁴³ has been taken to indicate that national proceedings are simply too unattractive to prevent complaints to the Commission. The public enforcement mechanism was not intended to provide a regular enforcement mechanism for individuals, nor has it the capacity to do so.

The interests relative to private damages claims combine are twofold: on one hand, the private interest, pursued through litigation (compensation); on the other hand, additional "public" interest in guaranteeing observance of the law (the rule of law). In the field of public procurement, the public interest that may be pursued by the private weighs

⁴² The time between Commission notification and Member State communication is shortened to 21 days.

⁴³ Joanna Szychowska, Head of Unit, DG Internal Market and Services, European Commission at the "Remedies in Public Procurement" Conference of 26 November 2012 held by the European Commission in Brussels.

large – unlike in the competition sector, the authorities concerned are not private companies disposing of their own capital, but public authorities spending public money. From the point of view of deterrence, damages are often discussed in terms of ineffectiveness on one hand, and over-deterrence on the other, in what can be termed the “optimal enforcement literature”.⁴⁴ The unwanted consequences of over-deterrence in relation to competition law have been ascribed to lie in, for example, over-conservative investment behavior or marketing techniques of firms. Such considerations are less convincing in public procurement as, after all, public money is expected to be spent in prudent and low-risk ways. A valid concern, on the other hand, relates to the risk of encouraging unfounded challenges to bid procedures and the resulting time delays.

Looking at the policy side of damages, the field of competition law has received overwhelming attention in EU law. While public procurement also pursues competition objectives,⁴⁵ damages actions for enforcement have received much less attention for this policy field.

2.3.1 Damages in the Remedies Directive

This relative lack of attention persists although damages in public procurement have long been identified as being particularly difficult by the EU legislator. The memorandum of explanation for Commission proposals to the Remedies Directive did contain several remarks

⁴⁴ W. P. J. WILS, *The optimal enforcement of EC antitrust law : essays in law & economics* (Kluwer Law International, 2002).

⁴⁵ A. S. GRAELLS, *Public procurement and the EU competition rules* (Hart, 2011).

on damages, see COM(87) 134⁴⁶ and COM(88) 733⁴⁷. The later and more detailed utilities proposal also mentions severe problems in claiming damages.⁴⁸

More recently, the Commission's Impact Assessment reported that "[t]here appears to be a particular problem with the use of damages as a Remedies action – the figures collected, supported by the feedback from stakeholders during the consultation process, are so low as to be almost non-existent".⁴⁹ The Commission's Impact Assessment Report of 2006 identifies as problems:

4.3. Inherent Limits of Damages Action

An aggrieved supplier faced with a signed public contract, is often deterred from bringing a damages action for the following reasons:

- *actions in damages have **no real corrective effect**. Even if the public contract already signed is held to have been awarded illegally, in the great majority of cases it remains in force when it has already been signed. Hence, even if the damages action is successful and some (limited) financial compensation is granted, the economic operator will ultimately not win the public contract and may also feel that he has compromised his future business with the Awarding Authority. This also limits the deterrent effect.*
- *damages actions **are hampered by practical difficulties**. Actions are rarely successful as a result of the practical difficulty of needing to prove that the economic operator was genuinely a tenderer who had a serious chance of winning the contract. If this is not proved, no compensation for lost business opportunities is awarded to the complainant and often, in practise, any financial award is limited to the reimbursement of costs incurred in bidding for the contract and may not even cover the legal costs of bringing the action. Such actions are even more difficult to bring for a potential tenderer who has not been able to participate in a public procurement procedure as a result of the lack of transparency.*
- *the **process is lengthy and costly**. In all Member States, damages is an action on the merits before ordinary Courts (and not by way of interlocutory procedures as in the case of interim measures) which may therefore last for years. Furthermore, given the requirements of proof, the process can be*

⁴⁶ The explanatory memorandum mentions "unequal opportunities for claiming damages" on page 2 Proposal for a Council Directive coordinating the laws, regulations and administrative provisions relating to the application of Community rules on procedures for the award of public supply and public works contracts, COM(87) 134.

⁴⁷ Page 9 of the explanatory memorandum states "a few examples can be given to illustrate current differences and gaps in national systems (...) As regards remedies granted by the courts (...) the possibility of obtaining damages is subject in certain Member States to limits and uncertainties such that it is largely theoretical" COM(88)733.

⁴⁸ Proposal for a Council Directive 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, COM(90)297, p 3.

⁴⁹ Commission Staff Working Document. Annex to the Proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC CEE with regard to improving the effectiveness of review procedures concerning the award of public contracts, Impact Assessment Report – Remedies in the field of public procurement, 4.5.2006, SEC(2006) 557, 12 ('Impact Assessment Report on Remedies').

somewhat protracted, and may incur high litigation costs for both parties (economic operators and Awarding Authority).⁵⁰

In classifying the degree of importance of the overall weaknesses of the (old, i.e. pre-2006/77 amendments) system, the ‘threat’ of damages not acting as a deterrent was classified as large, due to the burden of proof requirement, as well as restrictions on judicial action following the signature of a contract.⁵¹ While precise cross-country statistics on damages claims were lacking, the total number for 8 countries from the EU-15 countries amounted to only 28 damages actions. In addition, qualitative surveys indicate extremely low levels of practical consideration and impact in terms of damages claims.⁵² The reasons given are diverse, and differ from case to case, between jurisdictions and also between legal cultures.

2.3.2 The remedies amendments by Directive 2007/66

With the new remedies amendment in Directive 2007/66, the private enforcement of public procurement rules was greatly strengthened. The amendment is entitled “with regard to improving the effectiveness of review procedures concerning the award of public contracts”. The main thrust of the changes is clear. The review mechanisms which had been established were perceived as weak, specifically as regards the possibility of aggrieved tenderers challenging direct illegal awards of contract, also called *de facto* tendering, by which a contracting authority awards a public contract without opening the contract to public tender at all. Another weakness was that the lack of time allowed for an effective review between the decision being made to award a contract and the conclusion of the contract in question.⁵³

⁵⁰ Impact Assessment Report on Remedies, 12.

⁵¹ Impact Assessment Report on Remedies, 21.

⁵² For example, J. M. HEBLY, E. T. DE BOER & F. G. WILMAN, *Rechtsbescherming bij aanbesteding* (Uitgeverij Paris, 2007).

⁵³ Compare recital 3 of the preamble to Directive 2007/66/EC, “Consultations of the interested parties and the case law of the Court of Justice have revealed a certain number of weaknesses in the review mechanisms in the Member States. As a result of these weaknesses, the mechanisms established by Directives 89/665/EEC and 92/13/EEC do not always make it possible to ensure compliance with Community law, especially at a time when infringements can still be corrected. Consequently, the guarantees of transparency and non-discrimination sought by those Directives should be strengthened to ensure that the Community as a whole fully benefit from the positive effects of the modernisation and simplification of the rules on public procurement achieved by Directives 2004/18/EC and 2004/17/EC.”

The Commission made a policy choice, based on the consideration that “among the two types of Remedies [pre- and post-contractual], pre-contractual remedies are the more effective remedies in the context of public procurement”.⁵⁴ This policy consideration translated into a significant modification of the initial remedies directives targeting pre-contractual remedies and the specific post-contractual remedy of ineffectiveness. This left the existing damages provisions as they were: minimal.

Through the amendment, the post-contractual position of tenderers was improved by time limits for review procedures and standstill provisions. Also, specific violations such as *de facto* tendering now entail the post-contractual remedy of ineffectiveness of already concluded contracts. This solution addressed the so-called ‘race to contract’⁵⁵ which was sanctioned by the Remedies directive prior to the amendment.⁵⁶ However, for violations other than *de facto* tenders, the post-contractual remedy of ineffectiveness is not required. The only other post-contractual remedy remains a damages action. In addition, the remedy of ineffectiveness may be waived in the public interest, thus potentially leaving an aggrieved tenderer with nothing but an action for damages. Damages actions therefore remain an important component of the private enforcement of EU public procurement law.

Significantly, the amendments made by Directive 2007/66/EC did not directly alter the damages provision in any way. As is apparent from the legislative history, this was a conscious decision, and while damages claims were identified as a problematic area, the Commission decided not to include damages in the final proposal. However, the fact that the wording on damages has not changed does not mean that Directive 2007/66 has no significance for the interpretation of damages claims: first of all, it is an expression of the legislator’s will. Damages were regarded as being too problematic and potentially beyond competence to legislate. On one hand, this provides some recognition on the part of the

⁵⁴ Impact Assessment Report on Remedies, 23.

⁵⁵ Since concluded contracts could not be undone, there was a practice of signing illegally tendered contracts as quickly as possible, as in many legal orders the contracts could not then be undone, and an aggrieved tenderer would be left with only a damages claim.

⁵⁶ Article 2(6) of Directive 89/665 (repealed) stated, “[f]urthermore, 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 procedures shall be limited to awarding damages to any person harmed by an infringement.”

legislator that damages claims are problematic. On the other hand, a conscious choice was made not to legislate. This omission could also be interpreted as due to a perceived lack of political will, competence or need. In addition, damages as a remedy must be seen in the context of their interrelationship with other remedies. The fact that alternative remedies have changed means that damages claims must be reassessed in terms of their overall balance relative to other (newly available) remedies.

The amendment strengthens the existing Remedies Directives in relation to what had been perceived as weaknesses in the review mechanisms of the Member States, mechanisms which in turn ensure the proper application of the substantive Remedies Directives. For a large part, this constitutes a codification of the ECJ case law rendered, for example, regarding the minimum standstill period. The new Remedies Directive is an excellent example of the kind of dialogue taking place between the European legislator and the judiciary, and also an excellent example of the way in which EU law ‘evolves’⁵⁷ through dynamic interpretation of existing legislation and subsequent codification which in turn engages new preliminary reference procedures demanding the interpretation thereof. The Remedies Directive is both, codification and clarification: first, a dimension of codification – the *Alcatel* jurisprudence⁵⁸ is codified very clearly with regard to time limits. Also, regarding the “most serious breach of Community law in the field of public procurement”,⁵⁹ the *Brunswick Waste Disposal* case law⁶⁰ has been processed in the Directive. However, the

⁵⁷ Without entering into the intricacies of evolution in biology, the factors triggering evolution include recombination, mutation, selection, and drifting of genes (basically a shift of genes due to chance).

⁵⁸ Case C-81/98 *Alcatel Austria and others* [1999] ECR I-7671 and Case C-212/02 *Commission / Austria*, unpublished.

⁵⁹ Recital 13 of Directive 2007/66.

⁶⁰ In the first case of the Commission against Germany, the Commission brought infringement proceedings under Article 226EC against Germany, namely the municipality of Bockhorn for failure to tender, as well as the city of Brunswick for illegally using the privately negotiated procedure in contracting out the collection of waste water. The ECJ found that Germany had failed to fulfill its obligations under the respective public procurement provisions. Joined Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-03609. In the follow up case, the Commission brought renewed action against Germany for failure to comply with the judgment rendered in 2003 which, since the Bockhorn contract had been annulled in the meantime, concerned only the waste disposal contract of the city of Brunswick. The contract concluded between Brunswick and Braunschweiger Kohlebergwerke remained in question, although at the time of judgment this was also rescinded, but only after the date of expiry of the period prescribed in the reasoned opinion. An important factor was that it was concluded for a period of 30 years. Case C-503/04 *Commission v Germany* [2007] ECR I-06153.

Directive goes further than mere codification, it is also reactionary and clarificatory to the rendered case law: issues such as the confusion over whether *Brunswick Waste Disposal* required *ex-nunc* or *ex-tunc* termination were picked up and somewhat clarified. One may also wonder whether the legislator stepped in with the purpose of limiting a broad interpretation by the CJEU.

2.3.3 No short-term legislative intervention on damages in public procurement

More recently, the Commission has published a new modernization package, which proposes important changes to the substantive rules of public procurement.⁶¹ Since this modernization concerns the recasting of the substantive public procurement directives, damages were not regarded as an issue.

On 26 November 2012, a conference was organized by the Commission on the Remedies Directives under the theme “State of Play, Challenges and Opportunities”.⁶² To anyone familiar with the policy making processes of the Commission, this initially raised the question of whether the conference was to be a preliminary and informal platform through which to assess a potential amendment to the Remedies Directive, perhaps in synchronization with the substantive modernization package. Stakeholders present voiced their opinion that the national legal systems needed more time in order to absorb the changes introduced by Directive 2007/66, the effects of which it was too early to assess. The panels considered the overall national review procedures, the European Court of Justice, the division of tasks between review bodies and the Commission, and the question of whether the review systems suit the specificities of the procurement sector. The reactions of the Commission officials present indicated that the conference was a means of input for the outstanding ‘impact assessment’, but not a preparation for any future remedies directive amendment already in the pipeline. When confronted with the question of damages, the Commission officials showed definite awareness of the issues, but indicated that there is currently no willingness to table a political proposal in this regard.

⁶¹ The modernization process targets a revision of Directive 2004/17/EC and 2004/18/EC, and the adoption of a directive on concessions.

⁶² “Remedies in Public Procurement”, Conference of 26 November 2012 held by the European Commission in Brussels.

2.3.4 What is the trouble with public procurement damages?

A popular argument against legislative intervention in relation to damages is that, simply, aggrieved tenderers do not *want* to claim damages.⁶³ When presented, the argument of the moot nature of damages mostly remains confined to the anecdotal although some studies confirm the reluctant attitudes which are blamed on a psychological element.⁶⁴

This thesis questions these assumptions. It examines the hypothesis that, on the contrary, damages claims are not perceived as *claimable*, and so the reluctance of aggrieved bidders to engage in damages claims is due to a doctrinal problem rather than a reason founded in the behavior of firms. The doctrinal possibilities, it seems, have remained what they were over twenty years ago, as described by the Commission: a more theoretical possibility.

Accepting an intrinsic connection between the availability of damages claims as a secondary form of protection of rights, EU legal rights then remain theoretical rather than actual. The fact that there are few damages claims could be a *result* of the difficulty in bringing damages claims, rather than the superfluous nature thereof.

In the following chapters, several national systems are examined. The hypothesis pursued is that public procurement damages claims face inherent legal structural obstacles which, if left unaddressed, will always make damages claims in the sector of public procurement difficult. Specific doctrinal legal criteria – as opposed to the ‘psychological’ reasons cited - regularly serve either to render the bringing of successful damages claims impossible, or to limit the damages claimable in a way that does not outweigh the risks inherent to litigation.

From an institutional perspective, the legislative vacuum necessarily leads to a focus on the European Court of Justice as an actor. The open texture of the damages provisions

⁶³ “Remedies in Public Procurement”, Conference of 26 November 2012 held by the European Commission in Brussels. It is commonly phrased as bidders “do not want to bite the hand that feeds them”.

⁶⁴ P. CRAIG & M. TRYBUS, 'Angleterre et Pays de Galles/England and Wales', in Rozen Noguellou, et al. (eds), *Droit comparé des contrats publics* (Bruylant, 2010), cite a UK business report in this respect, similarly the findings of D. PACHNOU, *The effectiveness of bidder remedies for enforcing the EC public procurement rules: a case study of the public works sector in the United Kingdom and Greece* (University of Nottingham, 2003).

contained in the procurement legislation results in a greater number of cases requesting the interpretation and clarification of said provisions. With or without legislation, the Court will have to face these question when adjudicating damages in cases where it is equally bound by the doctrine of ‘procedural autonomy’.

Due to legislative inaction, the EU judge is faced with a lack of determinacy in law and hence enormous scope to maneuver – a judicial policy space within which it is forced to position itself, vis-à-vis both the EU legislator who has not acted, and the national courts. This thesis understands the Court as an actor confined by doctrinal (EU law) and structural constraints (its mandate in the Treaty). Our inquiry therefore begins by stating the law, and identifying the gaps and inconsistencies relating to EU requirements on damages in general, and public procurement in particular, in the applicable law as it currently stands.

3 THE ECJ APPROACH TO DAMAGES UNDER GENERAL EU LAW

Public procurement forms part of the Community *acquis* and is therefore framed by the body of general EU law. While public procurement damages are a specific problem, they cannot but be understood within the wider context of damages for breaches of EU law. The thesis first outlines the EU law requirements on damages - for breaches of EU law in general, and EU procurement law in particular. In the EU legal order, the notion of 'damages' qualifies as a remedy, and thereby becomes defined, for example by the Member State liability doctrine, as a 'remedial right'. At the same time, damages have been examined in the context of the 'procedural autonomy' doctrine and are in that respect subject to a substance/procedure logic.⁶⁵ As the two main general EU law doctrines that deal with damages on a judicial level, procedural autonomy and Member State liability are briefly presented in the following.

3.1 DAMAGES AS PROCEDURE (PROCEDURAL AUTONOMY)

Due to the decentralized enforcement of EU rights, the creation of rights is effected at EU level while their realization takes place in the national courts - a process through which the national judge becomes the "juge de droit commun"⁶⁶. On one hand, the division operates under a requirement of uniform application, expressed by the ECJ as follows: "*The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty*".⁶⁷ On the other hand, this 'executive force' of Community law remains located in the national courts,

⁶⁵ Member State liability and different approaches to procedural autonomy have been treated in numerous other publications. The purpose of this chapter is not to explain the two doctrines in intricate detail, but to make grounds for the forthcoming arguments.

⁶⁶ K. LENAERTS, 'The rule of law and the coherence of the judicial system of the European Union', (2007) 44 *Common Market Law Review*, 1625, 1645.

⁶⁷ 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 00585.

embedded in a national system of judicial organization, rules on procedure and actions in front of courts; rules that are fundamentally local.⁶⁸

This functional distribution has been addressed in the famous formulation of the *Rewe/Comet* rulings:

“In the absence of Community rules on the subject, it is for the domestic legal system of each Member State to designate the Courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature. (...) The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect”.⁶⁹

It is this formulation which came to be known as the concept of “procedural autonomy”. Its limitations in the form of the principles of equivalence (non-discrimination) and effectiveness (not rendering virtually impossible or excessively difficult the exercise of rights conferred by EU law) were refined in subsequent case law.

The principle of equivalence basically precludes domestic claims from being treated more favorably than claims based on European law.⁷⁰ This of course brings about the usual intricacies of discrimination, for example in the necessity of finding a comparator.⁷¹ The principle of effectiveness⁷² (not rendering virtually impossible or excessively difficult the exercise of rights conferred by Community law) was refined in subsequent case law. It has been debated more, as the requirement is vague.⁷³ The equivalence limb presupposes the

⁶⁸ J. S. DELICOSTOPOULOS, 'Towards European Procedural Primacy in National Legal Systems', (2003) 9 *European Law Journal*, 599, 599.

⁶⁹ 33/76 *Rewe-Zentralfinanz AG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 01989, para 5.

⁷⁰ It hence stipulates that EU law-based claims must be treated as favorably as national claims. Although it is basically a non-discrimination principle, one can read a more positive obligation into the requirement of equivalence than into the essentially negative assertion of non-discrimination. I am grateful to Prof. HW Micklitz for this remark.

⁷¹ For a discussion, see M. DOUGAN, *National remedies before the Court of Justice : issues of harmonisation and differentiation* (Hart, 2004), 24.

⁷² The principle of effectiveness is a relational term, expressing the relation between “Ist-und Sollensleistung”.

⁷³ See for example S. SEYR, *Der effet utile in der Rechtsprechung des EuGH* (Duncker & Humblot, 2008); M. ROSS, 'Effectiveness in the European legal order(s): Beyond supremacy to constitutional proportionality', (2006) 31 *European Law Review*, 476; T. TRIDIMAS, *The general principles of EU law* (Oxford University Press, 2006).

context of a national legal order, and can be legally significant only with such a concrete setting to define the comparator. The effectiveness postulate, on the other hand, sets out a European requirement on the functionality of national rules; it is not defined by reference or in relation to national rules. In order to crystallize the *EU requirements* on damages, this limb is the more interesting one for the purposes of this thesis and the one on which the main focus will subsequently be placed.

3.1.1 Variations of procedural autonomy's 'effectiveness'

There are many different accounts of the 'effectiveness limb' used within the procedural autonomy test, focusing either on describing and categorizing the case law or on the type of legal reasoning deployed by the ECJ.

Descriptive accounts

A historical account has been rendered, mainly differentiating three stages in the case law of the ECJ, corresponding to different degrees of intrusiveness of the ECJ into national procedural autonomy.⁷⁴ These have developed constructions of analysis mainly relating to the development of the principle of effectiveness and the intensity of EC Law intervention in national legal orders linking it either to a temporal element (the 'evolution') which essentially discerns case law in terms of waves, periods or generations. For our purposes, the informative value of this dimension is limited to the insight that the ECJ's approach to the question has varied over time. The historical account is not able to supply probable predictions, but it does draw attention to the fact that the doctrine has not yet steadied, and is therefore at a critical stage, prone to interpretation.

A topological account groups the case law according to the different functions within the process; that is, for example, the jurisdiction of courts, time limits for bringing claims, and the actual remedies (for example, in the form of damages).⁷⁵ Since it has often happened that strings of case law emerge in clusters around claim types, these are also sometimes brought together, clustered; for example, in the form of recovery of illegal aid, or restitution of unlawfully levied charges.

⁷⁴ A. WARD, *Judicial review and the rights of private parties in EU law* (Oxford University Press, 2007).

⁷⁵ By way of example, M. DOUGAN, *National remedies before the Court of Justice : issues of harmonisation and differentiation* (Hart, 2004), 32-33.

Analytical accounts

Analytical accounts comprise those approaches which examine the structure of the legal reasoning performed, dealing with the application of the test.

One of the roughest structural differences can be found in the work of authors who separate the notion of judicial protection from the 'effectiveness' under the *Rewe/Comet* case law formulation. One could say that these are 'two limb' or 'three limb' accounts of procedural autonomy, that is, accounts comprising two or three limbs, consisting of either equivalence and effectiveness only; or equivalence, effectiveness, and judicial protection.⁷⁶

Additionally, one may defend a subdivision into an objective or subjective version of 'effectiveness' in the narrow sense, as contained in the *Rewe/Comet* formulation. Does effectiveness refer to the effectiveness of the protection of (subjective) rights, or protection of the (objective) law? The ECJ has used both expressions.

In addition, authors separate the question of effective judicial protection from whether the different limbs apply cumulatively or not. Timmermans, for example, advocates the distinction between the *Rewe/Comet*-effectiveness and judicial protection, but speaks out against the cumulative application of the criteria.⁷⁷ Also Prechal, currently judge at the ECJ suggests a distinction between effectiveness and the fundamental right to judicial protection.⁷⁸

Regarding the sequence of the equivalence and effectiveness criteria, Ward proposes to first examine procedural rules under the equivalence principle. Once this is not violated, national procedural rules should be said to enjoy a *Keck-style* presumption of compatibility,

⁷⁶ Christian Timmermans presentation "Limits imposed by EU law to Member States' Freedom of Action in Fields not Regulated by EU law", Robert Schuman Centre for Advanced Studies, 13 April 2011.

⁷⁷ Christian Timmermans presentation "Limits imposed by EU law to Member States' Freedom of Action in Fields not Regulated by EU law", Robert Schuman Centre for Advanced Studies, 13 April 2011. Timmermans' conceptual understanding differentiates between 1) effet utile; 2) effectiveness under the *Rewe/Comet* formula in what we have called an objective and subjective right version; and 3) judicial protection. This position, in the light of the requirement of first entering the scope of EU law, seems untenable, as the autonomous application of principles of judicial protection is currently not possible. This distinction fails to account for the difference between 1) and 2).

⁷⁸ R. WIDDERSHOVEN & A. PRECHAL, 'Redefining the Relationship between 'Rewe-effectiveness' and Effective Judicial Protection', (2011) 4 *Review of European Administrative Law*, 31.

as long as they do not impede the essence of the right of access to court, pursuit of a legitimate aim, and proportionality.⁷⁹ This essentially likens the effectiveness test to the internal market tests, but it is additionally vested with an exemption.⁸⁰

Emphasis has recently been put on the equivalence part of the test. It is argued that 'equivalence' should be put first in a sequence with effectiveness and also that the outcomes it allows can deliver more legal certainty⁸¹. Bobek on the other hand draws attention to the implications of the choice of comparator as in the equivalence limb of the test.⁸²

Instead of focusing on the analytics of the legal reasoning deployed in the test, some authors stress the difference in outcome, which can be distinguished based on whether it is supposed to provide an adequate or only a minimum level of judicial protection.⁸³

3.1.2 The different uses of effectiveness

Effectiveness as a concept is elusive: is it a "principle, arbiter, standard or result"?⁸⁴ From an analytical point of view of effectiveness, it is argued that effectiveness has sometimes been considered as a standard, while sometimes the reasoning has drawn more attention to the balancing being undertaken.⁸⁵ In addition, the normative power of procedural autonomy has increased. Initially, the effectiveness test was an independent assessment of the needs of

⁷⁹ A. WARD, 'Do unto others as you would have them do unto you: Willy Kempter and the duty to raise EC law in national litigation', (2008) 33 *European Law Review*, 739.

⁸⁰ In *Keck*, the Court distinguished product requirements from selling arrangements. Under the internal market logic, product requirements would be subject to court scrutiny, while mere selling arrangements (such as opening hours and the like) would be accepted provided that the two conditions set out by the Court were met. Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

⁸¹ A. WARD, 'Do unto others as you would have them do unto you: Willy Kempter and the duty to raise EC law in national litigation', (2008) 33 *European Law Review*, 739, 751.

⁸² M. BOBEK, 'Why there is no principle of "Procedural Autonomy" of the Member States', in Hans- W. Micklitz & Bruno de Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2011), the contribution is also notable for being outspokenly critical of the recent developments of procedural autonomy.

⁸³ See W. VAN GERVEN, 'Of Rights, Remedies and Procedures', (2000) 37 *Common Market Law Review*, 501, 504.

⁸⁴ M. ROSS, 'Effectiveness in the European legal order(s): Beyond supremacy to constitutional proportionality', (2006) 31 *European Law Review*, 476, 479

⁸⁵ This is not to say that using effectiveness as a standard does not imply a certain trade-off between different values. However, the inherent *balancing* does not surface in a reasoned form. The last part of this thesis draws attention to the value choices inherent in procedural law.

effectiveness from an EU law point of view. Over the past ten years, ‘procedural autonomy’ has increasingly become a positive claim on behalf of national rules. The test now involves a weighing up of the procedural autonomy possessed by Member States *against* the effectiveness of EU law.

Effectiveness as a standard

Under the ‘effectiveness’ limb, the Court tests that a national rule *must not render virtually impossible or excessively difficult* either i) *the exercise of rights* conferred by European law or ii) *the application of European law*. These formulations differ from one another as one is geared towards the protection of a right, and the other towards protection of the law itself. These two formulations exemplify a subjective and an objective approach respectively.⁸⁶ Subjective in this context refers to a specific interest of an individual or group right based test, whereas objective relates to the pure application of law in order to protect a wider common interest of society. Depending on the limit chosen (impossible/excessively difficult) effectiveness is the tool used to set a standard based on which national rules must realize EU law/rights. The question of national procedural rules is framed as an instrumental one, in which national procedural law merely realizes substantive law.

Effectiveness as a balancing exercise

The test of ‘effectiveness’ was rephrased in the *van Schijndel/Peterbroeck* cases, during which the ECJ used additional and seemingly cumulative considerations when testing the ‘effectiveness’ of a national rule:

“...national procedural provisions [...] must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole before the various national instances. [context part] In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the

⁸⁶ The acceptance of the terms subjective and objective for the indication that the protected interest can either be specific or general varies across legal traditions. The distinction is meant similarly to the French distinction between “public policy rules designed to order society (*règles d’ordre public de direction*), adopted in the general interest and which the court may raise of its own motion, and public policy rules designed to protect specific interests (*règles d’ordre public de protection*), adopted in the interest of a particular category of persons and which may be relied upon only by persons belonging to that category”. See Case C-429/05 *Rampion and Godard* [2007] ECR I-08017, para 58.

*principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration [balancing part]”.*⁸⁷

The structure of the effectiveness test has changed⁸⁸ from that of a standard to place new emphasis of the national context (‘contextualization’). In addition it takes into account the purpose of the national rule (‘purposive approach’), followed by a subsequent balancing of the two. Generally, the *van Schijndel/Peterbroeck* test is therefore referred to as a ‘balancing approach’. It is not only the purpose (“the role of that procedure”) of the national rule that is taken into account, but the context, which is a wider notion including role, progress and various judicial instances. Moreover, the purpose is taken into account at both levels, EU and national. Accordingly, the rationale or purpose of a given procedural rule can justify a restriction of or limitation to the bringing of a claim based in EU law. The Court referred to rights of the defense, legal certainty, proper conduct of procedure, but one might also consider, for example, unjustified enrichment⁸⁹. However, the test goes further than a merely ‘contextualised’ understanding of a national procedural rule, which would only imply a method for determining the ‘real’ nature of a national rule. In addition, the basic principles upon which these national rules are based must “*be taken into consideration*”. Herein lays the truly fundamental importance of the contextual approach: the balancing aspect is a novelty, as for the first time the national procedural law receives “standing”. By taking into consideration national procedural rules, and the national considerations which justify the existence of these rules, these national value judgments enter into conflict with EU law requirements. The conflict is not automatically resolved by primacy as a rule but through a balancing exercise. However, this is not an alternative to effectiveness as a standard. In understanding the contextualized *van Schijndel/Peterbroeck* test as a balancing exercise, effectiveness as a standard is used to determine the EU law requirements on accuracy in the

⁸⁷ Joined Cases C-430/93 and C-431/93 *Van Schijndel / Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705, para 19; Case C-312/93 *Peterbroeck, Van Campenhout & Cie / Belgian State* [1995] ECR I-4599, para 14.

⁸⁸ M. HOSKINS, 'Tilting the Balance: Supremacy and National Procedural Rules', (1996) 21 *European Law Review*, observing that the Court of Justice “departed from the orthodox principle of procedural autonomy”, 376. However, he criticizes the approach as being too vague and prefers effectiveness as a more useful standard in the national court.

⁸⁹ Joined Cases C-295/04 to C-298/04 *Manfredi and others* [2006] ECR I-06619.

application of EU law, which are then justified and balanced against the contextualized national procedural provisions.⁹⁰

To summarize, two uses of the principle of effectiveness are distinguished. The first is ‘effectiveness as a standard’, in which procedural law must meet a standard of accuracy⁹¹ in the implementation of EU substantive law. Secondly, the ‘balancing use’⁹² of effectiveness – it allows a departure from the accurate or correct application of EU law and introduces a mechanism of justification. The justification exercise can comprise two dimensions of balancing, namely i) procedural economy balancing against accuracy and ii) a constitutional dimension to the question regarding the source of the justificatory values: whether they derive from European procedural justice values or as exhibited in the national rule, and hence from the national level itself.

While for some time the *Peterbroeck* test was no longer regarded as pertinent, the procedural autonomy doctrine has over the last two years received increasing attention. Probably as a consequence thereof, the ECJ has increasingly made use of the balancing formulation.⁹³

Judicial protection as a fundamental right

Lastly, the Court sometimes refers to judicial protection as a fundamental right when assessing ‘effectiveness’. Judicial protection as a fundamental right can be separated from effectiveness as a standard. First, it is based on subjective rights language. It develops into

⁹⁰ For strong criticism on the use of the ‘effectiveness’ limb in general, see A. WARD, ‘Do unto others as you would have them do unto you: Willy Kempter and the duty to raise EC law in national litigation’, (2008) 33 *European Law Review*, 739, 753. According to her, effectiveness as a standard is too indeterminate, and the contextual approach too unstructured. She therefore proposes to streamline the ECJ’s jurisprudence with Article 6(1) ECHR case law, according to which “*non-discriminatory temporal limitations to the enforcement of Community law, at national level, would only need to be disapplied, under EC law, if they struck at the “very essence” of right of access to a court, failed to pursue a legitimate aim, and were disproportionate.*” In my reading of the case, all of these elements are already implicit in the effectiveness under the *Peterbroeck* test, with the possible exception of the ‘very essence’ element. A clearer articulation within effectiveness testing would nevertheless be desirable. I do agree with Ward’s criticism of the indeterminacy of effectiveness as standard.

⁹¹ In procedural theory the merely ‘servant function’ of procedural law vis-à-vis substantive law is often described as the accuracy view. I discuss this aspect in greater detail in Chapter 15.

⁹² P. HAAPANIEMI, ‘Procedural Autonomy: A Misnomer?’, in Laura Ervo, et al. (eds), *Europeanization of procedural law and the new challenges to fair trial* (Europa Law Publishing, 2009), 98.

⁹³ In Case C-246/09 *Bulicke* [2010] ECR I-7003.

an increasingly independent limb of the procedural autonomy test firstly because it refers to an autonomous and concretizable set of sources of law (Charter of Fundamental Rights, the Convention of Human Rights and Member States' common traditions). As principled rights deriving from the ECHR, or more recently the Charter of Fundamental Rights, these rights can only inform the interpretation of other EU laws; for the moment, they are not self-standing rights applicable independent of EU secondary legislation. Despite the change of legal status of the Charter, the scope of the Charter is still largely dependent on its future interpretation. Violation of the Charter does not in itself grant applicability, but is contingent on the scope of application of EU law to a case. The rights are thus not self-standing. On the other hand, Convention rights are sometimes limited to specific types of disputes, such as private or criminal proceedings. The respective scopes of application of the Charter and ECHR therefore differ at times. Article 6(1) ECHR guarantees *a fair and public hearing* within a reasonable amount of time *by an independent and impartial tribunal* established by law. Article 13 ECHR guarantees the *right to an effective remedy* to everyone whose rights and freedoms as set forth in the Convention are violated.

The principle of judicial protection was enshrined by the ECJ in the *Johnston*⁹⁴ case, in which recourse was made to the common traditions of the Member States, as well as Articles 6 and 13 of the ECHR for authority (although, for example, Article 6 (1) ECHR concerns fair trials, confined to civil law disputes, granting overall procedural rights). *Steffensen* concerned the admissibility of evidence in a procedure, and the Court of Justice stated that parties "*must be afforded a real opportunity to comment effectively on it in order for the proceedings to reach the standard of fairness required*"⁹⁵. Since *Johnston*, the importance of the effectiveness of judicial protection has been continuously stressed,⁹⁶ although its relation to the 'principle of effectiveness' has never been explicitly addressed.

Although Article 6 TEU and Article 51(2) of the Charter restrict the Charter from extending the competences of the EU, it remains to be seen as to how the Fundamental

⁹⁴ Case 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1663.

⁹⁵ Case C-276/01 *Steffensen* [2003] ECR I-3735, para 77.

⁹⁶ One of the most important recent cases being Case C-432/05 *Unibet (London) Ltd. and Unibet (International) Ltd. v. Justitiekanslern* [2007] ECR I-2271.

Charter will inform the case law on judicial protection in the future regarding the right to an effective remedy and a fair trial in Article 47, as framed by Article 52 on the scope of guaranteed rights and Article 53 on the level of protection of the Charter:

Article 47

Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Some scholars, for example former ECJ judge Timmermans, heavily stress the different rationales underlying the respective principles of effectiveness. Whereas effectiveness in an objective sense is concerned with the uniform application of the law, effectiveness in a subjective sense, of subjective rights that is, is concerned with the protection of rights. The third form of effectiveness of judicial protection can be phrased as effective “access to justice”,⁹⁷ as it mostly appears in cases in which an “individual appears to be denied access to justice or an available remedy”.⁹⁸ Thus construed, the existence of such a maxim is connected to the principle of legal protection derived from, for example, Articles 6 and 13 ECHR, in the form of access to an independent and impartial (EU or national) court.⁹⁹

These values are not national, but due to the sources they are inherently inter/supranational. In the balancing version of effectiveness by contrast, it is possible for a national value to enter the balancing metric. However, the judicial protection rights are, as of yet, not self-standing and serve only as interpretative tools, and would represent a common EU-wide denominator.

⁹⁷ Christian Timmermans presentation “Limits imposed by EU law to Member States’ Freedom of Action in Fields not Regulated by EU law”, Robert Schuman Centre for Advanced Studies, 13 April 2011.

⁹⁸ J. ENGSTRÖM, *The Europeanisation of Remedies and Procedures through Judge-made Law - Can a Trojan Horse achieve Effectiveness? Experiences of the Swedish Judiciary* (European University Institute, 2009) Tome I, 48.

⁹⁹ W. VAN GERVEN, 'Of Rights, Remedies and Procedures', (2000) 37 *Common Market Law Review*, 501, 521.

The role that the fundamental right to an effective remedy is going to play in the development of the CJEU's approach to damages is open to speculation. However, it is likely that the provision is going to play an increasingly important role in interpreting remedies. Again, due to this uncertainty, national courts are going to refer to preliminary references – see for example the reference by the Italian Consiglio di Stato on the relevance of Article 47 of the Charter in relation to the provision on ineffectiveness in the Remedies Directive 89/665.¹⁰⁰

3.1.3 'Procedural autonomy' results in considerable uncertainty for the Court

The notion of procedural autonomy is often based on a negative conception: procedural autonomy is what is left between the boundaries of demands of equivalence and effectiveness. In this sense, it is nothing more than a result. As such, procedural autonomy is but the consequence of the absence of Community rules. It is thus characterizable as “just another label”¹⁰¹ for the *Rewe/Comet* formula, as mere “shorthand for the fact that where (and as long as) there are no Community rules, Community law has little choice but to rely on national rules”.¹⁰² These are descriptive and non-normative accounts.

The notion of procedural autonomy becomes legally relevant only once the area delimited by equivalence and effectiveness can also make claims independently, therefore deserving a positive description. Implicitly, this is recognized by *Kakouris*, who consequently denies that Member States possess procedural autonomy.¹⁰³ The question of procedural autonomy therefore concerns whether an actual balancing occurs which positively gives recognition to the demands of Member States' autonomy. The Member States' claim to procedural autonomy is then capable of being weighed against demands of effectiveness

¹⁰⁰ Request for a preliminary ruling from the Consiglio di Stato (Italy) lodged on 15 January 2013, *Ministero dell'Interno v Fastweb S.p.a.* Case C-19/13.

¹⁰¹ S. PRECHAL, 'Community Law in National Courts: The Lessons from Van Schijndel', (1998) *Common Market Law Review* 681, 682 fn 3.

¹⁰² Also defended by S. PRECHAL, 'Community Law in National Courts: The Lessons from Van Schijndel', (1998) *Common Market Law Review*, 681.

¹⁰³ C. N. KAKOURIS, 'Do the Member States Possess Judicial Procedural "Autonomy"?', (1997) *Common Market Law Review*, 1389.

and equivalence. In the alternative, procedural autonomy is nothing more than the mere residue of those aspects left untouched by the requirements of Community law.

As the doctrine stands so far, the existence of such a claim to autonomy and the precise nature thereof are disputed. In applying procedural autonomy, the ECJ faces significant uncertainties: is Procedural Autonomy descriptive or prescriptive, and if the latter is the case, what does it prescribe?

Procedural autonomy, and in particular the effectiveness limb of the test, constrains judicial reasoning when damages are involved: the ECJ has fully subjected damages claims to the use of the procedural autonomy doctrine. Similarly, the legislator has refrained from legislative action on damages on grounds of the Member States' procedural autonomy.¹⁰⁴

In relation to damages, the inherent ambiguity of the doctrine is exacerbated by the uneasy classification of damages within a substance-procedure category. After all, it is called *procedural* autonomy. A general concern of procedural autonomy is whether the procedure-substance distinction *in se* is valid. With respect to damages, this concern is particularly relevant.

3.2 DAMAGES AS A REMEDY (MEMBER STATE LIABILITY)

The classic view on damages in EU law is that, in the absence of EU law requirements, damages are to be regulated through the national system. The absence of regulation in secondary legislative instruments does not mean, however, that there are no requirements emanating from the European level. In cases of breaches of EU law, the effectiveness of EU law must be ensured. Under the general principles of the Treaty, the ECJ created a remedy for violations of breaches of EU law by the State. Damages claims must additionally consider

¹⁰⁴ Commission Staff Working Document. Annex to the Proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC CEE with regard to improving the effectiveness of review procedures concerning the award of public contracts, Impact Assessment Report – Remedies in the field of public procurement, 4.5.2006, SEC(2006) 557, 12 ('Impact Assessment Report on Remedies').

Member State liability.¹⁰⁵ This remedy is pecuniary in nature and elicits a compensation rationale.

3.2.1 The constitutive criteria of Member State Liability

In *Francovich*, the Court founded an obligation to make good the damage resulting from breach of a Member State's obligation under Community law.¹⁰⁶ *Francovich* lays down the conditions for liability as regards a Member State's failure to take all the measures necessary to achieve the result prescribed by a directive. These are (1) individual rights, (2) ascertainability of the right's content, and (3) causality between the breach and the loss suffered. In *Brasserie du Pecheur*,¹⁰⁷ an individual's right to claim damages for violations of Community law was extended to "whatever [...] organ of the State whose act or omission was responsible for the breach".¹⁰⁸ The material conditions giving rise to Member State liability as substantiated in *Brasserie* are the following: (1) a breach of a European rule intending to confer individual rights, (2) a breach of a sufficiently serious nature, and (3) causality between the breach and the damage sustained.

Breach of a rule intended to confer individual rights

Whether or not a Community rule is intended to confer rights on individuals is determined solely by the EU Courts, as that determination exclusively concerns the interpretation of the content of an EU legal instrument.¹⁰⁹ A distinction between the creation of an individual

¹⁰⁵ And potentially, through the bridge of the *Bergaderm*-judgment, Institutional liability also, see Case C-352/98 *P Bergaderm and Goupil / Commission* [2000] ECR I-5291.

¹⁰⁶ C-479/93 *Andrea Francovich v Italian Republic* [1995] ECR I-03843, para 35 concerned the failure of the legislature to act: "It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty."

¹⁰⁷ In contrast to *Francovich*, *Brasserie* concerned a positive violation of Community law rather than an omission.

¹⁰⁸ Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur / Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and others* [1996] ECR I-1029, para 31. In this respect European law resembles international law whereby the State is taken as a unitary legal entity which is liable as a whole, rather than the liability resting with any of its constituent parts. Compare also Art. 27 of the Vienna Convention on the Law of Treaties.

¹⁰⁹A. BIONDI & M. FARLEY, *The right to damages in European law* (Kluwer Law International 2009), 32. Due to the national variations regarding rights and interests, one must keep in mind that Community law operates on an assumption of rights that is not contingent upon national law interpretations thereof.

right on one hand and the direct effectiveness of a provision on the other exists¹¹⁰ based on a consideration of the relativity of illegality, so that only legitimate interests are protected. This vision distinguishes between a protection of 'the market' or other broader/general interests, and an individual right. Confirmation of this approach may be read in *Peter Paul*, which concerned a national law which had been obstructing individual claims on the basis of deficient supervision as required by a banking directive.¹¹¹ The national law did not consider the (EU) banking legislation at hand to grant individual rights, as it was the market that was being protected. In this particular case, the national interpretation withstood the ECJ's scrutiny, and the national law was upheld. This is also at the heart of the distinction between subjective liability schemes (which require the violated norm to protect the interest of an individual) and objective liability schemes¹¹² (according to which the mere violation of a rule is enough to ground a claim for damages).¹¹³

Seriousness of the breach of Community law

Within the test of the 'seriousness' element, legislative and administrative action are distinguishable: the seriousness of a breach seems to be differently qualified for the two conducts.¹¹⁴ Liability for judicial action¹¹⁵ has been accepted, but is subject to specific scrutiny.¹¹⁶

¹¹⁰ S. PRECHAL, *Directives in EC law* (Oxford University Press, 2005).

¹¹¹ Case Case C-222/02 *Peter Paul, Cornelia Sonnen-Lütte and Christel Mörkens v Bundesrepublik Deutschland* [2004] ECR I-09425.

¹¹² Regarding objectivity of liability one may distinguish the following dimensions – objectivity in terms of a protected interest is not necessary, a mere breach suffices. However, also regarding the dimension of fault and subjective liability, the term of objective liability is sometimes used to denote the difference in relation to fault between an objective legal fault perspective and a subjective moral fault perspective. The question of fault is examined at a later stage.

¹¹³ M.-P. GRANGER, 'National applications of Francovich and the construction of a European administrative *ius Commune*', (2007) 32 *European Law Review*, 157.

¹¹⁴ The differences in linguistic versions in this respect have been used in order to cast doubt regarding the nature of this condition – the literal English translation of the concepts used in French and German (violation sufficiently characterise, hinreichend qualifiziert) would be a sufficiently qualified breach. For details see J. BEATSON & T. TRIDIMAS, *New directions in European public law* (Hart, 1998), 43 which refer to D. EDWARD & W. ROBINSON, 'Is there a Place for Private Law Principles in Community Law?', in Ton Heukels & Alison McDonnell (eds), *The action for damages in community law* (Kluwer Law International, 1997). It is tempting to follow the distinction under English national law giving this condition an inherent connection with legal factual situations. However, from a formal point of view all linguistic versions are equally authentic. The legal concept of a sufficiently serious breach is filled with European, rather than national meaning. Lastly the application of the concept by the ECJ belies this artificially literal application.

As a general rule, the Member State must have manifestly and gravely disregarded the limits to the exercise of its powers¹¹⁷. Factors which the competent court may take into consideration include:

*“the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.”*¹¹⁸

Liability for a legislative act was addressed in the *British Telecom* case;¹¹⁹ incidentally a case arising in the utilities sector, therefore falling under (the old) Directive 90/531. The Court stated that a restrictive approach to liability is justified for Member States exercising their legislative function in order that they not be *“hindered by the prospect of actions for damages whenever the general interest requires the institutions or Member States to adopt measures which may adversely affect individual interests”*.¹²⁰ Again, *British Telecommunications* concerned a Member State’s legislative action, and the Court found that Article 8(1) was imprecisely worded and could reasonably have borne the interpretation that Britain had given to it in its implementation. In general, therefore, the good faith in the implementation of directives seems to preclude Member State liability.¹²¹

¹¹⁵ Which was clearly established in Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239.

¹¹⁶ A discussion on the merits in relation to immunities for particular parts of the State is omitted here.

¹¹⁷ Judgments in Joined Cases 83 and 94/76, 4, 15 and 40/77 *Bayerische HNL Vermehrungsbetriebe GmbH & Co. KG and others v Council and Commission of the European Communities* [1978] ECR 01209, para 6, and Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-01029, para 55.

¹¹⁸ See Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v. Germany and the Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and Others* [1996] ECR I-1029.

¹¹⁹ Case C-302/94 *The Queen v Secretary of State for Trade and Industry, ex parte British Telecommunications plc* [1996] ECR I-06417C-392/93.

¹²⁰ Case C-302/94 *The Queen v Secretary of State for Trade and Industry, ex parte British Telecommunications plc* [1996] ECR I-06417, para 40.

¹²¹ See also the *Brinkmann* case, in which Denmark had classified tobacco roles erroneously as a ‘cigarette’ in its implementation. Since other Member States had followed the same interpretation, Denmark was said to have acted in good faith, and was not found liable. Case C-319/96 *Brinkmann Tabakfabriken GmbH v Skatteministeriet* [1998] ECR I-05255. See also A. BIONDI & M. FARLEY, *The right to damages in European law* (Kluwer Law International 2009), 50.

It has been argued that the seriousness of the breach of Community law is a disguised fault criterion, or something akin to it.¹²² For example, in *Hedley Lomas*,¹²³ the Court referred to the failure of the breaching Member State to produce any evidence regarding the justification which it had advanced (concerning the non-compliance of slaughterhouses with a Directive on the stunning of animals). The failure to substantiate the justification for the refusal to grant the license was taken into account by the Court within the argument on seriousness of the breach. Implicitly, the seriousness criterion could thus include an element of fault on behalf of the Member State to aggravate the breach.¹²⁴ The approach taken is therefore not a consequential one in relation to the position of an individual, but is assessed in terms of enforcement.

Initially, as a type of liability motivated by estoppel, Member State liability was granted for wrongful or missing implementation – it served to overcome the lack of direct effect of directives due to non-legislation by Member States. From granting individuals protection against non-implementation, it was extended to cover the application of law or situations involving administrative law. Operational mistakes in the application of the law, for example, were regarded as fulfilling the qualification of the “sufficiently serious” breaches since they were characterized as breaches with ‘no discretion’¹²⁵ – which was at issue in *Hedley Lomas*, and arguably in *COS.MET*. *Hedley Lomas*¹²⁶ found the United Kingdom to be obliged to make reparations for the damage caused to an individual on the basis of a refusal to issue an export licence in breach of Article 34 of the Treaty. When examining the ‘seriousness of the breach’ criterion, the Court ruled that where “*the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the*

¹²² I. B. LEE, 'In Search of a Theory of State Liability in the European Union', (1999) 9/99 *Harvard Jean Monnet Working Paper*, A. BIONDI & M. FARLEY, *The right to damages in European law* (Kluwer Law International 2009) 53-55, M.-P. GRANGER, 'National applications of Francovich and the construction of a European administrative *ius Commune*', (2007) 32 *European Law Review*, 157.

¹²³ Case Case 5/94 *R. v. Ministry of Agriculture, Fisheries, and Food (MAFF), ex parte Hedley Lomas Ltd* [1996] ECR I-02553.

¹²⁴ A. WARD, *Judicial review and the rights of private parties in EU law* (Oxford University Press, 2007), 230.

¹²⁵ A. BIONDI & M. FARLEY, *The right to damages in European law* (Kluwer Law International 2009), 47.

¹²⁶ Case Case 5/94 *R. v. Ministry of Agriculture, Fisheries, and Food (MAFF), ex parte Hedley Lomas Ltd* [1996] ECR I-02553.

existence of a sufficiently serious breach".¹²⁷ Due to the lack of consideration and choice which characterize legislative actions, an administrative action involves less discretion, and consequently may more readily constitute a 'sufficiently serious' breach. Admittedly, *Hedley Lomas* concerned a direct breach of a Treaty provision, rather than merely a breach of the terms of a directive. On the other hand, one may argue that rules contained in directives are often more readily ascertainable and clear, consequently leaving the Member State without discretion. In this respect it is also worthwhile to compare the argument of the Court in *COS.MET*,¹²⁸ in which the Court similarly held that the obligations set out in the directive did not give Member States discretion, and therefore that a breach thereof would be sufficiently serious to give rise to liability.¹²⁹ However, uncertainty persists regarding the interpretation of the 'sufficiently serious' criterion deployed by the Court, for example, in considering the threshold to be reached regarding operational breaches only, and as Dougan reads into *Haim* and *Larsy*, whether lacking appreciable discretion only may - but not necessarily - lead to a sufficiently serious breach.

Through the open characterization of a sufficiently serious breach, *all* types of actions emanating from the State are caught by the criterion – including legislating, executing and adjudicating. The criterion is only shaped by the degree of discretion incumbent on a Member State based on a norm it is supposed to effectuate. The extension in the kinds of conduct considered as sufficiently serious breaches demonstrates a move away from the 'naive' conceptions of the legislator having total discretion (and hence fault), and of the administration and judiciary as perfect enforcers of the law. This narrative has been nuanced and softened up in the sense that legislators are not alone in disposing of discretion, and that there is an error in praxis extending to the application of law, rather than merely implementation through legislation.

Causality/Causation

¹²⁷ Case Case 5/94 *R. v. Ministry of Agriculture, Fisheries, and Food (MAFF), ex parte Hedley Lomas Ltd* [1996] ECR I-02553, para 28.

¹²⁸ Case C-470/03 *A.G.M.-COS.MET Srl v Suomen valtio and Tarmo Lehtinen* [2007] ECR I-02749, para 82.

¹²⁹ Similarly, in *Larsy II*, Belgium was held liable for the simple misapplication of a social security regulation despite being in possession of all the relevant information. Case C-118/00 *Gervais Larsy v Institut national d'assurances sociales pour travailleurs indépendants (INASTI)* [2001] ECR I-05063.

In principle, the notion of causality is left mostly untouched by requirements set at EU level. It is notorious that in many instances whereby cases have been ‘won’ successfully in the European Courts, the national courts have in the end found against the individual applications on the grounds of a lack of causality.¹³⁰ Especially in countries establishing objective liability,¹³¹ more emphasis is put on the requirement of the chain of causation.¹³² Nevertheless, there are instances in which the CJEU seems to more closely scrutinize causality, holding that a directive imposes an obligation of result, which could not be limited *in casu* by the imprudence of a travel organizer regarding unforeseeable events in relation to the package travels directive.¹³³ Similarly, in *COS.MET*, a statement which was made by a government official on the lacking security of elevators produced by a company, a statement which was in violation of the product safety directive’s procedures, was indicated by the Court to potentially be sufficient to establish causation in relation to the fall in turnover and decreasing profit margins. The facts were then left to the verification of the national courts.¹³⁴

What is the personal scope of Member State Liability?

Discrepancies in defining the boundaries of the personal scope of Member State liability are one of the biggest issues. The positions can be exemplified by former ECJ judge van Gerven and Dougan, who have both written extensively on the subject. Dougan¹³⁵ identifies disputes of a vertical character (that is, against an emanation from the State), the parallel operation of *Francovich* remedies and those required under the direct effect of an instrument, and

¹³⁰ Both *Francovich* and *Brasserie* under German law failed to give the claimant a right to compensation on grounds of lacking causality. Contrary to this, consider the *Factortame* judgment, in which causality was easily established, leading to a settlement of GBP 55 million, see A. BIONDI & M. FARLEY, *The right to damages in European law* (Kluwer Law International 2009), 57, M.-P. GRANGER, 'National applications of *Francovich* and the construction of a European administrative *ius Commune*', (2007) 32 *European Law Review*, 157.

¹³¹ Objective liability in the sense of independence no-fault liability.

¹³² M.-P. GRANGER, 'National applications of *Francovich* and the construction of a European administrative *ius Commune*', (2007) 32 *European Law Review*, 157.

¹³³ For example, in Case C-140/97 *Walter Rechberger, Renate Greindl, Hermann Hofmeister and Others v Republik Österreich* [1999] ECR I-03499.

¹³⁴ Case C-470/03 *A.G.M.-COS.MET Srl v Suomen valtio and Tarmo Lehtinen* [2007] ECR I-02749, para 84.

¹³⁵ M. DOUGAN, 'What is the point of *Francovich*', in T Tridimas & P Nebbia (eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order* (Hart Publishing, 2004), specifically on this particular problem.

remedy “blindspots” which are filled in by *Francovich* criteria as main problematic effects in relation to the nature of private law. This leads him to argue that Member State liability ought to be limited to vertical disputes – individual/State disputes –in public law fields only. This additional functional version of the public-private divide results in a Member State liability which is narrower than is generally conceived. Van Gerven, on the other hand, has been championing the convergence (or “inspiration”) of the EU Institutional Liability case law for a long time now. He justifies the application of principles developed under EU non-contractual liability cases to all non-contractual liability cases (and hence Member State liability) due to the fact that the common conditions for EU Liability were extracted from the common principles of the Member States. The liability of the EU, in turn, is based on three criteria, namely the existence of damage, a causal link between damage and conduct, and the illegality of the conduct. In the analysis in his opinion in *Banks*,¹³⁶ one of the fundamental opinions on Member State liability, van Gerven construed liability as arising from a breach of EU law itself. However, the illegality is contingent on the direct effectiveness of the Competition provisions as between parties. In other words, liability for private parties arose when obligations were imposed on private parties on the basis of the horizontal direct effect of that provision.

Abstracting, although phrased in different vocabulary, both positions struggle with the same point but give different answers: Dougan advocates that Member State liability ought to be limited to vertical public law disputes; van Gerven advocates liability based on the EU provisions themselves, and certainly for those with direct effect. The direct effect argument (such as his) necessarily implies a position on the private-public divide through its forms of horizontal and vertical direct effect. Dougan proposes a narrowed Member State liability limited to disputes under public law; van Gerven pushes towards a horizontally effective non-contractual liability which is not limited exclusively to Member States (but perhaps is limited to provisions which had been accorded horizontal direct effect).

The spectrum of advocated opinions is explained by the different theories relating to the public-private divide that they rely on. The concept of public or public nature is difficult

¹³⁶ Opinion of A-G Van Gerven in Case C-128/92 *Banks* [1994] ECR I-1209.

to put into practice for the purposes of EU law for several reasons. The most common tradition connects public functions to the notion of the State. Under this precept, it is mainly the changing role of the State - in combination with the mix of the State and private actors - that challenged the definition of “the public”, resulting in the breakdown of the public-private divide that is at present so widely observed.¹³⁷ However, the State is, for example, not a concept to be found in English law, where the public/private divide has historically been less apparent. Yet there is a body of public law which can be applicable to bodies governed by private law, but which can be subject to public law principles, i.e. self-regulatory bodies, for example sports or pharmaceutical bodies, monopolies. The question under traditional EU law is presumably governed by a formal definition of a State entity under the *Foster* criteria.

3.2.2 Ambiguities of the Member State Liability Doctrine

Member State liability is unclear in several respects: in the first instance, there is *internal uncertainty* – for example, discord regarding the definition of the ‘sufficiently serious’ criterion, particularly in relation to what extent operational measures by a State are covered. The personal scope of the liability is also ambiguous, that is, in relation to whether and in what form a public-private divide applies. In addition, there is the *external or structural uncertainty* that results from the fact that the relation to *parallel* remedies granted by EU law is ambiguous, as is its relation to additional domestic remedies in the application of Member State liability at the national level.

3.3 CONCLUSION

This part showed that the enforcement standard which national law must meet is set only partly by the public procurement Remedies Directives themselves, since many aspects of enforcement either remain untouched by them, or are not exhaustively regulated. The question answered was how the general EU law is applied in the procurement field.

¹³⁷ M. RUFFERT & DORNBURG RESEARCH GROUP ON NEW ADMINISTRATIVE LAW. WORKSHOP, *Legitimacy in European administrative law : reform and reconstruction* (Europa Law Publishing, 2011), 16.

In adjudicating damages claims for breaches of EU law, the ECJ is constrained by several doctrinal boundaries which are embedded in the emerging system of EU law. EU law *as it presently stands* formulates certain requirements which must be met by national damages claims. Member State liability requires the provision of damages for violations of EU law, as a specific remedy. Under the doctrine, a remedy - namely damages - can be postulated at EU level. Procedural autonomy is a doctrine in which damages as a remedy of enforcement of EU law must meet effectiveness requirements (the doctrine as actually applied implies the procedural *and* remedial autonomy of the Member States).

We have highlighted several uncertainties and gaps in the way in which these doctrines can be applied with regard to damages. The following chapter looks at damages for violations of EU public procurement rules in particular and examines how this can be fitted with the general framework just presented.

4 SOURCES OF EU PROCUREMENT LAW AND DAMAGES

Damages for violations of EU procurement law are governed by several sources: while the ‘substantive’ procurement directives by themselves command effectiveness, an additional layer of legislation with detailed enforcement provisions for the procurement rules has been passed. These Remedies Directives also contain a provision on damages, which, however, is left entirely unspecified.

This chapter assesses the European requirements with reference to the secondary legislation, the public procurement Remedies Directives.¹³⁸ As iterated above, additional recourse is to be had to primary law as contained in the Treaty, the general principles of EU law and the judicial interpretation thereof, more specifically under the doctrine of ‘procedural autonomy’ and damages developed under Member State liability. Further, we observe what kinds of legal reasoning has been utilized by the ECJ in searching for alternative sources of EU law on damages. In this respect, we examine the potential for analogies to other similar actions under different procedures (damages claims for breaches of procurement law by the EU institutions) and other substantive areas of law (spill-over).

4.1 DAMAGES AS REGULATED BY THE PUBLIC PROCUREMENT REMEDIES DIRECTIVES

In the field of judicial review, the public procurement ‘Remedies Directives’, that is, the Public Sector Remedies Directive 89/665/EEC and the Utilities Remedies Directive 92/13/EEC,¹³⁹ lay down the minimum conditions to be satisfied by the review procedures established in the national legal systems. It is rare for the EU legislator to make such distinct, explicit and detailed provisions regarding the enforcement side of an EU legislative instrument. The rules address the application of EU legislation by national courts, and as

¹³⁸ This Chapter is partially based on H. SCHEBESTA, ‘Community Law Requirements for Remedies in the Field of Public Procurement: Damages’, (2010) *European Procurement & Public Private Partnership*.

¹³⁹ It would seem more appropriate to speak of Enforcement Directives, since it encompasses not only rules on remedies, but also on sanctions, as well as enforcement mechanisms granted to the Commission. The term ‘Remedies Directive’, however, is the most commonly accepted terminology.

such, form part of the system of decentralized enforcement of Community law.¹⁴⁰ Public procurement is a sphere in which the European legislative process has created procedural and remedial rules for judicial review. These are applicable only to contracts falling within the scope of Directive 2004/18/EC and 2004/17/EC.

At the same time, according to the letter, the objective of the Enforcement Directive is mere coordination. Or, as the Court held: *“Since Directive 89/665 does no more than coordinate existing mechanisms in Member States in order to ensure the full and effective application of the directives laying down substantive rules concerning public contracts, it does not expressly define the scope of the remedies which the Member States must establish for that purpose.”*¹⁴¹ This statement certainly belies the significance of the Directives in the face of judicial developments and the amendments made by Directive 2007/66/EC. Whether referred to as coordination or harmonization, the rules steer national laws on procedure and remedies – which opens the discussion as to what extent this is the case.

The initial Remedies Directives instituted basic outlines of a system of review, an important counterpart to the substantive procurement rules. They consisted of a meager six articles, aiming to create effective review procedures for decisions taken by contracting authorities. The directive stresses effectiveness and rapidity (Art. 1(1)). Furthermore, it enshrines the equivalence principle, i.e. that there should be no discrimination between national rules implementing the directive and national rules (Art. 1(2)). Any person having or having previously had an interest must be able to use such review procedures (Art. 1 (3)). Article 2 enumerates the available remedies, interim measures, set aside for decisions and damages, as well as the organizational features of the bodies having review powers. Article 3 grants specific powers of review to the Commission in cases of manifest infringement of the substantive Directives.

¹⁴⁰ Centralized Community enforcement is found, for example, in the form of interim relief sought before the ECJ under 242 and 243 EC, or Articles 226 and 228 of the EC infringement procedure. It is interesting to note that the Commission possesses powers to intervene directly in the award procedure before the conclusion of a contract under a special procedure contained in Art. 3 Remedies/Art. 8 Utilities Remedies.

¹⁴¹ Case C-92/00 *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Stadt Wien* [2002] ECR I-05553, para 58.

20 December 2009 marked the end of the transposition period of Directive 2007/66, which is the first substantial amendment to both the Public Sector Remedies Directive 89/665/EEC and the Utilities Remedies Directive 92/13/EEC. As damages claims must be seen relative to the other available remedies, this chapter begins by surveying the changed remedies regime as has been in force since the amendments by Directive 2007/66.

4.1.1 After amendments under Directive 2007/66¹⁴²

The amendment to Directive 2007/66 changed the previous regime in mainly three ways: by introducing a standstill clause between the award and conclusion of contract; providing for a new remedy, the ineffectiveness of illegally concluded contracts; and introducing automatic suspension of tender procedures when these are challenged in courts.

Alongside damages, in very specific cases an additional post-contractual remedy is available, the remedy of ineffectiveness of *de facto* tenders. Ineffectiveness is probably the most innovative remedy to address this “most serious breach of Community law”.¹⁴³ For the first time, where a *de facto* contract has been concluded, the aggrieved tenderer might have access to a remedy other than the mere claiming of damages. However, “ineffectiveness should not be automatic but should be ascertained by or should be the result of a decision of an independent review body.”¹⁴⁴ The consequences are determined by national law, by providing for the retroactive cancellation of all contractual obligations (*ex tunc*) or, conversely, by limiting the scope of the cancellation to those obligations still to be performed (*ex nunc*). All of these effects, however, are subject to the limitation of requirements of general interest. The remedies are subject to a public policy exception, which will predictably lead to some questions concerning interpretation in front of the ECJ. In cases where illegally awarded contracts have already been (partially) completed, the Amendment foresees sanctions of a punitive nature to be instituted by the Member State.

Although the damages provisions have not been directly altered, there can be implications – the overall level of regulation of remedies has increased, where other

¹⁴² For a thoughtful assessment of the amendment, see E. CHITI, 'Directive 2007/66 and the Difficult Search for Balance in Judicial Protection Concerning Public Procurements', (2010) *Italian Journal of Public Law*, 125.

¹⁴³ Recital 13, preamble of Directive 2007/66.

¹⁴⁴ Recital 13, preamble of Directive 2007/66.

elements of the remedial systems have become more refined; questions of hierarchy of the remedies have arisen, and to a certain extent these have been addressed. For example, since it is expressly regulated, ineffectiveness as *lex specialis* takes precedence over damages claims. The 'penal' aspect of damages, on the other hand, has been expressed in a separate provision on sanctions and administrative fines. The place of damages is thus to be determined relative to other available remedies. Without modifying the damages provision, the Amendment modified the balance of remedies and impacts on a systemic interpretation of the Remedies Directive.

Although leaving the damages provision untouched, the *overall* remedies regime has become more intensely regulated. This can be seen as a reason for which procurement damages, as integral part of the remedial system, ought to be determined at EU level as well.

4.1.2 Damages as largely unregulated by the Remedies Directives?

However, to claim that damages themselves are "regulated" by the Remedies Directive is to go too far. The "heavy mists"¹⁴⁵ surrounding damages in the Remedies Directive have not been lifted by the amendments made by Directive 2007/66. Next to the power of holding interlocutory procedures and the setting aside of contracting authorities' unlawful decisions, the Directive is limited to providing that the review procedures must include the power to "award damages to persons harmed by an infringement":¹⁴⁶

Article 2 Directive 89/665/EEC

1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

...(c) award damages to persons harmed by an infringement.

2. The powers specified in paragraph 1 may be conferred on separate bodies responsible for different aspects of the review procedure.

5. The 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.

6. ...

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 procedures shall be limited to awarding damages to any person harmed by an infringement.

¹⁴⁵ H. LEFFLER, 'Damages Liability for Breach of EC Procurement Law: Governing Principles and Practical Solutions.', (2003) *Public Procurement Law Review*, 151.

¹⁴⁶ See Art. 2(1)(c) Directive 89/665/EEC.

Unchanged and unelaborated from its original version, this formulation remains confined to the mere duty of providing a cause of action. In legislative terms, the regulation of the existence of damages in public procurement thus cannot be said to have intensified. From a strictly literal reading of the Directive, the crucial question regarding possible heads of damages is omitted. One of the most important heads to discuss in terms of efficiency of a remedy for an aggrieved tenderer would be, for example, the award of loss of profit, but also the recuperation of bidding costs.¹⁴⁷ The procedural modalities are other important aspects that ultimately define the effectiveness of a remedy. Although the Directive does establish time limits for the bringing of claims in general, the specific procedural conditions such as the burden of proof in claiming damages are not touched upon by the black letter of the Directive.

It is important to note that, surprisingly for two regimes that are otherwise close to identical, on the point of damages there is an important additional provision contained in Article 2(7) of the Utilities Remedies Directive 92/13/EEC:

“Where a claim is made for damages representing the costs of preparing a bid or of participating in an award procedure, the person making the claim shall be required only to prove an infringement of Community law in the field of procurement or national rules implementing that law and that he would have had a real chance of winning the contract and that, as a consequence of that infringement that chance was adversely affected.”

A similarly worded consideration can be found in the recital to Directive 92/13/EEC:

“Whereas claims for damages must always be possible; Whereas, where a claim is made for damages representing the costs of preparing a bid or of participating in an award procedure, the person making the claim is not be required, in order to obtain the reimbursement of his costs, to prove that the contract would have been awarded to him in the absence of such infringement;”

The Directive 92/13 provision is particularly interesting because it invokes the vocabulary of the lost chance. As such, there are several ways of interpreting the reach of the provision itself. It can be qualified as being an evidentiary rule distributing the burden of proof.¹⁴⁸ At

¹⁴⁷ Lost profits can be claimed in a number of Member States; however, a comparative analysis of the domestic legal systems is postponed until later chapters.

¹⁴⁸ See for example F. J. ARZTMANN, *Schadenersatz im Vergaberecht in Deutschland und Österreich* (Peter Lang, 2005), 45, quoting several other authors.

the same time, it could be interpreted as stipulating the availability of specific heads of damages or, on the other hand, as a true chance in the sense of a departure from the general causation rule of the 'but for' test. These different interpretations are discussed in detail in Chapter 13 on the lost chance.

From a systemic point of interpretation, other questions are open: although Directives 89/665 and 92/13 are largely similar, they are not identical, especially on the point of damages. The question as to the value of this provision in the utilities remedies directive arises in relation to the interpretation of damages available under the general remedies directive.

4.1.3 Judicial interpretation in case law

In the meantime, the court was repeatedly asked to interpret the Remedies Directive, including on aspects related to damages claims. For instance, it was asked to rule on time limits¹⁴⁹ and fault¹⁵⁰. The discovery of documents was subject to a judgment cited widely even beyond the public procurement field.¹⁵¹ Further, the Court has held that EU law does not preclude a national rule allowing judges to raise the illegality of a procurement procedure of their own motion, without one of the parties having to plead this.¹⁵² In terms of defenses, the ECJ has held that a national court may not dismiss a damages claim regarding the unlawfulness of a decision of a contracting authority on the grounds that something other than the alleged unlawfulness had already tainted the decision.¹⁵³

¹⁴⁹ Case C-406/08 *Uniplex (UK)* [2010] ECR I-00817.

¹⁵⁰ In the Portuguese case line: Case C-275/03 *Commission of the European Communities v Portuguese Republic* of 14 October 2004, which was an unpublished 226 EC action; Details of the case derive from the follow-up action by the Commission under 228 EC in C-70/06 *Communautés européennes contre République portugaise* [2008] ECR I-00001, not published in English; Commission Decision C(2008) 7419 final of 25 November 2008 requiring payment of the penalty payments under the C-70/06 judgment; T-33/09 *Portugal / Commission* [2011] ECR II-1429, which is the application of annulment of that Commission Decision, the General Court case is now subject to appeal in front of the CJEU in Case C-292/11 P.

¹⁵¹ Case C-450/06 *Varec* [2008] ECR I-581.

¹⁵² Case C-315/01 *GAT* [2003] ECR I-6351.

¹⁵³ Case C-315/01 *GAT* [2003] ECR I-6351.

These topical findings, such as the time-limits in the *Uniplex* case¹⁵⁴ for example, concern the intersection between national laws and the directives. The substantive issues raised in the cases are therefore discussed in the horizontal treatment of selected issues that follows the national country studies overview. The purpose of the coming section is to reach a better understanding of the legal reasoning in the ECJ's adjudication on damages in EU law. It therefore focuses on aspects of the case law that have methodological relevance to the interpretation of the remedies directives, specifically in relation to general EU law principles on damages.

4.2 DEVELOPMENTS IN THE INTERPRETATION OF THE REMEDIES DIRECTIVES IN THE ECJ'S CASE LAW

How does the CJEU come to terms with the open texture of the damages article in terms of sources of law? This section first considers the main recent judgments addressing the question of the relationship between the Remedies Directive and general EU law on a meta level. It then examines Member State liability, which the ECJ explicitly held to be a source of interpretation for the damages article. Finally it addresses spill-over interpretations from other areas of law.

4.2.1 Meta judgments on the adjudication of damages in public procurement

In several recent judgments, the Court of Justice has itself been asked to pronounce on the interpretation of the Remedies Directive and Article 2(1)(c) of Directive 89/665 (the damages provision) under the preliminary reference procedure. The key findings concerning damages and the reasoning deployed by the Court of Justice is summarized below for the cases:¹⁵⁵

¹⁵⁴ Case C-406/08 *Uniplex (UK)* [2010] ECR I-00817.

¹⁵⁵ It is interesting to note that the ECJ had already 'dodged' detailed questions on the damages article at earlier times. For example, in the GAT case, the referring administration (*Bundesvergabebamt*) had included a question on whether " (...) Article 2(1)(c) of Directive 89/665, if necessary considered in conjunction with other principles of Community law, [is] to be interpreted as meaning that if the breach committed by the contracting authority consists in imposing an unlawful award criterion, the tenderer will be entitled to damages only if he can actually prove that, but for the unlawful award criterion, he would have submitted the best tender?". The ECJ declared this specific question inadmissible because the body was not competent to award damages at all: "On the other hand, the *Bundesvergabebamt*, which is not directly competent to award damages to persons harmed by unlawfulness, is not entitled to refer to the Court for a preliminary ruling questions relating to the award of damages or the conditions for awarding them" in Case C-315/01 *GAT* [2003] ECR I-6351, para 38.

- C-314/09 *Stadt Graz/Strabag AG* of 30 September 2010
- C-570/08 *Simvoulis* of 21 October 2010
- C-568/08 *Combinatie Spijker Infrabouw* of 9 December 2010

One might take note of the fact that remedies in all instances were subjected to the procedural autonomy test in some way. It is apparent that the ECJ's approach to damages in relation to procedural autonomy is far from uniform, even in a confined area such as procurement law.

Procedural independence in C-570/08 Simvoulis

In a case interpreting Article 2(8) of Directive 89/665 on the right to seek judicial review, the Court spoke about “the procedural independence enjoyed by the Member States”.¹⁵⁶ This terminology is new, and bears witness to a self-restraining court. At the same time, one might wonder whether the doctrine of ‘procedural autonomy’ is solidifying into one of ‘procedural independence’. Additionally, the Court brought up the non-harmonizing nature of the Directive, in stating, “[t]he argument that such an interpretation would be likely to lead to a lack of uniformity in the application of European Union law cannot be accepted, in so far as Directive 89/665, as is apparent, in particular, from Article 1(3) thereof, does not seek to completely harmonise the relevant national legislation.”¹⁵⁷ In this judgment, the Court of Justice relied on the nature and intensity of the degree of harmonization envisaged. The meaning of ‘procedural autonomy’ in this case is such as to preclude the ECJ from striking down a national rule on the basis of effectiveness requirements.

Procedural autonomy and a contextual judicial remedy in C-314/09 Stadt Graz/Strabag.

¹⁵⁶ Case C-570/08 *Symvoulis Apochetefseos Lefkosias* 2010 ECR I-10131, para 36. According to a search conducted through the curia.eu search engine, so far it is the first and only time that the “procedural independence” wording has been used by the Court itself. Whether this is a negligible translation deviation or the manifestation of an incrementally changing understanding of the Court as to the competence of Member States regarding their procedural law cannot be determined by reference to the wording of a single case. Nevertheless, a change in phrasing, if recurring, is certainly noteworthy as a proxy for changing meaning.

¹⁵⁷ Case C-570/08 *Symvoulis Apochetefseos Lefkosias* 2010 ECR I-10131, para 37.

Previously, the ECJ had adopted a rather different approach regarding procedural autonomy in *Stadt Graz/Strabag*:

*“Although, therefore, the implementation of Article 2(1)(c) of Directive 89/665 in principle comes under the procedural autonomy of the Member States, limited by the principles of equivalence and effectiveness, it is necessary to examine whether that provision, **interpreted in the light of the general context and aim of the judicial remedy of damages, precludes a national provision** such as that at issue in the main proceedings from making the award of damages conditional, in the circumstances set out in paragraph 30 of this judgment, on a finding that the contracting authority’s infringement of the law on public contracts is culpable.”¹⁵⁸*

Here, the Court did apply the effectiveness principles. In fact, two additional criteria according to which the national measure can be judged are specified: *the general context* and the *aim of the judicial remedy of damages*. This warrants two remarks; first of all, the wording may be interpreted as a first step into the direction of differentiation between different areas of law (following the *Peterbroeck* case law). Secondly, the Court postulated - in addition to the procedural autonomy doctrine - an independent assessment of whether remedies are available. The additional requirements on the provision of remedies produces a tension between the substance-procedure and the rights-remedies approach. In finding that damages claims cannot be made dependent on culpability, the ECJ did little but pay lip-service to the principle of procedural autonomy.

Member State liability and procedural autonomy in C-568/08 Combinatie Spijker Infrabouw

In the *Combinatie Spijker* case, the Court applied the *Rewe/Comet* effectiveness test (i.e. basically the procedural autonomy test, but without calling it that) and a State liability requirement on damages cumulatively. The ECJ clearly pointed out that Directive 89/665 does not contain a *“detailed statement either as to the conditions under which an awarding authority may be held liable or as to the determination of the amount of the damages which it may be ordered to pay”*.¹⁵⁹ In other words, the wording of the Directive does not contain either constitutive criteria, or criteria for the quantification of damages.

¹⁵⁸ Case C-314/09 *Strabag and others* [2010] ECR I-8769, para 34.

¹⁵⁹ Case C-568/08 *Combinatie Spijker Infrabouw* [2010] ECR I-12655, para 86.

However, after this deferring passage, the judgment continued: *“That provision [in Article 2(1)(c)] gives concrete expression to the principle of State liability for loss and damage caused to individuals as a result of breaches of EU law for which the State can be held responsible.”*¹⁶⁰ After remarking in passing that although the principle of Member State liability was only developed in 1991 in *Francovich*,¹⁶¹ i.e. that it did not exist at the time of drafting of the Directive, the *“right of reparation”* was now *“consistent”*, and as a *“principle is inherent in the legal order of the Union”*.¹⁶² The judgment continues *“[a]s matters stand at present, the case-law of the Court of Justice has not yet set out, as regards review of the award of public contracts, more detailed criteria on the basis of which damage must be determined and estimated.”*¹⁶³ Accordingly, the Court first of all rejects the idea that due to the applicability of Member State liability, the ECJ has formulated criteria for damages. There is a tendency for differentiation, a distinction according to the area of law, i.e., the review of the award of public contracts specifically. In the specific case, this reasoning is used to close the door on the formulation of damages criteria by the judges. At the same time it leaves that possibility open for the future by stressing the fact that this is *“for the moment”*, and *“not yet”* the case. The judgment also mentions the fact that in Directive 2007/66 the EU legislator chose not to alter the damages provision. It is rare for the CJEU to base an interpretation on the legislative will so explicitly.

On the point of damages, the judgment proceeded to mention the principles of equivalence and effectiveness (*‘procedural autonomy’*), but did not test or apply them. It simply repeated the *Rewe*-formula, stating that *“damages arising from an infringement of EU law”* (para 90) and the *“detailed procedural rules governing actions for safeguarding an individual’s rights under EU law”* (para 91), in the absence of any provisions of EU law in that area, are for the internal legal order of each Member State.

To sum up the argumentative steps performed, firstly, the CJEU stated that the Directive itself contains no conditions for damages. Secondly, it proceeded to equate the

¹⁶⁰ Case C-568/08 *Combinatie Spijker Infrabouw* [2010] ECR I-12655, para 86.

¹⁶¹ Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, para 87.

¹⁶² Case C-568/08 *Combinatie Spijker Infrabouw* [2010] ECR I-12655, para 87.

¹⁶³ Case C-568/08 *Combinatie Spijker Infrabouw* [2010] ECR I-12655, para 88.

Damages Article with a specific expression of Member State liability. Third, it stated that specific criteria have not yet been developed in relation to Member State liability in the field of public contracts. Fourthly, it found that national rules must comply with the principles of effectiveness and equivalence (referring to the relevant case law, but without using the term 'procedural autonomy'). Overall, the ECJ was extremely reluctant to engage with the question in substantive terms.¹⁶⁴ However, the structural implications of the ruling are immense, as it 'imports' Member State liability as a source through which the Remedies Damage provision may be interpreted.

In the field of procurement, the Court subjects cases on enforcement rules consistently to the procedural autonomy test; however, even in a confined area of law, the use of this doctrine is extremely divergent. In *Symvoulia* the CJEU went so far as to speak (for the first time) of procedural independence of the Member States, while in *Strabag* procedural autonomy did not preclude the Court from striking down a fault requirement. In *Combinatie Spijker*, the Court took a deferent attitude to procurement damages under the effectiveness and equivalence test (without naming it procedural autonomy), only to hold that the damages provision is an expression of Member State liability.

4.2.2 Member State Liability Applied in Public Procurement: a thought experiment

Prior to the *Combinatie Spijker* judgment, it had already been accepted that contracting authorities in most cases constitute public bodies, and thus State entities, and that therefore the case law on Member State liability under *Francovich* and *Brasserie* could be an applicable source of European law requirements. What place this Member State liability would then occupy in relation to damages claims arising from secondary instruments, such as the public procurement directives themselves, was less apparent. Would there be a minimum threshold, or a hybridization¹⁶⁵ of remedies?

¹⁶⁴ This may in part be due to the wording of the referred questions, which asked, in a highly abstract manner that was almost entirely detached from the particular circumstances of the case and its factual situation, whether "Community law set[s] criteria for determining and estimating those damages".

¹⁶⁵ N. REICH, 'Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in Case of Breaches of EC Rights', (2007) 44 *Common Market Law Review*, 705.

With its ruling in *Combinatie Spijker*, it seems that, at least for the public procurement sector, the Court has furnished an answer which conflates a secondary damages article with damages under Member State liability. We will examine the implications of the fact that the ECJ did not proceed to ‘apply’ the criteria itself. To review, the Court held that the “*provision [in Article 2(1)(c)] gives concrete expression to the principle of State liability for loss and damage caused to individuals as a result of breaches of EU law for which the State can be held responsible.*”¹⁶⁶ It continued by enumerating the three constitutive conditions of the right to reparation, by stating that “*the rule of EU law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious, and there must be a direct causal link between the breach and the loss or damage sustained by the individuals.*”¹⁶⁷

Based on the assumption that contracting authorities are public bodies, and that a breach of the public procurement rules is qualified under the *Brasserie*-criteria, before the judgment it had already been argued that the Member State liability case law is pertinent to damages claims for breaches of EC law public procurement rules.¹⁶⁸ A critique of this conflation is offered in Section 14.4. First, we project what such an application would look like in the public procurement sector.

It is interesting to compare the rights conditions of Member State liability with the personal scope of the Public Procurement Remedies Directive.

National law is not alone in its capacity to limit liability by requiring an interest on the part of the person bringing an action. In the criteria for application of the Directive, it is provided that the Directive’s applicability may be limited to those having an interest in obtaining a contract, and having suffered or being at risk of suffering harm. In this instance,

¹⁶⁶ Case C-568/08 *Combinatie Spijker Infrabouw* [2010] ECR I-12655, para 86.

¹⁶⁷ Case C-568/08 *Combinatie Spijker Infrabouw* [2010] ECR I-12655, para 87.

¹⁶⁸ For example H. LEFFLER, ‘Damages Liability for Breach of EC Procurement Law: Governing Principles and Practical Solutions.’, (2003) *Public Procurement Law Review*, 151, who draws attention to the ECJ’s wording e.g. in Case C-92/00 *Hospital Ingenieure Krankenhausstechnik Planungs-Gesellschaft mbH (HI) v Stadt Wien* [2002] ECR I-05553 and demands that it is foremost a strengthening of the remedies in public procurement specifically. He therefore (although not very insistently so) pleads for a more nuanced view of the general principles and public procurement-related cases, stating that public procurement should “colour the decision in the concrete case” (p 154).

it is therefore Community law itself which imposes limitations to the standing of claimants, based on principles of both interest and harm.

With regards to this, the Court has held that the provisions in Articles 1(1) - on the right to have decisions which have been made by the contracting authorities reviewed effectively, and as rapidly as possible - and 2(1)(b) - on the right to have unlawful decisions set aside - of Directive 89/665 are directly effective.¹⁶⁹ As the obligations contained in 2(1)(a) and (c) on damages are similarly precisely worded, they must be seen as highly likely to dispose of direct effect as well. The situation differs in this respect from the situation giving rise to the preliminary question on Member State liability in *Peter Paul*.¹⁷⁰ In *Peter Paul*, the Court held that the Member State could not be liable because the Directives did not confer directly effective rights onto individuals. It is here contended that Directive 89/665 does create a directly effective right for individuals to receive damages under certain circumstances. Under the Directive, Member States are explicitly sanctioned to limit the ring of persons who can rely on these provisions, therefore including those having suffered harm and having an interest within the damages provision. By contrast, under Member State liability, the finding of failure to fulfill its obligations is not bound to a finding of damage flowing therefrom.¹⁷¹ This finding was confirmed in *Commission v Germany*, in which the Court held that a Member State may not rely on the fact that no third party has suffered damage.¹⁷²

There is some incommensurability between liability under Member State liability and a potentially more limited form of liability for damages under the Directive. Principally, secondary law cannot (except in cases of full harmonization) reduce the impact of primary law, as has also been held in relation to damages in the field of public procurement.¹⁷³ As an

¹⁶⁹ To this effect, see Case C-15/04 *Koppensteiner GmbH v Bundesimmobiliengesellschaft mbH* [2005] ECR I-04855, para 38.

¹⁷⁰ Case C-222/02 *Peter Paul, Cornelia Sonnen-Lütte and Christel Mörkens v Bundesrepublik Deutschland* [2004] ECR I-09425.

¹⁷¹ Case C-263/96 *Commission v Belgium* [1997] ECR I-7453, para 30, Joined Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-03609, para 42.

¹⁷² Joined Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-03609, para 42.

¹⁷³ Joined Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-03609, para 37-39.

intermediate conclusion, we may note that the application of the Directive is more limited than Member State liability would have us expect. One could wonder whether the provision on harm contained in the Directive should not be re-read in the light of primary law so as to guarantee at least that level. Again, this is a speculative argument which depends on the relation we perceive Member State liability and the damages provision as having towards each other.

So far, it has not been determined as to which violations of the public procurement rules are to be regarded as “sufficiently serious” to entail Member State liability.¹⁷⁴ The Court distinguished between areas of broad and little discretion in order to establish whether there were grounds for State liability and what their precise respective conditions were. The question is whether a breach of a directive would constitute a “sufficiently serious” breach,¹⁷⁵ which is contingent on the question of whether it concerns an area in which the Member State enjoys broad or little discretion. Once it is established that a breach of the public procurement rules should indeed be judged as sufficiently serious, we can draw on the case law as established in Member State liability for the purposes of damages in public procurement, and also under the Directive itself. Secondly, as *Brasserie* concerned a legislative measure, it remains open according to what criteria other measures of the Member States are to be judged. Again, in public procurement we can think of two distinct Member State violations, one of which would be the actual law enacted, which would indeed be a ‘classic’ case of Member State liability for legislating. On the other hand, one of the main arguments is that Member States can also incur liability for mere administrative acts, that is, for decisions taken by a contracting authority, under (at least) the conditions guaranteed by primary law, the *Brasserie* conditions. In the very detailed provisions

¹⁷⁴ S. TREUMER, 'Damages for Breach of the EC Public Procurement Rules - Changes in European Regulation and Practice', (2006) *Public Procurement Law Review*, 159.

¹⁷⁵ To the opposite effect, see S. TREUMER, 'Damages for Breach of the EC Public Procurement Rules - Changes in European Regulation and Practice', (2006) *Public Procurement Law Review*, 159, who argues that it is not of great practical importance. It is here submitted that whether a breach is sufficiently serious is important in order to determine whether there is a requirement flowing from Community law, rather than grounding a praxis by means of a comparative overview of the Member States' legislation on damages in order to then reintroduce it at the European level via principles as generally recognized in the Member States' legal orders.

contained in the public procurement directives, this lack of discretion is manifest.¹⁷⁶ A simple breach of the Directives is therefore 'sufficiently serious', thus amounting to a liability closely approaching strict liability.

The last requirement of causation is specifically problematic regarding procedural law violations, as these may amount to mere technicalities.¹⁷⁷ In the field of public procurement, one of the advantages is that the breach of the – be they procedural - rules on how to award a contract makes the awarding of the contract unlawful. The violation of a rule that would have caused a procedure to become illegal can be said to have caused damage. Nevertheless, there remain some issues specific to public procurement which could possibly challenge the chain of causation: (1) *Causation in case of damages that might have been sustained even in the absence of the violation alleged by the applicant.*¹⁷⁸ A complication which has arisen in this respect is the allegation that a tender procedure was already unlawful, due to the unlawfulness of another, previous decision, so that the decision actually challenged by a tenderer did not directly cause the harm. (2) *The conduct of the plaintiff as a factor affecting causation (the chain¹⁷⁹) or contributory negligence.* Further, a claim for damages in relation to an allegedly unlawful decision may be made dependent upon that contested decision being set aside by a review body (see Art. 2(6) Directive 665/89). The directives therefore implicitly sanction legal regimes with a requirement to initiate a set-aside action against decisions, usually regarded as a requirement to mitigate damages under general tort law principles. This principle also corresponds to the general damages case law rendered under *Brasserie du Pêcheur* and *Factortame III* allowing national courts to scrutinize whether the injured party "showed reasonable diligence in order to avoid the loss or damage or limit its extent and whether, in particular, he availed himself in time of all the legal remedies available to him". The legislative text in this respect on one hand enunciates

¹⁷⁶ A. WARD, *Judicial review and the rights of private parties in EU law* (Oxford University Press, 2007), 230, also in favor of liability for the mere breach of a directly effective Community rule. Similarly A. BIONDI & M. FARLEY, *The right to damages in European law* (Kluwer Law International 2009), 45.

¹⁷⁷ G. ANAGNOSTARAS, 'Not as unproblematic as you might think: The establishment of causation in governmental liability actions.', (2002) 27 *European Law Review*, 663.

¹⁷⁸ On this aspect see G. ANAGNOSTARAS, 'Not as unproblematic as you might think: The establishment of causation in governmental liability actions.', (2002) 27 *European Law Review*, 663.

¹⁷⁹ For a very general discussion of this aspect see G. ANAGNOSTARAS, 'Not as unproblematic as you might think: The establishment of causation in governmental liability actions.', (2002) 27 *European Law Review*, 663.

the general principles, without departing from them, which leads to a sense of coherency of the EC legal regimes. Secondly, both general principles and secondary law leave the duty to mitigate damages to the discretion of the particular Member State's legal system. The question of possible justifications remains rather undetermined in terms of its concrete implications and will thus most likely have to be interpreted on a case-by-case basis.

Following the *Combinatie Spijker* ruling, we observe that damages are subject to a 'conflationary' trend of interpretation, a transcendent interpretation of damages which imports the case law of general Member State liability to the field of procurement. This tendency does not stop here, but is aggravated when considering the possible extension of the institutional liability of the EU.

4.2.3 The role of Institutional Liability in interpreting Member State liability

The liability of EU institutions under 340 TFEU can also be considered if one argues that the liability of Member States and that of the EU converge (or at least should do so).¹⁸⁰ To a certain degree, this trend towards convergence is supported by the case law, namely the *Brasserie* and the *Bergaderm* judgment. In *Brasserie*, the Court held that "liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances".¹⁸¹ This statement was repeated in *Bergaderm*, wherein the Member State liability conditions were applied to the liability of the EU.¹⁸²

However, significant inconsistencies in the Courts approach to both forms of liability persist.¹⁸³ From the point of view of the legal process approach followed in this thesis, the action itself is an entirely different one, with different roles for the CJEU. Under institutional liability, the General Court acts as a court of law and as a court of fact. Therefore, when

¹⁸⁰ W. VAN GERVEN, 'Of Rights, Remedies and Procedures', (2000) 37 *Common Market Law Review*, 501. The reason most commonly cited is that there should be no difference in the rights of an individual when faced with different institutions violating its rights.

¹⁸¹ Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-01029, para 42.

¹⁸² Case C-352/98 P *Bergaderm* [2000] ECR I-5291, para 41 and following.

¹⁸³ For a very recent and pointed comparison between the two forms of action, see A. BIONDI & M. FARLEY, *The right to damages in European law* (Kluwer Law International 2009).

faced with damages claims, it is required to rule on all aspects of the case. The Member States' common traditions are then the relevant sources of law. We can see, however, the magnitude of the bridge which is created by importing Institutional liability into Member State liability: it lies in the source of law; the inspiration for which will be the Member States' common traditions.

The case law rendered by the General Court on damages has been discussed specifically within the field of public procurement. This is so because the General Court itself has had to pronounce in detail on the award of damages and the different heads of damages which an aggrieved tenderer should be able to claim have also been discussed in the context of tendering procedures undertaken on behalf of the European Union— that is in the framework of 340 TFEU procedures.¹⁸⁴ In addition, it is false to assume that these cases are only interpretations of the Public Procurement Directives. While to many of the EU's the tenders, the procurement directives are applicable, they are often governed additionally by a distinct set of rules.¹⁸⁵ In the interpretation of damages claims, the General Court has further recourse to administrative law principles and financial regulations as they apply to the EU. It is therefore important to insist on distinguishing the characteristics of the tendering procedure of the EU from those of a contracting authority in a national Member

¹⁸⁴ Case T-203/96 *Embassy Limousines & Services v European Parliament* [1998] ECR II-04239.

¹⁸⁵ First of which would the general principles of the Community, such as the principle of sound administration, principle of equal treatment in the award of public contracts, concern for sound financial management of Community funds and the prevention of fraud. See, for example, T-160/03 *AFCon Management Consultants, Patrick Mc Mullin and Seamus O'Grady v Commission of the European Communities* [2005] ECR II-00981 paras 74 ff. In the relevant case, the tendering procedure was said to be governed under the General Regulations for Tenders and the Award of Service Contracts financed from Phare/Tacis Funds. In Case T-203/96 *Embassy Limousines & Services v European Parliament* [1998] ECR II-04239, the Parliament's liability was alleged on different grounds, one based on the Directive, the other on general principles of European administrative law. The claim regarding infringement of the Directive was rejected, and the Parliament was found to be in breach of having invoked legitimate expectations which were not rectified early enough. It is correct that the Parliament was held liable, however not for infringement of the Directive. This steered the Court's judgment on the damages claim, since they were specific damages claimed relying on the legitimate expectations invoked, which therefore resulted in the Court granting damages for reliance as well as bidding costs. Re-iterating my argument against the generalizability of the 288EC jurisprudence, it is here submitted that *in casu* it was the special circumstances of the trust induced by Parliament rather than an automatic breach of public procurement rules which resulted in these heads of damages. The judgment as such is therefore not easily transferred to regular damages for a breach of the EC Public Procurement Directives.

State.¹⁸⁶ Recourse to the Institutional Liability case law can only be made by means of analogy, not by straight application.

Contrary to this, on the basis of jurisprudence rendered in the field of institutional liability, it has been argued that the Courts scrutiny amounts to only a “relaxed review standard”,¹⁸⁷ based on the *Embassy Limousines* line of cases¹⁸⁸. Basically, the Institutional liability cases have only been able to reach such prominence in the doctrinal discussion of Member State liability in public procurement because these cases also deal with procurement, that is, the tendering process. The differences were emphasized above, but there is a tendency in the literature to look at damages claims rendered by the General Court and those in preliminary reference proceedings as identical. From a legal process and an institutional point of view, this is flawed. While it is sometimes true that the legislation applicable to the procurement processes of the EU is governed by the procurement directives, this is not always the case. In any event, the institutions are bound by additional sources of law, such as financial regulations and administrative principles. In addition, the General Court is required to act as a court of law and of fact, which means that the interpretations it renders are not directly transferrable to issues which surface in a preliminary ruling procedure. In terms of effect, however, it is likely to open a gate for the Member States’ traditions to spill over into the interpretation and hence become informal sources of law for public procurement damages.

¹⁸⁶ T. Gruber in G. GRUBER, T. GRUBER, A. MILLE & M. SACHS, 'Public Procurement in the European Union', in (NWV, 2006). It seems at least to suggest the applicability of the principles enunciated in the cases on the Community liability for damages in relation to contracting authorities.

¹⁸⁷ H. LEFFLER, 'Damages Liability for Breach of EC Procurement Law: Governing Principles and Practical Solutions.', (2003) *Public Procurement Law Review*, 151, who is also critical, but cites Arrowsmith.

¹⁸⁸ Case T-203/96 *Embassy Limousines & Services v European Parliament* [1998] ECR II-04239, para 56, also often cited as authority T-13/96 *TEAM v Commission* [1998] ECR II-4073 T-160/03 *AFCon Management Consultants, Patrick Mc Mullin and Seamus O'Grady v Commission of the European Communities* [2005] ECR II-00981, para 98 which granted no compensation for bid preparation, based on an exemption therefrom in the contract: “Article 24 of the General Regulations for Tenders and the Award of Service Contracts financed from Phare/Tacis Funds provides that in the event of closure or annulment of a tendering procedure, the tenderers are not entitled to compensation. It follows that the charges and expenses incurred by a tenderer in connection with his participation in a tendering procedure cannot in principle constitute damage which is capable of being remedied by an award of damages. However, the provision in question cannot, without potentially undermining the principles of legal certainty and of protection of legitimate expectations, apply in cases where an infringement of Community law in the conduct of the tendering procedure has affected a tenderer’s chances of being awarded the contract”.

4.2.4 Competition law damages and public procurement

One further source of damages law is the area of Competition law. We have already drawn attention to the importance that damages actions carry for this field. In a realistic interpretation, given the prominence of this policy field in EU law, it is not surprising that it is precisely this field in which the ECJ has ventured into making more authoritative statements regarding the requirements of EU law on the availability of damages for breaches of EU law.

The interplay between policy making and court judgments in competition law has been very intensive, as evidenced by a brief overview of the timing of policy studies and court judgments.¹⁸⁹ The Deringer Report of 1961 identified damages in competition law as a contentious issue, and this was followed in 1966 by Member State comparisons. An extended account of Member States' remedies systems was undertaken in the Braakman Report of 1997. In 1999, the Commission published the White Paper on Modernization of the competition enforcement system. In 2001, the Court gave the landmark *Courage* judgment, which postulated the full effectiveness and the practical effect of how Article 101 TFEU would be put at risk if individuals could not claim damages for loss caused.¹⁹⁰ The judgment was confirmed in 2006 in *Manfredi*,¹⁹¹ which held that individuals seeking compensation would be entitled to claim actual loss and loss of profit, plus interest. The Commission responded by publishing the 2005 Green Paper on damages, but with legislative action still pending, the Court is increasingly faced with questions pertinent to damages claims. Causation as a topic was removed from the 2008 Commission White Paper. In a way, the field illustrates how important policy agenda setting can be, even with regards to the judiciary.

The Court-developed doctrines on damages in Competition law are based on the direct effect of Treaty articles 101 and 102 TFEU. This is important for the implications of *Courage* in terms of the horizontal dimension. The question again arises as to whether or not

¹⁸⁹ This sketch is based on V. MILUTINOVIC, *The 'right to damages' under EU competition law : from Courage v. Crehan to the White Paper and beyond* (Kluwer Law International 2010).

¹⁹⁰ Case C-453/99 *Courage v Crehan* [2001] ECR I-6297, para 26.

¹⁹¹ Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619.

Francovich and damages based on effectiveness in Competition law are alike. Effectiveness is fully applied to private law persons, while *Francovich* states the instances in which the State is specifically protected (for example, when legislating, the State enjoys special immunities and a “presumption of benevolence”).¹⁹² However, mainstream opinion holds *Francovich* to be separate from direct effect *Courage* damages.¹⁹³

4.2.5 Spill-over effects of the interpretation of other secondary legislation

In addition, a case for ‘cross-fertilization’ between different regulatory sectors has been made or accepted between public procurement and gender discrimination.¹⁹⁴ Notably, the non-discrimination legislation has significant case law on damages.¹⁹⁵ Both fields deal with equality, with additional strong similarities in their purposes of regulation, as they are both concerned with equal opportunities, on one hand for tenderers, and on the other hand for employees e.g. in looking for a job. Furthermore the interest which is protected is similar; the Equal Treatment Directive protects the interests of the person discriminated against; the Public Procurement Directive, the interests of the aggrieved tenderer. In this respect the environmental directives, for example, are more elusive, as they are geared towards the protection of the environment, rather than individually assertable rights. Other aspects of the field of damages in the environmental sector may prove more pertinent due to its largely administrative nature. Both fields exhibit specific structural similarities to public procurement, which is relevant by way of analogy and in view of a certain coherency inherent to the treaty system on damages.¹⁹⁶

¹⁹² V. MILUTINOVIC, *The ‘right to damages’ under EU competition law : from Courage v. Crehan to the White Paper and beyond* (Kluwer Law International, 2010).

¹⁹³ This was the consensual opinion among the participants of the British Institute for International and Comparative Law conference ‘Celebrating 20 Years of *Francovich* in the EU’ held 17 November 2011 which discussed extensively the role of competition law damages in relation to *Francovich* damages.

¹⁹⁴ S. TREUMER, ‘Damages for Breach of the EC Public Procurement Rules - Changes in European Regulation and Practice’, (2006) *Public Procurement Law Review*, 159.

¹⁹⁵ See above for the discussion on why non-discrimination legislation seems to be comparable to public procurement.

¹⁹⁶ See Opinion of A-G Colomer in Case C-396/07 *Mirja Juuri v Fazer Amica Oy* [2008] ECR I-08883, para 52.

4.3 FROM INDETERMINACY TO CONFLATION

Overall, in the field of public procurement law, the European Court of Justice is placed in a particular position with regards to damages: legislative inertia regarding damages claims in public procurement exerts systemic pressure on the ECJ to interpret the relevant legislation. The pressures of the preliminary reference procedure put the CJEU in the position of having to determine the interpretation of damages because the Court is held to give an answer to all national cases. The Court at most may hold that a question is for the national legal order to decide, but in that case it equally needs to motivate its answer – therefore effectively creating ‘law’ with respect to the powers of interpretation of EU legislation. But also a ‘negative’ integration approach which strikes down national legislation indirectly leads to positive criteria or standards that national laws have to meet in providing damages. The CJEU is therefore a maker of law on damages on a horizontal level (relative to the EU legislative process) and on a vertical level (*vis-à-vis* the national courts).

Doctrinally, Member State liability is being pulled into assimilation with general damages available under the direct effect of EU law, in particular Competition damages, but also non-contractual liability of the EU (340 TFEU). Particularly in public procurement, we observe a strong tendency towards conflation of MS liability and procedural autonomy, as well as the influence of Institutional liability on Member State liability – in line with the *Bergaderm* judgment. Secondly, damages are not understood to be separate from the procedural law of the Member States, but form part of it; the ‘procedural autonomy’ doctrine is applied to both procedural and remedial rules. Lastly, spill-over interpretations are common, borrowing freely from other fields of law, such as competition law rulings on heads of damages, and seem to contain a possible interpretation for the field of public procurement.

The implications of these observations and a proposal for an alternative construction are put forward in the last part of this thesis (Chapters 15 and 16). It is the national courts that apply EU law and award damages. Gaps left by EU law are filled by national law. This is why, in the next section, we turn to the national arena and how the national courts have dealt with damages in procurement.

5 THE ROLE OF COMPARATIVE LAW IN ADJUDICATING

After dealing with the requirements on damages emanating from the EU level, in the next chapters, attention is turned to the national fora. The thesis first surveys four jurisdictions in detail (chapters 6 - 9). On the basis of these country studies, the concept of damages is reconceptualised as a bundle of rules rather than a holistic remedy. The issues thus identified are then discussed in a horizontal manner in chapters 11 - 12. Both of these elements of the thesis can be said to fall under the heading of comparative law. I sketch what each part purports to accomplish, and then lay down the different ways in which comparative law is used to advance the overall thesis. This also necessitates a brief excursion into the use of comparative law in the Court of Justice of the EU. For the purposes of this thesis, comparative law is more than a methodology; it is part of the thesis. This thesis seeks to advance the point that an adjudicative theory in the context of the EU implicitly must rely on a theory of comparative law.

In the vertical part, a selection of national jurisdictions are presented in a qualitative, in-depth country study, examining the possibility for aggrieved tenderers to claim damages for breaches of EU public procurement law. The internal and national point of view replicates the perspective of a national court. This perspective reflects the structural constraints of the national legal order and national legal rules, which are a mixture of EU law and EU derived law, and are complemented by national norms.

The section based on the horizontal issue places the different jurisdictions in dialogue with each other. However, as distinct from engaging in a closed comparison between the country studies, we look at the issues from a defined and, more importantly, common perspective of European law, striving to enrich this point of view with a wider theoretical framework.

5.1 COMPARATIVE LAW, OF MEANS AND ENDS

5.1.1 A legal process view of comparative law

The use of comparative law is tied to the notion of 'legal change', from which one can distinguish exogenous and endogenous change. Exogenous refers to factors originating outside of a legal system, without the 'intention' of the inner system. Endogenous factors, on the other hand, are factors generated by a legal system's internal state. Earlier comparative law scholarship remained fixed in its consideration of legal systems as distinct, hermetically closed entities – as a result remaining “prisoner of a territorial national paradigm of inquiry”¹⁹⁷. The use of comparative law was thus founded mainly in very indirect applications to other legal systems, for example, by means of inspiration (or, to phrase it more critically, legal transplant). It is traditionally an inter-system comparison, and comparative law was seen to constitute an exogenous influence on legal systems.

Comparative legal process or institutionalism, on the other hand, is an intra-system - that is, endogenous - comparison; it is based on the assumption that all of the compared institutions operate within the same context, but that the intrinsic characteristics of the institutions make them operate differently in that same environment.

By taking a legal process perspective, we 'enlarge' the process of damages claims. EU scholars have mostly confined themselves to examining parts of the process which remained at EU level, in a type of *acquis* study. In other cases, they confine themselves to looking at the national realm without taking the EU's part in the process into account. The legal process account is more holistic, in that it portrays the EU adjudicative legal process as one which is integrated between the European Court and the national courts in a plural form. In fact, and we will come to this later, the relationship more accurately corresponds to a bundle of legal processes. The thesis tries to bring greater 'visibility' to the national part of the process by means of the country studies. From these, the horizontal comparison then provides an abstracted view in order to create an independent 'conceptual interface' which represents the application of damages claims in the national courts.

¹⁹⁷ U. MATTEI & A. MONTI, 'Comparative Law & Economics', in Società italiana di economic pubblica (ed), (Diritti, Regole, Mercato. XV Conferenza STEP 2003), 21.

By superimposing an additional layer of law, the national legal systems, understood in a Statist conception to be products of separate States, are not just indirectly permeable through inspiration/legal transplants, but are directly so. This supranational influence lifts comparative law out of its inter-system confines.

In contrast, in subscribing to a legal process point of view, there are ways of bridging between the exogenous and the endogenous. Comparative law can be cognized within the EU adjudication process and moves beyond the traditional study of *separate* legal systems. Understanding the EU and national orders from a legal process perspective integrates the national and European elements of a unitary process of adjudication. The classical element of comparison is thus simply not given in the EU legal context. Comparative law has come under such harsh criticism that its use warrants a certain measure of justification. This is not the place to discuss the end of comparative law, but its ends for the topic of this thesis. Specifically, this framework is characterized by an overarching legal context, namely EU law, and secondly by its material focus on public procurement law.

Systemic commonalities exist which are identical in all legal systems, such as the EU institutional structure and EU law. An additional degree of commonality arises from two factors in our case: first, the exhaustively harmonized influence to which they are subject, namely the input from common European norms on procurement; and secondly, the highly standardized factual constellations governed by public procurement regulation.

The exercise is not one of comparative law in the strict sense, defined as the comparison of distinct legal systems. EU public procurement lays out identical obligations for all Member States and a requirement of uniformity of interpretation as a common reference point. The point of departure is the same, however the results reached in various Member State courts are not - due to the indeterminacy of the availability of damages rules at EU level. The object of this thesis is to look at a damages regime deriving from secondary legislation and to understand in theory how identical European rights are secondarily protected in damages claims.

5.1.2 The use of comparative law in the present thesis

The operationalization of findings of comparative law can be undertaken through recognition of the role played by comparative law in the CJEU. When using comparative law-based input in the broadest sense, the CJEU needs a theory of comparative law and of how it can validly feature in its legal argumentations.

Comparative law is used pervasively in the adjudication process of the CJEU, albeit not always in an explicit fashion. Judges have written about the use of comparative law at the CJEU, which we can take as authoritative testimony on the practice. Recently, Lenaert put forward an opinion similar to those of other former ECJ judges Pescatore and de Wilmars, reflecting that: “la méthode de comparaison des droits imprègne, sous une panoplie de facettes, le travail quotidien du juge communautaire dans ses moindres recoins”.¹⁹⁸ The forms of influence of comparative law are various. They can be rather formalized, through AG opinions or party submissions, or they can stem from internal formal mechanisms, such as comparative law research notes commissioned by the Recherche et Documentation department for specific cases. They can even stem simply from the work of a référendaire curiously conducting research into other legal systems. At a very systemic level, each of the judges will have been trained in their own legal system and the délibéré between judges leads to confrontation between these different preconceptions. Comparisons are pervasive.

‘Comparative law’ can be made use of in the following ways:

- Comparative law as a methodology to uncover evidence of the availability of damages at the national level. It is one instrument through which to test the hypothesis that doctrinal problems, and not the indifference of aggrieved tenderers, preclude successful damages claims.
- From a functional point of view, comparative law can help us to identify different solutions to problems, i.e. the availability of damages for violations of procurement breaches.
- Comparative law has conceptual value. In this thesis, the comparative law part has enabled a better understanding of the notion of damages through the identification

¹⁹⁸ K. LENAERTS, 'Le droit comparé dans le travail du juge communautaire', in François van der Mensbrugge (ed), *L'utilisation de la méthode comparative en droit européen* (Presses universitaires de Namur, 2004), 118.

of the 'semantic field' of damages claims in different national jurisdictions, which were then abstracted.

- The discursive function of comparative law. Since legal process comprises the national level, comparative law can be used as a method to "describe" and frame the legal orders in their plurality. Comparative law is a communication tool which can help to find a standardized vocabulary and an interface between 'EU law' understanding and the national legal orders in the plural.
- The operationalization of comparative law-based findings. How does - and can - the CJEU use comparative law in the adjudication of damages claims? Does comparative law have authoritative force as a source of law?

While the two first functions are fairly common usages of comparative law, the last three deserve some elaboration, namely the conceptual function of comparative law, its discursive function and some thoughts on how comparative law can be utilized in the Court of Justice's adjudication.

Comparative law in this thesis is used in an instrumental manner: first of all, it is used as *a tool of conceptual analysis*, by means of which a set of defining issues are identified on the basis of the country studies. In the horizontal part, these issues are enriched by context, as well as by more examples and theory. Comparative law in this sense serves as the basis for an abstraction that improves our understanding of the meaning of relevant concepts. Secondly, in its *communicative function*, comparative law is used as an instrument to create a fiction, an interface, through which the legal orders in their plurality can be captured during the processes of EU adjudication. This can serve, for example, to assess the impact of a ruling within the national legal orders, or to assess acceptability.¹⁹⁹

Based on the initial comparative overview, topoi or immanent concepts for damages concerning breaches of EU procurement law are identified. These issues are dimensions

¹⁹⁹ P. PESCATORE, 'Le recours, dans la jurisprudence de la Cour de justice des Communautés européennes, à des normes déduites de la comparaison des droits des Etats membres', (1980) 32 *Revue internationale de droit comparé*, 337, K. LENAERTS, 'Le droit comparé dans le travail du juge communautaire', in François van der Mensbrugge (ed), *L'utilisation de la méthode comparative en droit européen* (Presses universitaires de Namur, 2004).

which determine and frame the ways in which damages claims are brought. In terms of conceptual analysis, the meaning of a concept is determined by how it is used. Therefore, to understand the concept of damages better, we must look at the different dimensions of use and practice in which they are placed, namely a set of concepts which stand in non-contradictory and coherent relation to each other. I attempt to create a common vocabulary for damages within the EU, which - in less intuitive terms - is best described as a constructivist endeavor:²⁰⁰ a constructivist method of conceptual analysis looks at concepts as embedded in a wider network of “concepts and theories”, i.e. a concept’s semantic field, the “performative aspects of concepts” and at the genesis of given concepts (as concepts are not “natural”).²⁰¹ Solum follows a similar account, stating that “the full communicative content results from both the semantics and the pragmatics of the utterance”.²⁰²

Additionally the argument is made for a constructivist conception of comparative law, in which ‘EU comparative law’ is understood as the semantic field of EU law. In the EU legal context, we can perhaps see EU comparative law as a heuristic device of simplification; *comparative law is used as a communication tool*. In order to understand what exactly a specific norm elaborated at EU level does within the national orders, we need comparative law to simplify the account. The reason for this is that we generally talk about specific implications, i.e. the impact of an EU norm in a particularized national legal order, but within the EU discourse of adjudication –accepting the general nature of the law made by the ECJ – comparative law can serve as the device which enables the discourse to reach an assessment of a legal norm in the multiplicity of national legal orders.

The need for comparative law to provide a mechanism or interface between the different national legal orders and the European level is created by the largely textual nature of EU law integration. It enables us to develop a wholly European understanding of the

²⁰⁰ See the accessible account on epistemology provided in G. VASCONCELOS VILACA, *Law as Ouroboros* (European University Institute, 2012).

²⁰¹ G. VASCONCELOS VILACA, *Law as Ouroboros* (European University Institute, 2012) 19-21, who follows the account of S. Guzzini (2005), “The Concept of Power: a Constructivist Analysis” *Millennium – Journal of International Studies* 33(3): 495-521.

²⁰² L. B. SOLUM, *Conference Paper: Communicative Content and Legal Content*. (EUI Legal and Political Theory Working Group, on file with author, 2012).

elements and uses of damages claims. It also enables us to *talk* about damages from a European point of view, taking into account the national legal orders (plural) in the abstract.

In this sense, EU comparative law is the interface or platform by means of which EU law can debate and discuss the national jurisdictions in their plurality at the same time, rather than acting as a bridge, merely connecting a particular legal order with EU law. It is the ‘third’ *lieu* or *locus* of EU law, a fiction. Understood as referring to this method, comparative law carries out a necessary reduction and abstraction, intentionally creating a ‘simplified’ version of the national legal systems in order to boost the possibility of further EU-wide generalization. This way of carrying out the comparative method is decried by some as its gravest vice, but at the same time, the simplification mechanism is also its greatest virtue. It becomes the place for national laws to meet EU law.

5.2 THE COUNTRY COMPARISONS

5.2.1 Vertical part description

The vertical part provides an overview of Member States’ systems of remedies in European public procurement as a whole, the implementation of Directive 2007/66 and the damages available to an aggrieved tenderer specifically – the purpose is to compare the damages available across the European Union as an examination of whether and how the realization of European rights differs across Member States.

Capacity constrains the number of jurisdictions which can be covered in detail. Therefore, the part on national systems is based on case selections which should, overall, depict the different methods of implementation in their diversity, using the method of ‘prototypical jurisdiction’²⁰³. The comparative country study comprises the Netherlands,

²⁰³ Relying on the classification of R. Hirschl, *On the blurred methodological matrix of comparative constitutional law*, pp. 48-63 as summarized in T. FIDALGO DE FREITAS, *Welfare rights and comparative constitutional law: Methods and state of the art* (on file with author 2009), 10, that “theories that pass the tests posed by prototypical cases, are thus likely to migrate well”.

France, the UK and Germany.²⁰⁴ Despite criticism concerning its focus on specific branches of law (for example, of neglecting public as opposed to private law) and general charges of oversimplification, the legal family approach is still regarded as useful by comparative law theory, especially in the European context.²⁰⁵ In our selection of case studies, it served as a point of departure: in European legal traditions, the roughest distinction can be made between common law and civil law countries. The civil law countries are then divided into the Germanic, Romanistic and (sometimes²⁰⁶) Nordic/Scandinavian legal systems. The central exponents of these jurisdictions were therefore chosen, these being the UK for common law, Germany for Germanic traditions, France for the Roman tradition and the Netherlands as an example of a modern and mixed jurisdiction.

From here, the specificity of public procurement as an area of law had to be accommodated, with specific focus on differences which would emerge at the stage of post-contractual remedies in the field of law. Previous research into the review and remedies systems of the EU Member States has classified their institutional and legislative frameworks.²⁰⁷ The institutional frameworks of Member States were categorized into single and dual systems of review – in a single system, all remedies are to be claimed in the same line of jurisdiction; special review bodies, administrative or civil judges. To this we would add

²⁰⁴ The four jurisdictions of England, France, Germany and the Netherlands are 4 of (to date) 27 Member States, together representing 100 of the 345 votes in the European Council and 62% of the EU's population. <http://www.consilium.europa.eu/council/voting-calculator?lang=en>.

²⁰⁵ The selection of countries made here is emblematic of the EU praxis on comparative law: a national comparison of all legal orders does not inform this EU terminology. Rather, it is always the 'traditional' legal families which are looked at, enlarged by outlying legal solutions found in other Member States. This practice is evidenced by the center for comparative law at the ECJ, namely the Research and Documentation Unit, in legal research carried out by referendaires, most legal academics and so on. This thesis does not attempt a normative critique of this practice, which there is certainly ample room for. Empirically, the peculiar and instrumental use of comparative law is well documented and descriptively most accurately depicts actual practice; therefore, for the purposes of this thesis, this will be assumed. However, by acknowledging the fact that comparative law is used, the methods of comparison are laid open and can thus be criticized more easily.

²⁰⁶ As an exponent of civil law, due to reliance on statutes as a source of law, on the other hand distinguished from France and Germany through the lack of their extensive codification movement of the 19th century. See J. ENGSTRÖM, *The Europeanisation of Remedies and Procedures through Judge-made Law - Can a Trojan Horse achieve Effectiveness? Experiences of the Swedish Judiciary* (European University Institute, 2009).

²⁰⁷ SIGMA, Central Public Procurement Structures and Capacity in Member States of the European Union. Sigma Paper No 40 (OECD 2007), 11. The study also looked at review culture and empirical information. We focus on the aspects based on purely legal dogmatic variables.

arbitration tribunals. Under the dual system, specific remedies have to be claimed in separate jurisdictions, the moment of contract conclusion most commonly being the cause of switching from one jurisdiction to the other.

Extensive cross-country surveys have been carried out and surveys have been conducted in relation to public procurement remedies regimes.²⁰⁸ The purpose of this thesis is to complement these with in-depth qualitative analysis. This comprises the legal regime beyond punctual rules, as well as the interpretations and adjudications of courts which go beyond the legislative frameworks. This is perhaps shy of constituting a 'law in action' approach, but by giving an overview which approximates actual litigation, it is more than merely the dead letter of the law.

In particular, the focus of the comparison does not just concern constitutive criteria for damages claims, but provides a more detailed analysis of the quantification phase of damages. This aspect of damages claims has been more superficially dealt with in previous overviews.

The country studies first look at the different countries in isolation, vertically. A statement is made outlining the law, covering i) the general system; ii) actions for damages; iii) constitutive criteria; iv) heads of damages; v) quantification of damages; and vi) discretion of judges.

The purpose in the first instance is conceptual, in that the comparison of different jurisdictions allows us to achieve a better understanding of underlying concepts. Secondly, it enables us to identify similarities and differences, which in turn answers the question of whether a 'common tradition of the Member States' can be said to exist (and whether this may thus constitute a source of law for EU law). On the other hand, differences must be judged against the uniformity requirement of EU law. Thirdly, problematic areas are identified, wherein national legal systems systematically obstruct damages claims, and in

²⁰⁸ SIGMA, Central Public Procurement Structures and Capacity in Member States of the European Union. Sigma Paper No 40 (OECD 2007); SIGMA, Public Procurement Review and Remedies Systems in the European Union. Sigma Paper No 41. (OECD 2007); SIGMA, Public Procurement Review Procedures. Sigma Paper No 30. (OECD 2000) .

which the standard of EU 'effectiveness' may not be met. Comparative law can here have inspirational value in uncovering different solutions and assessing their outcome.

6 CASE STUDY: THE NETHERLANDS

6.1 SYSTEMIC FEATURES OF PROCUREMENT CLAIMS

This Chapter presents damages claims in the Netherlands. While damages claims were touched upon in the legislative debate surrounding the Dutch implementation process for Directive 2007/66, an explicit provision regulating damages claims in public procurement remains absent. This is understandable in the light of the wording of Directive 2007/66, which itself refrains from introducing provisions on that matter. Damages have been the subject to some debate in the preparatory act for procurement legislation, which regarded the general tort liability scheme as sufficient.

There is some literature on damages in public procurement, including the quantification aspect thereof.²⁰⁹ The discussion of relevant case law, however, is based on contributions which made almost exclusive use of the Raad van Arbitrage ('RvA') public works arbitration tribunal case law. In light of the fact that the RvA has become significantly less important and that its adjudication methods were changed when applying EU procurement law²¹⁰, one needs to consider in how far older cases can still be regarded as

²⁰⁹ M. A. VAN WIJNGAARDEN & M. A. B. CHAO-DUIVIS, *Hoofdstukken Bouwrecht: Aanbestedingsrecht* (Kluwer, 2008); the series provides good coverage of the case law developments relating to construction law. *Hoofdstukken Bouwrecht: aanbestedingsrecht* of 2001 provides a good and recent collection of case excerpts, but without extensive comment. To my knowledge, the most pointed coverage on the calculation of damages in Dutch public procurement cases comes from Akkermans and Pijnacker Hordijk's contribution 'Schadevergoeding en schadeberekening' (compensation and quantification) in A. J. AKKERMANS & E. H. PIJNACKER HORDIJK, 'Schadevergoeding en schadeberekening', in W. H. van Boom, et al. (eds), *Aanbesteding en aansprakelijkheid* (Schoordijk Instituut Centrum voor aansprakelijkheid, 2001), 575. Recent handbooks on Dutch public procurement, such as the Dutch standard reference for public procurement E. H. PIJNACKER HORDIJK, W. H. VAN BOOM & J. F. VAN NOUHUYS, *Aanbestedingsrecht. Handboek van het Europese en het Nederlandse Aanbestedingsrecht* (Sdu Uitgevers, 2009) still rely on the piece in *Aanbesteding en aansprakelijkheid* as the only systematic inquiry into damages quantification in the field of public procurement, albeit in a slightly updated way.

²¹⁰ Whereas the RvA principally adjudicates based on "good men in all fairness", the statutes of the RvA were changed in 1995 in relation to the requirements of European public procurement claims, so as to provide for adjudication "according to the law". Article 18 (2) of the RvA statutes. The date of entry into force of that alteration was 1 September 1995.

pertinent. Since then, the law of damages has increasingly become determined by the Dutch judicial system.²¹¹

6.1.1 Sources of law

The European substantive public procurement rules 2004/18 and 2004/17 were implemented in the Netherlands through the *Raamwet EEG-voorschriften aanbestedingen* (the Framework law) and two ministerial decrees based on this framework law: *Besluit aanbestedingsregels voor overheidsopdrachten* (Decree tendering rules for public procurement, 'BAO') and *Besluit aanbestedingen speciale sectoren* (Decree tendering in special sectors, 'BASS'). These have since been replaced by the *Aanbestedingswet*, which entered into force on April 1 2013.

Due to the layered structure of the web of administrative law in the Netherlands, there is a multitude of legal instruments which regulate the procuring behavior of different government bodies. These may differ according to the object of a contract (e.g. works), contracting authorities (*Rijksoverheid*), or else for specific areas of law (e.g. transport law).

The first European substantive Directive 71/305 for works was implemented in the Netherlands by means of the *Uniforme Aanbestedingsreglement* (Uniform public procurement regulation, 'UAR') 1971. The intensification of regulation of public procurement at the European level was subsequently transposed by the UAR 1986, the UAR-EG 1991 and then the UAR 2001. The latter was then replaced by the *Aanbestedingsreglement Werken 2004* (Public procurement regulation for works, 'ARW' 2004) which was in turn replaced by the ARW 2005. For the utilities sector, this was the *Aanbestedingsreglement Nutssectoren 2006* (Public procurement regulation for utilities sectors, 'ARN 2006').²¹²

A separate act of implementation for the original Enforcement Directives 89/665 and 92/13 was not regarded as necessary at the time, since effective and fast procedures for

²¹¹ M. A. VAN WIJNGAARDEN & M. A. B. CHAO-DUIVIS, *Hoofdstukken Bouwrecht: Aanbestedingsrecht* (Kluwer, 2008).

²¹² The substantive public procurement rules are not discussed in this work. Regarding the Netherlands, see E. H. PIJNACKER HORDIJK, W. H. VAN BOOM & J. F. VAN NOUHUYS, *Aanbestedingsrecht. Handboek van het Europese en het Nederlandse Aanbestedingsrecht* (Sdu Uitgevers, 2009).

legal protection were already in place within the general Dutch framework of judicial protection. These included the possibility of interim measures and suspension of contract (*voorlopige voorziening* and *opschorting*), as well as the potential to claim damages.²¹³ However, the UAR 1986 foresaw an important role for the *Raad van Arbitrage voor de Bouw* (Arbitration council for the construction sector, 'RvA') through which disputes arising under the UAR became subject to arbitration.

Finally, the introduction of Amendment 2007/77 led to the adoption of a separate act for the implementation of the Enforcement Directives, the *Wet implementatie rechtsbescherming bij aanbesteding* ('Wira').

6.1.2 The implementation of the amendments made by Directive 2007/66

The Netherlands implemented the Amendment Directive 2007/66 by means of the *Wet Implementatie Rechtsbeschermingsrichtlijnen Aanbesteden* ('Wira'), a separate legal act which entered into force on 19 February 2010. Initially, Directive 2007/66 was to be implemented as part of a larger legislative package on public procurement. The comprehensive proposal for a Public Procurement Act was, however, rejected by the Upper House of Parliament in July 2008,²¹⁴ so that the legislature had to choose a separate act for transposing the Amendment in order to meet the implementation deadline of 20 December 2009 - which was ultimately missed by some weeks. The Lower House accepted the proposal on 26 November 2009, and the Upper House on 26 January 2010. Ultimately, both acts would be merged into a single legal instrument; the content would remain as agreed in the Wira.²¹⁵ This single instrument is now to be found in the *Aanbestedingswet*, which entered into force on 1 April 2013.

A certain lack of concern regarding the issue of the general compatibility of the overall Dutch system of judicial protection is clearly discernable, as was raised in the *Combinatie Spijker Infrabouw* preliminary reference.²¹⁶

²¹³ TK 2008-2009, 32 027, nr. 3, p. 3.

²¹⁴ EK 2005/2006, 30 501.

²¹⁵ TK 2008/2009, 32 027, nr. 4, p. 3.

²¹⁶ Case C-568/08 *Combinatie Spijker Infrabouw* [2010] ECR I-12655.

The Dutch implementation distinguishes between two legal moments: the first, the pre-contractual phase, and secondly, the phase after a contract has been concluded. Pre-contractual refers to all provisions governing remedies and procedures relevant before the award of a contract by the contracting authority, and therefore mainly relates to the available interim measures, whereas post-contractual remedies are those available after the awarding of a contract has taken place. This neat distinction does not always hold, specifically in the Dutch legal system, due to the relative importance and far-reaching developments in the doctrine of pre-contractual liability in the Dutch legal system, which is discussed below. However, it is remarkable that, contrary to the doctrine, which has always pointed out the potential implications of the pre-contractual liability doctrine, the legislator did not address the issue in the parliamentary debates leading up to the new law on the implementation of Directive 2007/66.

6.1.3 Jurisdictional questions

Arbitration versus the judiciary

The Netherlands is one of the systems which allow for arbitration in public procurement cases, in front of the procurement tribunal RvA. Additionally, jurisdiction can be administrative or civil, as in the Netherlands, public procurement disputes can arise under private and/or administrative law. In most, though not all, public tenders, the contracting authority acts in a private capacity. For tendering decisions, which are seen as the preparation of an action in a private capacity, administrative appeals are precluded according to Article 8:3 *Algemene wet bestuursrecht* ('Awb'). Thus, the administrative judicial branch is foreclosed, and public procurement disputes are brought in front of a civil judge.

In the Dutch system, both in establishing liability and in quantifying the damage, we have not discerned a distinction between the sources of the tortuous act; Dutch and European claims are treated alike. This is true only for the court system; under the arbitration system there is a difference regarding the principle on which awards are based;

according to the rules of law for European public procurement claims, for national claims the principle is to be “like good men in all fairness”.²¹⁷

The two-track civil procedures

In addition, the Dutch system of legal protection under civil jurisdiction is characterized by a two-way system of judicial protection, granting both the possibility of bringing a claim in front of an interim judge in a *kort geding* (summary/interim procedure), and/or bringing a fully fledged *bodemprocedure* (regular court procedure).

6.2 CAUSES OF ACTION

In the Netherlands, a claim by an aggrieved tenderer against the unlawful tendering procedure of a contracting authority could theoretically be based on a form of pre-contractual liability, specifically the duty to deal fairly (*redelijkheid en billijkheid*) contained therein or simply in torts.

In the legislative history of the implementation of the Remedies Directives, the legislator presumes an action in tort for these claims. Most commentators, although remarking that the pre-contractual variant might constitute an option, focus on an action in tort. Similarly, it has been observed that substantively it makes no difference whether an action for damages is based in breach of contract or torts.²¹⁸

This is true for the stage of the quantification of damages, which is done according to an identical article in the Dutch civil code for both actions. It is doubtful as to whether this necessarily holds true for founding an action since the constitutive criteria for finding liability differs under contract and torts, and different breaches are more likely to fulfill them in one than the other.

²¹⁷ Article 18 (2) of the RvA statutes, the date of entry into force of that change alteration was 1 September 1995.

²¹⁸ W. J. SLAGTER, 'Aanbestedingsaansprakelijkheid: grondslagen en knelpunten', in W. H. van Boom, et al. (eds), *Aanbesteding en aansprakelijkheid* (Schoordijk Instituut Centrum voor aansprakelijkheid, 2001), 14. Also J. M. HEBLY & F. G. WILMAN, 'Damages for Breach of Public Procurement Law. The Dutch Situation', in Duncan Fairgrieve & Francois Lichère (eds), *Public Procurement Law. Damages as an Effective Remedy*. (Hart Publishing, 2011), 77.

6.2.1 Precontractual liability and Redelijkheid en Billijkheid

The doctrine of precontractual liability is well developed in the Netherlands. A number of authors therefore defend the position that a pre-contractual relationship arises between a contracting authority and a tenderer. The most far-reaching application of the doctrine of pre-contractual liability has been defended in the case *Plas/Valburg*²¹⁹. According to some, however, only the tenderer with the lowest bid can benefit from pre-contractual liability for terminated negotiations established.²²⁰ Then, the pre-contractual relationship is governed by a requirement of *redelijkheid en billijkheid* (reasonableness and fairness).

6.2.2 Tort law

As an alternative to the requirements of *redelijkheid en billijkheid* under pre-contractual liability, actions under tort are possible. Two legal relations need to be distinguished: one is the claim of tenderer A, who was initially awarded a contract but, for example, based on ineffectiveness, lost the contract from the claim for damages; and the other, the claim of tenderer B, who wrongfully has not been selected or awarded a contract. The latter action is based in tort law, since the aggrieved tenderer in this case claims damages for the contracting authorities' behavior, which breached statutory duties favoring the aggrieved tenderer.²²¹ In comparison with the more inclusive approaches discussed in the doctrine, the legislator has a much simpler vision of the possibility of claiming damages under tort liability, compensated under the general provision of 6:162 Burgerlijk Wetboek ('BW'). The action under tort will be the starting point.

6.2.3 Tort Law Onrechtmatig gedrag: Constitutive elements

²¹⁹ HR 18 June 1982, NJ 1983, 723.

²²⁰ W. J. SLAGTER, 'Aanbestedingsaansprakelijkheid: grondslagen en knelpunten', in W. H. van Boom, et al. (eds), *Aanbesteding en aansprakelijkheid* (Schoordijk Instituut Centrum voor aansprakelijkheid, 2001), 17.

²²¹ This is also clearly defended by the legislator which, in the written preparations for the Wira, states several times that the damages provisions are to be implemented by means of the tort law provision contained in 6:162 BW, for example in the conversion table between Directive and the Wira implementation act attached to the proposal TK 2008-2009, 32027, nr 3, p 24.

The Netherlands is characterized by a two-tiered tort liability scheme, meaning that the finding of liability can be juridically separated from the quantification phase thereof. The constitutive elements are enumerated in a general provision of the Dutch Civil Code:

Dutch Civil Code 6:162

1. Whoever commits a tortuous act, which is attributable to him, against another is under a duty to compensate the damage which the other consequently sustains.
2. Regarded as tortuous acts are a violation of a right, an act or omission in breach of a statutory duty or with whatever according to unwritten law as determined by common dealing, both save the existence of a justification (*rechtvaardigingsgrond*).
3. A tortuous act can be attributed to the tortfeasor if it is imputable to his fault or a cause which according to the law or under common opinion are imputable to him.

6:162 (1) BW contains the constitutive conditions for tort liability, according to which liability is established in the first place: whoever commits a tortuous act which is attributable to him is under a duty to compensate for damage. The quantification of the extent of quantifiable losses is sealed (though not hermetically) in a second stage. In the following, we are briefly going to examine these separately before proceeding to the application thereof in public procurement disputes.

What are the principles and aims of Tort law in the Netherlands? The starting point or overarching principle in the Dutch Law of Damages is the principle of full compensation²²², even though this is not explicitly laid down by law. The aim of Tort law is primarily compensatory. In addition, a preventive or deterrent purpose is also recognized, but not a penalizing or retributive one.

Tortuous act

The definition of a tortuous act is contained in Article 6:162(2) BW: a tortuous act is “the violation of a right, an act or omission in breach of a statutory duty or under unwritten law in *maatschaapelijk verkeer betaamt* (as determined by societal convention); all save the existence of a justification.” In principle, upon the breach of a statutory duty, an act is

²²² J. SPIER, T. HARTLIEF, G. E. VAN MAANEN & R. D. VRIESENDORP, *Verbintenissen uit de wet en Schadevergoeding* (Kluwer, 2006) write about the “principle of full compensation”, “a principle with many exceptions... not absolute”.

qualified as tortuous.²²³ This has evident advantages for a plaintiff, since the burden of disproving liability in cases of a statutory breach shifts to the defendant (e.g. in order to demonstrate that the tort was justified).

Attributability (fault)²²⁴

Attributability (*toerekening*) is based on fault or causes which according to the law or *in het verkeer geldende opvattingen* (interpretation valid in societal convention) are attributable to the tortfeasor, see paragraph 3 Article 6:162 BW.

Damage (related to causality)

Wissink and van Boom provide the following definition of damages: “The concept of damages is not defined in statute law. Patrimonial damage is generally understood to contain three elements: (i) a causal element, i.e. damage occurs as a result of a certain event; (ii) an element of comparison, i.e. comparison between the situations with and without the damage causing event; and (iii) a hypothetical element.”²²⁵

Causality (quantification)

Article 6:162 BW provides that a certain (in the sense of ascertainable) link between the wrongful act and the loss needs to be sustained. Whether this is indeed the case is to be judged according to the same criterion as that for heads of damages, that is the extent to which damages can be imputed to the tortfeasor, a criterion which is found in 6:98 BW. The theoretical two stage distinction between establishing and quantifying liability is blurred on this point – causality is further discussed in relation to the second stage below.

Primarily, in stage one of establishing liability, the problem of causality is a problem of evidence. According to the regular rules of procedure, the injured party as the person relying on the rule also has to prove causality (Article 150 *Wetboek van Burgerlijke Rechtsvordering*

²²³ J. SPIER, T. HARTLIEF, G. E. VAN MAANEN & R. D. VRIESENDORP, *Verbintenissen uit de wet en Schadevergoeding* (Kluwer, 2006).

²²⁴ This is attributability in the narrow sense. The fault criterion is here used to determine whether it is attributable to a specific person. The case law is sometimes ambiguous in using the ‘fault’ criterion in cases which qualify the tortuous act, rather than using attributability as such. See J. SPIER, T. HARTLIEF, G. E. VAN MAANEN & R. D. VRIESENDORP, *Verbintenissen uit de wet en Schadevergoeding* (Kluwer, 2006).

²²⁵ M. H. WISSINK & W. H. VAN BOOM, 'The Netherlands. Damages under Dutch Law', in U. Magnus (ed), *Unification of Tort Law: Damages* (Kluwer, 1996), 146.

('Rv')). Certain exceptions to this rule have been granted, like a rule of reversal, which means that in specific areas of tort law, notably traffic law and risk norms, the mere breach of a rule thereof switched the burden of proof requirement. In principle, the possibility of alleviating the burden of proof could also be considered for public procurement disputes. However, this is clearly not the direction that the Supreme Court is taking at the moment, as it is narrowing down the rule of reversal concerning norms for specific dangers (in the sense of risk). Public procurement disputes do not fulfill these criteria developed in the more recent case law²²⁶ and therefore do not fall under risk liability and the reversal of proof that it can provide.

6.2.4 Justifications breaking causality

Due to the private law approach to contracting authorities' awarding of contracts, the autonomy of parties doctrinally obstructs the presumption that in an unlawfully conducted procedure, hypothetically, the contracting authority would have awarded a contract to the second lowest bidder. This precludes the claiming of damages for the positive interest of the contract. Where the contracting authority has awarded the contract, this justification is discarded.²²⁷

In terms of admissible justifications, there is strong argument in the Netherlands for the position that the fact that an aggrieved tenderer's bid submission was itself invalid is not considered a sufficient reason to break the chain of causation. This is the position taken by DC Rotterdam and CA Hague in HR 9 May 2008. This stance has been criticized by legal doctrine and is not always followed in the lower courts.²²⁸

Relativity (6:163 BW)

²²⁶ See HR 29 November 2002, NJ 2004, 304 and 305 (DA), on the reversal of proof rule in general. Further, see J. SPIER, T. HARTLIEF, G. E. VAN MAANEN & R. D. VRIESENDORP, *Verbindenissen uit de wet en Schadevergoeding* (Kluwer, 2006)

²²⁷ J. M. HEBLY & F. G. WILMAN, 'Damages for Breach of Public Procurement Law. The Dutch Situation', in Duncan Fairgrieve & Francois Lichère (eds), *Public Procurement Law. Damages as an Effective Remedy*. (Hart Publishing, 2011), 79, citing the authority of Rotterdam DC 8 October 2008, LJN BG3796 and CA 's-Hertogenbosch, 26 November 1990, BR 1991/641.

²²⁸ J. M. HEBLY & F. G. WILMAN, 'Damages for Breach of Public Procurement Law. The Dutch Situation', in Duncan Fairgrieve & Francois Lichère (eds), *Public Procurement Law. Damages as an Effective Remedy*. (Hart Publishing, 2011), 79.

Despite the breach of a statutory norm, 6:163 BW can preclude the attribution of liability as “[t]here is no duty of compensation, whenever the norm that was breached does not serve to protect against losses as the injured party has sustained them”. In the case of breach of a statutory duty, there are two additional requirements for the finding of tort liability. The first is the requirement of relativity, namely that a statutory duty also had the purpose of protecting from the damage that the injured party has sustained. From one perspective, the legislation on which the tort is based comes under scrutiny, namely regarding whether its scope extends to cover the damage. This provision has been interpreted as referring to the injured party, and whether he is covered by a statutory norm (in the sense of a protective norm or protected interest mechanism). From the other perspective, the damage sustained by the injured party is assessed and excludes damage sustained as merely derivatory.²²⁹ The Dutch Supreme Court elaborated sub-questions to determine the condition of relativity and on the basis of which the extent of the intended protection of the statutory norm should be examined. These referred to the goal and scope of the rule, namely to which persons, which losses and which ways of formation of loss it extends.²³⁰

In principle, the article is an expression of a limitation of liability through testing of the objective and purpose of a statutory norm regarding the protected person/entity and protected losses. It is by definition a concrete - that is, factual - rather than an abstract test.

The public procurement norms are clear as to the fact that they serve to protect aggrieved tenderers once these can be singled out. In circumstances of an unpublished illegal contract, an argument could be made to the effect that it is impossible for any entity to prove that they would indeed have benefited from the scope of the public procurement rules in that specific tender.

²²⁹ J. SPIER, T. HARTLIEF, G. E. VAN MAANEN & R. D. VRIESENDORP, *Verbintenissen uit de wet en Schadevergoeding* (Kluwer, 2006), give the example of losses of a shareholder in a company which are regarded as merely derivatory and are not compensated if the tortfeasor has committed a tort *against* the company, citing HR 2 December 1994, NJ 1995, 288 (*Poot/ABP*).

²³⁰ HR 7 May 2004, NJ 2006, 281 (*Linda*) in J. SPIER, T. HARTLIEF, G. E. VAN MAANEN & R. D. VRIESENDORP, *Verbintenissen uit de wet en Schadevergoeding* (Kluwer, 2006).

6.3 JUSTICIABILITY OF CLAIMS

Overall, damages actions, as actions on merit (and not awardable in interim proceedings²³¹), have an average duration estimated at about 18 months in first instance.²³²

6.3.1 Standing

Standing is regulated by Article 3:303 BW and requires sufficient interest. As such, the rule is widely drawn, as a theoretical interest is sufficient; it does not have to be demonstrated, for example, through a claimant expressing interest in a tendering procedure.

6.3.2 Time Limits

The prescription period for damages claims in the Netherlands remains at the standard level of limitation for legal claims of five years, according to Article 3:310 BW. However, these standard limitation periods can be deviated from, for example, according to the standard public procurement regulations.²³³

6.4 THE QUANTIFICATION OF DAMAGES²³⁴

Regardless of the cause of action for the breach, be it in tort or for breach of contract²³⁵, the applicable legislative provisions on the quantification of damage are identical. This is possible as the Dutch system draws a rather clear distinction between the question of the existence of damage in the abstract and the quantification of the value of compensation for

²³¹ See J. M. HEBLY & F. G. WILMAN, 'Damages for Breach of Public Procurement Law. The Dutch Situation', in Duncan Fairgrieve & Francois Lichère (eds), *Public Procurement Law. Damages as an Effective Remedy*. (Hart Publishing, 2011), 76.

²³² For example, by J. M. HEBLY & F. G. WILMAN, 'Damages for Breach of Public Procurement Law. The Dutch Situation', in Duncan Fairgrieve & Francois Lichère (eds), *Public Procurement Law. Damages as an Effective Remedy*. (Hart Publishing, 2011), 87, of course admitting variations.

²³³ J. M. HEBLY & F. G. WILMAN, 'Damages for Breach of Public Procurement Law. The Dutch Situation', in Duncan Fairgrieve & Francois Lichère (eds), *Public Procurement Law. Damages as an Effective Remedy*. (Hart Publishing, 2011), 85, referring to article 2.32.2 of the Works Procurement Regulations (ARW 2005), and also article 67 (3) of the Uniform Tendering Regulations (UAR-EG 1991).

²³⁴ M. H. WISSINK & W. H. VAN BOOM, 'The Netherlands. Damages under Dutch Law', in U. Magnus (ed), *Unification of Tort Law: Damages* (Kluwer, 1996), 143-158.

²³⁵ See A. J. AKKERMANS & E. H. PIJNACKER HORDIJK, 'Schadevergoeding en schadeberekening', in W. H. van Boom, et al. (eds), *Aanbesteding en aansprakelijkheid* (Schoordijk Instituut Centrum voor aansprakelijkheid, 2001), 19.

the damage. In a dispute, the plaintiff does not initially claim the exact extent of the losses he wishes to recover; it is sufficient for him to prove the likelihood of the tortuous act having caused damage in order to start the court proceedings.²³⁶

In a main procedure granting a claim for damages, the judge quantifies the damage to the extent that this is possible. Where quantification is impossible, he orders the damage compensation “*op te maken bij staat*”. If juridically determined, this is done in the damage factoring procedure (*schadestaatprocedure*²³⁷) in order to quantify the amount of the damage to be compensated. Procedurally, this split mirrors the substantive distinction between finding and determining the extent of a duty to compensate for damage. In practice, the procedure for establishing liability for compensation in the first place and the procedure for the quantification of damage compensation are often collectively referred to as the “procedure for establishing damage” (Articles 612 – 615b Dutch Civil Procedure, *Wetboek van Burgerlijke Rechtsvordering*). The purpose of the *schadestaatprocedure* lies only in determining the extent of the damages to be compensated; the basis for establishing damage liability²³⁸ is not reopened – the parties are bound by the finding in the main procedure on that point.²³⁹ The aggrieved tenderer must at that stage merely demonstrate that the probability of damage exists.

6.4.1 Definition of recoverable losses

The concept of damages is not defined explicitly, but recoverable losses are laid down by law. Article 6:95 BW grants a duty to compensate all patrimonial and “other disadvantage”. Patrimonial damage is further elaborated in Article 6:96 BW to include *damnum emergens* and loss of profit, further reasonable costs in order to limit the damage occurring, in order to establish liability, and to cover the *incasso* proceedings for payment. Article 6:106 BW covers immaterial damage. Statutory interest is granted according to 6:83 starting from the point of

²³⁶ HR 13 June 1980, NJ 1980, 185 (*WHH*), the case law in this section is based on J. SPIER, T. HARTLIEF, G. E. VAN MAANEN & R. D. VRIESENDORP, *Verbintenissen uit de wet en Schadevergoeding* (Kluwer, 2006).

²³⁷ This procedure is governed by Articles 612-615b Rv. Generally, see H. J. SNIJDERS, C. J. M. KLAASSEN & G. J. MEIJER, *Nederlands Burgerlijk Procesrecht* (Kluwer, 2007)

²³⁸ HR 30 May 1997, NJ 1998, 381 (*Elink Schuurman/Van Gastel qq*).

²³⁹ HR 17 January 1997, NJ 1997, 230 (*Moerman/Bakker*).

the wrongful act, 6:105 regulates losses which have not yet materialized. Damage is compensated in money, but there is a possibility for *in natura* claims.²⁴⁰

The nature of this indirect 'definition' or carving out of the term damage itself has given rise to controversy over whether "damages" are merely of a factual nature or a constitute a normative concept. The Dutch Supreme Court has accepted jurisdiction for cassation and determining whether a lower instance had used an incorrect interpretation of the law regarding the concept of damages in the stage of quantification.²⁴¹ This would sustain the argument that the concept of damages is normative, as the Dutch Supreme Court does not determine the factual situations giving rise to disputes.

Causality, in the stage of quantifying the damages, refers to the issue of determining which losses can be compensated, according to Article 6:98 BW. The answer to the question has changed over time as varying theories have been advanced. Heads of damages are therefore not subject to a strict *numerus clausus* but to a list which is more or less open and contingent upon the finding of loss.

Bid costs

On which side does the Dutch legal system place the burden of bid preparation in a legal tender? The Netherlands generally has a strong doctrine of precontractual liability,²⁴² which has been discussed numerous times in order to examine whether a contracting authority is duty-bound to refund bid preparation costs in regular public procurement procedures. Other legal concepts proposed to legally ground such a duty is that of the 'promise' (*uitloving*)²⁴³ and contract proper. Neither the law, nor jurisprudence, nor doctrine is conclusive on the

²⁴⁰ In the past, this provision has served to sustain that under Dutch law a contract could be declared ineffective on the basis of an "in-natura damage claim". In view of Directive 2007/66, we are not going to discuss this argument further.

²⁴¹ J. SPIER, T. HARTLIEF, G. E. VAN MAANEN & R. D. VRIESENDORP, *Verbintenissen uit de wet en Schadevergoeding* (Kluwer, 2006), referring to HR 18 April 1986, NJ 1986, 587.

²⁴² Slagter, van den Berg, as discussed in C. E. C. JANSEN, 'Aanbesteding en offertekostenvergoeding', in Bert van Roermund, et al. (eds), *Aanbesteding en aansprakelijkheid. Preventie, vergoeding en afwikkeling van schade bij aanbestedingsgeschillen*. (Schoordijk Instituut Centrum voor Aansprakelijkheidsrecht, 2001), 89.

²⁴³ By VerLoren van Themaat and Van Wassenauer van Catwijck, as discussed in C. E. C. JANSEN, 'Aanbesteding en offertekostenvergoeding', in Bert van Roermund, et al. (eds), *Aanbesteding en aansprakelijkheid. Preventie, vergoeding en afwikkeling van schade bij aanbestedingsgeschillen*. (Schoordijk Instituut Centrum voor Aansprakelijkheidsrecht, 2001), 91.

possibility of claiming bid preparation costs. The authors that propose a positive answer seem to do so in a provocative way, in order to steer legal developments, rather than in a descriptive fashion that claims to represent the state of the law in the Dutch legal system.²⁴⁴ This statement is confirmed by the fact that none of the contributions sustain their argument with cases in which the civil judge has actually applied any of the proposals in order to grant preparation of bid costs. As the law currently stands, it seems that the duty to pay for the preparation of bidding costs rests entirely with the bidder.²⁴⁵ The reader should note, however, that doctrine is notoriously divided on the subject matter (although to a lesser extent in public procurement cases than regarding precontractual liability in general).

The positive interest, or the lost profit

In the case that an aggrieved tenderer is able to demonstrate that s/he would have had to receive a contract, lost profits are the standardized measure of damages awarded. At the same time, this 'generous' compensatory measure is coupled with a very high standard of burden of proof: the aggrieved tenderer in principle has to prove that he would have obtained the contract.²⁴⁶

The extent of the lost profits are ascertained according to the case, but can involve expert appointment, average profit margins or reasonable, specific profit expectations as expressed, for example, in the bid. In addition, general or overhead costs may be claimed, but facts such as the aggrieved tenderer having used its capacity through alternative

²⁴⁴ See for example C. E. C. JANSEN, 'Aanbesteding en offertekostenvergoeding', in Bert van Roermund, et al. (eds), *Aanbesteding en aansprakelijkheid. Preventie, vergoeding en afwikkeling van schade bij aanbestedingsgeschillen*. (Schoordijk Instituut Centrum voor Aansprakelijkheidsrecht, 2001), 100, who claims that an invitation to tender corresponds to an offer, with the handing in of a suitable tender serving as acceptance of something beyond a merely "procedural contract" (which van den Berg defends), a contract in which the contracting authority gains information, in return for which it should bear certain costs of preparing the bid.

²⁴⁵ C. E. C. JANSEN, 'Aanbesteding en offertekostenvergoeding', in Bert van Roermund, et al. (eds), *Aanbesteding en aansprakelijkheid. Preventie, vergoeding en afwikkeling van schade bij aanbestedingsgeschillen*. (Schoordijk Instituut Centrum voor Aansprakelijkheidsrecht, 2001), 79, calls the system whereby bidding costs are not compensated by the contracting authority the "present system" in the Netherlands.

²⁴⁶ J. M. J. VAN RIJN VAN ALKEMADE, 'Overheidsaansprakelijkheid voor onrechtmatige verdeling van schaarse publieke rechten', (2011) *Overheid en Aansprakelijkheid*, 69, 72.

contracts may be taken into account.²⁴⁷ Legal fees are claimable, as long as they are reasonable.²⁴⁸ In a recent, almost spectacular, case, the court awarded lost profit *and* even consequential damages amounting to € 10 million.²⁴⁹

The negative interest

Since it is perceived that the lost profit as compensable damage is the point of departure, the remaining negative interest, or losses that are more specific, such as bid preparation and bid participation, are considered as subsidiary claims if the lost profit claim fails.²⁵⁰ At the same time, others presume that aggrieved tenderers can claim bid costs only in cases where no tenderer was successful in claiming for the positive interest and where a reasonable chance is assumed.²⁵¹ Others see the burden of proof as lower.²⁵² The dissonance in doctrine demonstrates that procurement practice and the courts have not provided a definite doctrine relating to the probability of an aggrieved tenderer having been awarded a contract – legal uncertainty characterizes the damages claim.

The lost chance

The lost chance is discussed in relation mainly to recoverable damage. Although it may be summed up under causation, it refers to claims for a lost opportunity, and hence the lost chance functions as a head of damage. Legal scholars have discussed this possibility but, to date, only two final court judgments in public procurement have applied it, one of which is unpublished.²⁵³ In the latter, *NIC*, the court assessed the chances of both plaintiffs to have

²⁴⁷ J. M. HEBLY & F. G. WILMAN, 'Damages for Breach of Public Procurement Law. The Dutch Situation', in Duncan Fairgrieve & Francois Lichère (eds), *Public Procurement Law. Damages as an Effective Remedy*. (Hart Publishing, 2011), 82.

²⁴⁸ 6:96 BW.

²⁴⁹ Rechtbank Zutphen, 28 december 2011 LJN BU9991 (final judgment).

²⁵⁰ J. M. HEBLY & F. G. WILMAN, 'Damages for Breach of Public Procurement Law. The Dutch Situation', in Duncan Fairgrieve & Francois Lichère (eds), *Public Procurement Law. Damages as an Effective Remedy*. (Hart Publishing, 2011), 83.

²⁵¹ E. H. PIJNACKER HORDIJK, W. H. VAN BOOM & J. F. VAN NOUHUYS, *Aanbestedingsrecht. Handboek van het Europese en het Nederlandse Aanbestedingsrecht* (Sdu Uitgevers, 2009), 663.

²⁵² For an overview of opinions, see J. M. J. VAN RIJN VAN ALKEMADE, 'Overheidsaansprakelijkheid voor onrechtmatige verdeling van schaarse publieke rechten', (2011) *Overheid en Aansprakelijkheid*, 69, 73.

²⁵³ Utrecht DC, 4 July 2001, BR 2002/91 and Den Haag 29 March 2000, *Staat en Nederlands Inkoopcentrum (NIC)* rolnr. 94/3490. Not published, mentioned in E. H. PIJNACKER HORDIJK, W. H. VAN BOOM & J. F. VAN

been 50% to receive the award respectively, so that the damages was to be equally distributed among the two (thus equaling 100% of the total damage).²⁵⁴ But note also a case applying the lost chance in the proportional version: a tenderer who belonged to the circle of aggrieved bidders had only a chance of one out of six to be awarded the contract. The damage should be calculated proportionally to that chance. The actual contract value is taken as the basis for the calculation and parties disputed whether a 3% or 7% profit margin ought to be granted, which the court resolved for 3%. The money value was then multiplied by 1/6 to express the chance.²⁵⁵

For the Dutch system the damage, i.e. the recoverable loss, defines the discussion – therefore where a tenderer can squarely prove that it would have been the successful tenderer, lost profits are in order. Where this is not the case, the question is recast as one of a lost business opportunity, and if that fails, the negative interest is discussed. The Netherlands seem particularly averse to granting bid cost claims. The reasoning is based on a strong economic rationale according to which the economic risk of participating in a tender procedure rests with the tenderer. To a certain extent this is surprising, other covered jurisdictions do not rely on the economic allocation argument as much; bid costs are generally easily claimable.

6.4.2 Methods of Quantification

The method of quantification is laid down in 6:97 BW, giving discretion to the judge to quantify the damage in the way most suited to the nature of the loss. If the extent of the damage is not able to be determined precisely, the judge must make an estimation.

NOUHUY, *Aanbestedingsrecht. Handboek van het Europese en het Nederlandse Aanbestedingsrecht* (Sdu Uitgevers, 2009), 661.

²⁵⁴ A. J. AKKERMANS & E. H. PIJNACKER HORDIJK, 'Schadevergoeding en schadeberekening', in W. H. van Boom, et al. (eds), *Aanbesteding en aansprakelijkheid* (Schoordijk Instituut Centrum voor aansprakelijkheid, 2001), , 31. The particular constellation of chance and both aggrieved bidders being the plaintiffs in the procedure therefore do not support a proportional attribution of the lost chance.

²⁵⁵ Rechtbank Utrecht, 4 July 2001, rolnr. 105430 / HA ZA 99-1672.

The judge therefore determines the amount of damages *ex aequo et bono*. The rules of “*stelplicht*” and evidence do not apply.²⁵⁶ However, where damage is proven, a claim for compensation of damage cannot be rejected on the grounds of the indeterminability thereof.²⁵⁷ To some authors, this provision is an expression of the principle of full compensation;²⁵⁸ read in this light, the provision grants a wide degree of discretion on one hand, and on the other, leaves the judge with a duty to secure full compensation.²⁵⁹ The judge does have the option of reducing the amount of damages under 6:100 BW, limitation thereof under 6:110, and mitigation under 6:109 BW.

Abstract versus concrete

The abstract method is rarely used – if it is used, it constitutes a minimum threshold, and should a plaintiff expect more damages under the concrete method, he is entitled to claim that difference.²⁶⁰ This has been rejected for example in claims for the compensation of lost profits. Generally speaking, public procurement disputes are highly likely to be calculated based on an individual, that is, concrete method of quantification.

²⁵⁶ A. J. AKKERMANS, *Proportionele aansprakelijkheid bij onzeker causaal verband. Een rechtsvergelijkend onderzoek naar wenselijkheid, grondslagen en afgrenzing van aansprakelijkheid naar rato van veroorzakingswaarschijnlijkheid* (Katholieke Universiteit Brabant, 1997), 182.

²⁵⁷ A. J. AKKERMANS, *Proportionele aansprakelijkheid bij onzeker causaal verband. Een rechtsvergelijkend onderzoek naar wenselijkheid, grondslagen en afgrenzing van aansprakelijkheid naar rato van veroorzakingswaarschijnlijkheid* (Katholieke Universiteit Brabant, 1997), 182.

²⁵⁸ A. R. BLOEMBERGEN & S. D. LINDENBERGH, *Schadevergoeding* (Kluwer, 2001), 8.

²⁵⁹ J. SPIER, T. HARTLIEF, G. E. VAN MAANEN & R. D. VRIESENDORP, *Verbintenissen uit de wet en Schadevergoeding* (Kluwer, 2006).

²⁶⁰ J. SPIER, T. HARTLIEF, G. E. VAN MAANEN & R. D. VRIESENDORP, *Verbintenissen uit de wet en Schadevergoeding* (Kluwer, 2006).

7 Case study: Germany

7.1 SYSTEMIC FEATURES

7.1.1 Characteristics: The Cascaded System of Sources of Law

Public procurement law in Germany is characterized by a multiplicity of legal sources. This so-called 'cascade system' consists of a threefold relegation of norms: through the Act Amending Public Procurement Law (*VgRÄG*), public procurement law was incorporated into German competition law by adding a part four to the German Act against the Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*). The provisions therein are supplemented by a lower norm, the Ordinance on the Award of Public Contracts (*VgV*). The Ordinance in turn refers to the *Verdingungsordnungen*, that is, the Procurement Regulations *VOB/A*, *VOL/A*, and *VOF*. This lowest level of the legislative cascade is elaborated through the strong role of two private regulatory bodies.²⁶¹ The link to the legislative power of the State, at least formally, is created through through the *VgV* and §97(6) *GWB*.²⁶² By means of the relegation through the *VgV*, however, the Procurement Regulations also acquire statutory character. Thereby they are capable of producing external effects, in the sense that they are not just internal obligations addressed to the administration, but can also be relied on by third parties.

The delegation of norms is questioned in relation to the legislative principles of a constitutional state.²⁶³ A reform of this cascaded system has been continuously advocated

²⁶¹ DVA, Deutscher Vergabe- und Vertragsausschuss für Bauleistungen (DVA) and Deutsche Vergabe- und Vertragsausschuss für Lieferungen und Dienstleistungen (DVAL). They are responsible for ensuring conformity of the regulations with European provisions. On the other hand, the involvement of the affected interests, coupled with the very specific nature of public procurement can in this constellation achieve a balancing of affected interests represented in the DVA/DVAL with public interests. These are (potentially) positive side effects. While formative for the non-Europeanized part of German public procurement law, under the influence of the European public procurement directives its importance decreases continually. See also M. KNAUFF, 'Das Kaskadensystem im Vergaberecht - ein Regelungsmodell mit Zukunft?', (2010) *NZBau*, 657, 659, 661.

²⁶² M. KNAUFF, 'Das Kaskadensystem im Vergaberecht - ein Regelungsmodell mit Zukunft?', (2010) *NZBau*, 657, 661.

²⁶³ Which require, under the principle of democracy contained in Article 201 GG, a re-traceability to the will of the people. M. KNAUFF, 'Das Kaskadensystem im Vergaberecht - ein Regelungsmodell mit Zukunft?', (2010) *NZBau*, 657, 661.

on grounds of European legality,²⁶⁴ German constitutionality²⁶⁵ or efficiency considerations – but so far these calls have gone unheard.

At the same time, the move to incorporate the provisions on procurement into the GWB split German public procurement in two: due to §100 Abs. 1 GWB, in connection with §2 of the Ordinance on the Award of Public Contracts *Vergabeverordnung (VgV)*²⁶⁶, the GWB public procurement law is exclusively applicable to contracts falling within the scope of the EU public procurement rules. Judicial protection therefore varies considerably with respect to national as opposed to European public procurement procedures.²⁶⁷

7.1.2 Implementation of Directive 2007/66

The changes required after the amendment to the Remedies Directive under Directive 2007/66 were undertaken together with those required due to unfavorable ECJ judgments. The ECJ had found the German ‘budgetary solution’ for procurement law, under which aggrieved tenderers could not rely on procurement rights before the courts, to be illegal. Consequently, an important realignment of both primary and secondary law protection took place. The changes were introduced in Germany by means of the *Gesetz zur Modernisierung des Vergaberechts*, which entered into force on 24 April 2009.²⁶⁸ Regarding those provisions

²⁶⁴ The cascade system relates to the organization of the legal norms at national level, the formal aspects of implementation of which, as the ECJ held, as long as they are effective (principle of effectiveness) and provide enough protection to the individual, are at the discretion of the Member State. Under European primary law, the compatibility of the cascade principle with the internal market provisions or the principle of transparency could be questioned – for making the exercise of the right to free movement more unattractive, or due to their complex nature for violating the principle of transparency.

²⁶⁵ German constitutional law provides more highly developed standards regarding the formal quality of legal norms than European law currently does – accordingly, the principle of cascade can be critically examined in relation to the clarity of the legal order on one hand, thus being similar to but more developed than the European principle of transparency.

²⁶⁶ Verordnung über die Vergabe öffentlicher Aufträge, issued on the basis of §97 Abs. 6, §127 GWB.

²⁶⁷ In fact, this dual approach has led to considerable criticism based on a discrimination critique. From the European perspective, it is an interesting example of the implications of the internal situation and reverse discrimination doctrine under European law. See, for public procurement and the internal discrimination doctrine, the concise essay C. BRAUN & C. HAUSWALDT, ‘Vergaberechtliche Wirkung der Grundfreiheiten und das Ende der Inländerdiskriminierung? Zugleich eine Anmerkung zum EuGH-Urteil Coname’, (2006) *EuZW*, 176.

²⁶⁸ BGBl I, 790. The Bundestag accepted the draft on 19.12.2008 and the Bundesrat agreed on 13.2.2009.

of Directive 2007/66 that left discretion to the Member States, Germany chose the following implementation²⁶⁹:

For the pre-contractual stage, the standstill period and duty to suspend are implemented through §101a11 GWB. §101a1 1-5 GWB regulates the standstill period - the standstill period between the award decision and contract conclusion has been extended from 14 to 15 days. This period is shorter under §101a4 GWB, namely 10 rather than 15 days, where fax or electronic communication means have been used. Contracts concluded during a suspension period are void. §115, §118 GWB grant automatic suspensive effect to requests for review.

Regarding primary protection in the post-contractual stage, the ineffectiveness of contracts is governed by §101b GWB: contracts of a *de-facto* procured nature, or those that have been concluded in violation of §101a, are ineffective retrospectively (*ex-tunc*). This can only be established in review proceedings, 30 days after knowledge, 6 months after contract conclusion, or, in case of the publication of a contract in OJEU, 30 days after. Notably, the option granted by the Directive 2007/66 of derogating from the ineffectiveness requirements is not explicitly transposed in any provision.

7.1.3 Jurisdiction

According to §13 GVG, the regular civil courts have jurisdiction, see §104 (2) 2 GWB.

7.2 THE CONSTITUTIVE CRITERIA FOR VARIOUS ACTIONS

Remedies are categorized in a system of primary and secondary protection. Primary remedies aim to protect or restore initial, original rights - for tenders this means receiving a contract award or restoring the chance to participate fairly in procedures. In Germany, a lot of emphasis is put on primary remedies, while secondary protection takes the form of

²⁶⁹ For an overview of the implementation of Directive 2007/66 see M. BURGI, 'A Report about the German Remedies System.', in Steen Treumer & Francois Lichère (eds), *Enforcement of the EU Public Procurement Rules* (Djof Publishing, 2011), .

damages actions. The latter have been described as “extremely low profiled and lacking in clarity despite its many and quite elaborate regulations”.²⁷⁰

The German legal system opens, at least theoretically, a plurality of actions by means of which damages for public procurement breaches can be pursued: the first is (A) a specific statutory legal basis. It transposes the Remedies Directive’s damages article in Germany through §126 GWB. The second action is based on (B) the nature of the special and protected relationship between the aggrieved tenderer and the contracting authority by means of the figure of *culpa in contrahendo*.²⁷¹ Then, through the nature of the State involvement in public procurement situations, there is a pronounced perspective on (C) the liability of public authorities.²⁷² Lastly, there are (D) specific Competition law claims.²⁷³ In the following, each of these is examined in turn.

7.2.1 Damages claims based on §126 GWB

Recoverable losses are based on §126 s1 and s2 GWB, which is a specific legal base for damages arising out of the violation of public procurement rules. As such, the wording of §126 GWB derives from the implementation of Directive 92/13/EEC (the Utilities Remedies Directive). As observed above, the two remedies directives on claims to damages diverge, in that the Utilities Remedies Directive is more precise. Due to the material scope of the GWB, the article extends to also cover the general public Directive 89/665/EEC. Therefore, Germany has given this article a wider degree of implementation than is strictly necessary under the wording of Directive 89/665/EEC. At the same time, §126 GWB is bound to the scope of application of the GWB, hence it is only applicable to contracts surpassing the EU law-related thresholds and is without pertinence to purely national claims. The provision reads:

²⁷⁰ M. BURGI, 'A Report about the German Remedies System.', in Steen Treumer & Francois Lichère (eds), *Enforcement of the EU Public Procurement Rules* (Djof Publishing, 2011), 141 (translation HS).

²⁷¹ §§311(2), 241(2), 280(1) BGB. This is achieved either through a quasi-delictual version, which implies loyalty and information duties having been created in the relationship; or the quasi-contractual version, which takes the parties’ statements as offers implying a measure of responsibility for the risk of breakdown of the negotiations.

²⁷² §823(1) and (2) BGB; §826 BGB; §839 BGB jo 34 GG.

²⁷³ §§33, 20, 19 GWB and possibly §1UWG.

§126 Claim for damages of the expectation damages

[sentence 1] *Where the contracting authority violated a provision intended to protect undertakings, and where the undertaking without this violation, in the selection of the tenders, would have had a real chance of having been granted the award, which [the real chance] was, however, adversely affected by that infringement, the undertaking may claim damages for the costs of preparing the bid or for the participation in an award procedure. [sentence 2] Additional claims to damages remain unaffected.*

Constitutive elements of §126 GWB

§126 GWB constitutes a specific and independent basis for claims of damages.²⁷⁴ The option to rely on §126 GWB depends on whether or not a contract falls within the scope of part IV of the GWB (which is determined according to § 100, § 2 VgV, § 1 Abs. 2 SektVO). The constitutive elements are a) a provision intended to protect undertakings, b) a tenderer that enjoyed a real chance, and as will be discussed below, some authors argued in favor of c) an implicit fault requirement.

Provision intended to protect undertakings

§126 GWB requires the violation of a provision “intended to protect undertakings” – whether or not legislation is protecting an interest is a question that is very relevant for German doctrine. Over time, the position of aggrieved bidders was considerably strengthened because public procurement legislation increasingly became understood as competition law, and §97 (7) GWB guarantees a subjective right to undertakings for the respect of the public procurement provisions contained therein. Since the renunciation of the ‘budgetary solution’, §97 (7) GWB reads:

(7) Die Unternehmen haben Anspruch darauf, dass der Auftraggeber die Bestimmungen über das Vergabeverfahren einhält.

The creation of subjective rights must be assumed for all those norms which are determined to protect an interest at the European level. This includes the arguably non-statutory norms of the VOB/A, VOL/A und VOF.²⁷⁵ The wording of §126 GWB gives rise to the question of

²⁷⁴ See OLG Koblenz, 15.01.2007, 5 U 4/06.

²⁷⁵ From the point of view of an interpretation based on the will of the legislator, quite a story has been told about the open texture of this article being the result of a drafting mistake; additionally, the preparatory works express quite divergent opinions on the extent of the subjective right that is granted in the provision. See, for example, P. JEBENS, 'Schadensersatzansprüche bei Vergabeverstößen', (1999) *Der Betrieb*, 1741, 1742-1743.

whether provisions of public procurement law are alone in giving rise to a damage claim on the basis of this article, or whether any other provisions can do so, too. Given the legislative history, as well as the place of §126 GWB in section IV on public procurement in the GWB, it is commonly assumed that the violated provision must relate to public procurement rules. These being part IV, namely §97 and further of the *GWB*, the *VgV* (relegation in §§97(6) and §127 GWB) and the procurement regulations based on §§97 (6), 127 GWB and the static relegation under §§4 ff *VgV*. Though the latter's legal character is questionable, due to the relegation they can nevertheless be seen to constitute provisions intended to protect undertakings. However, it is commonly assumed that not all norms in public procurement law are of a protective nature.²⁷⁶ In order to determine this criterion, the jurisprudence developed under §823 (2) BGB is regarded as pertinent.²⁷⁷ In addition, most authors rely on the interpretations that have been made with respect to the primary protection of rights under §107 (2) nr 1 GWB, as it would constitute an internal incoherency to admit an action for review under the latter, but subsequently deny secondary protection for the very same right.²⁷⁸

Personal scope

§126 GWB, which extends the personal scope beyond aggrieved bidders that would have received the award in the regular, legal course of the procurement procedure, has a claim, namely to include all those that would have had a "real chance".²⁷⁹ The "real chance" requirement is the main criterion in determining whether a damages claim under §126 GWB is going to be successful.

The provision thus enlarges the circle of potential claimants from those that would have been awarded a contract, to those that 'merely' had a chance of being awardee. However, it has also been interpreted by the courts as containing a 'comparability' requirement in the

²⁷⁶ Weyand, 42.6.2, "besteht Einigkeit, dass diese Eigenschaft nicht allen Normen des Vergaberechts zugemessen werden kann, und zwar insbesondere dann nicht, wenn sie haushaltsrechtlichen, ordnungsrechtlichen oder gesamtwirtschaftspolitischen Charakter haben."

²⁷⁷ C. ALEXANDER, 'Vergaberechtlicher Schadensersatz gemäss §126 GWB', (2009) *Wettbewerb in Recht und Praxis*, 28, 30.

²⁷⁸ C. ALEXANDER, 'GWB § 126 Anspruch auf Ersatz des Vertrauensschadens', in Pünder/Schellenberg (ed), *Vergaberecht* (Nomos, 2011), rn 15.

²⁷⁹ KG 14.8.2003, NZBau 2004, 167, 168.

first place, meaning that, for example, *de facto* tenders without procedure – and hence without comparable bids – cannot fulfill the requirement of a sufficiently closely defined ‘chance’. The chance is therefore not entirely hypothetical, but must have manifested itself. This is true also in instances where it is the contracting authority’s fault that such a chance has not been demonstratively manifested.²⁸⁰

The loss of chance

The concretization of what a chance as a modification of causality entails divides German doctrine: chance could be interpreted as meaning being included in a shortlist (*engere Wahl*), forming part of a specific, closely clustered group with the highest chances. According to another view, a chance exists if the contracting authority, within its margin of discretion, *could* have awarded the contract to the bid in question.²⁸¹

The BGH endorsed the latter view in its judgment of 27 November 2007, an important case that provided much needed clarification on several points regarding the claim of damages. The attribute ‘real’ chance specifies that a bid must have had “*specialty qualified prospects of receiving the award*”.²⁸² A chance in this sense is read as a probability of being granted the award which is higher or qualitatively special. The court reached this conclusion mainly on a historic reasoning, referring back to the legislative amendment in the course of the passing of the *VgRÄG*. Therefore, the real chance has to be interpreted as meaning that, within the margin of its discretion, a contracting authority could have awarded the contract to a tenderer. The test can comprise the following elements:²⁸³ at which stage did a violation occur? Is there a comparability of bids? Did the aggrieved bidder qualify himself? Was the bid within the margin of discretion of the contracting authority? According to the BGH the

²⁸⁰ C. ALEXANDER, 'GWB § 126 Anspruch auf Ersatz des Vertrauensschadens', in Pünder/Schellenberg (ed), *Vergaberecht* (Nomos, 2011), rn 23.

²⁸¹ For authors on the respective positions, see BGH, 27.11.2007, X ZR 18/07 = ZfBR 2008, 299, 301.

²⁸² Translation HS, BGH, 27.11.2007, X ZR 18/07.

²⁸³ From C. ALEXANDER, 'GWB § 126 Anspruch auf Ersatz des Vertrauensschadens', in Pünder/Schellenberg (ed), *Vergaberecht* (Nomos, 2011), rn 34.

question has to be answered for the concrete case: *“It is a question of the individual case, which can only be answered by taking the award criteria into consideration”*.²⁸⁴

Examples of instances which preclude a lost chance and hence the recovery of damages include events beyond the contracting authorities’ control and where the discretion to award the contract to a tender had not been given.

No lost chance can be allowed if the award procedure was precluded due to insolvency proceedings, i.e. due to circumstances over which “the defendant had no influence”, and in cases where the contracting authority did not award the tendered contract at all. With regards to §126 GWB, a real chance would have sufficed, however, since the insolvency proceedings put an end to the tender, and the defendant had no influence on the insolvency, the courts found the claimant to be deprived of a chance. The wording is not clear as to whether or not the requirement is one of causality (i.e. that the ‘violation’ was due to circumstances beyond the defendant’s control).²⁸⁵ It is more likely that the court will rely on the fact that, due to the insolvency, the contracting authority is not awarding the contract in question at all.

There was no lost chance in a case where a tenderer was ranked second on price, and where the lowest price was presumably the award criterion. The lower court had held that the tenderer had had a chance solely on the basis of having been ranked second. In this case, the contracting authority had no margin of appreciation allowing the award of the contract to the claimant if (as the revising court presumed) the criterion was the lowest price.²⁸⁶

For a discussion of the ‘lost chance’ requirement and its interpretation in Germany, see the relevant part in the horizontal country comparison in Chapter 13.

Fault

²⁸⁴ §25 Nr. 3 Abs. 3 i. V. mit §10a lit. a VOB/A 2006, §11 Nr. 1 Abs. 1 i. V. mit §7 Nr. 2 Abs. 2 lit. i VOB/A-SKR 2006, §25 Nr. 3, §25a Nr. 1, §25b Nr. 1 VOL/A 2006, §11 Nr. 1 VOL/A-SKR 2006, §16 Abs. 2, 3 VOF 2006) and the weighting thereof (Marge, Matrix, Punktsystem, o. Ä.) , see BGH, 27.11.2007, X ZR 18/07.

²⁸⁵ Decision of VK Mecklenburg-Vorpommern, 20.03.2012, 1 VK 1/11.

²⁸⁶ OLG Naumburg, 28.10.2010, 1 U 52/10 (Hs); the judgment was not scrutinized by the revision on this point.

In Germany, some authors read an unwritten fault requirement into §126 GWB, based on an analogy to the subjective liability requirement under the overarching principles of civil liability. According to them, a deviation from the general liability criteria would have to be made explicit by the legislator, as exceptions to this principle under German law are rare.²⁸⁷ However, the courts sometimes followed this approach without further examining the ‘fault’ criterion.²⁸⁸

Whether or not the provision also entailed a fault requirement was the subject of critical discussion for some time. Since 2007, the BGH has interpreted §126 GWB as not requiring fault, but it initially based this interpretation on the legislative history of §126 GWB, rather than requirements deriving from European law.²⁸⁹ That fault cannot be a constitutive criterion, even in cases where it is coupled with a reversal of the burden of proof, was reaffirmed by the ECJ. In *Stadt Graz* in 2010, it held that a fault requirement would contravene Directive 89/665/EC.²⁹⁰ For EU law claims, the fault criterion is therefore dispensed with. As we will see, however, the question remains open for the German *culpa in contrahendo* doctrine.

The recoverable loss under §126 GWB

Under the special legal basis of §126 GWB, the recoverable loss is limited to the negative interest. Further claims based on other legal bases remain possible, as explicitly sanctioned by the second sentence of the provision. The recoverable damages are discussed in greater detail in the section on recoverable losses below.

7.2.2 Non-contractual obligations: the *culpa in contrahendo* under §§280, 311 (2) BGB

The second sentence of §126 GWB explicitly regulates the relationship between the different liability bases and states that liability claims based on other provisions are not

²⁸⁷ BGH, 27.11.2007, X ZR 18/07. See also for an overview of doctrine.

²⁸⁸ See for example OLG Schleswig-Holsteinisches 1. Zivilsenat 25.09.2009 1 U 42/08, para 27.

²⁸⁹ BGH, 27.11.2007, X ZR 18/07; see also H.-J. PRIEB & F. J. HÖLZL, 'Drei Worte des EuGH: Schadensersatz ohne Verschulden! - Zur gemeinschaftsrechtskonformen Auslegung des §126 S. 1 GWB', (2011) 1 *Neue Zeitschrift für Baurecht und Vergaberecht*, 21.

²⁹⁰ Case C-314/09 *Strabag and others* [2010] ECR I-8769.

precluded by the §126 GWB liability. Since §126 GWB grants only the negative interest²⁹¹, it is implied that the provision is relevant only in relation to coexistent bases leading to greater amplitude of recoverable damages. The most commonly discussed bases under which a defaulting contracting authority may incur more far-reaching liability is the pre-contractual *culpa in contrahendo*.

The legal institution of *culpa in contrahendo* can be theoretically justified on account of either contractual or delictual reasoning. Briefly summarized, the quasi-delictual version assumes a precontractual information duty, which can be breached by one of the parties not correcting the expectations of the other party that the contract will ultimately be concluded, for example, due to a lack of willingness to finally conclude a contract at all. A second variant of the quasi-delictual version constructs a positive duty to the loyal continuation of negotiations. The contractual approach, on the other hand, does not depart from duties in the trust relationship, but from the statements of parties as the point of departure signalling the willingness to contract. Inherent to this conception is an assumption of the risk of the negotiations breaking down. The party statements are therefore conceived as promises. In Germany, this was a judge-made construction which received legislative recognition with the reform of the law of obligations when it was cast in two provisions of the BGB. The *culpa in contrahendo* leads to the protection of the negotiation relationship that precedes the contract's conclusion.

As public procurement situations involve greatly institutionalized interaction before the contract is concluded, such protection takes great importance. Factually, liability based on the *culpa in contrahendo* is, next to §126 GWB, the most important cause of action. It is significant to the aggrieved tenderer as it may found a claim to the positive interest. The tendency of the courts is increasingly to grant it.²⁹² However, overall the constitutive criteria are more difficult to satisfy, particularly since an aggrieved bidder must demonstrate that a favorable award decision would have been made.

²⁹¹ According to the title, the provision itself refers to bid preparation costs.

²⁹² K. STOCKMANN, '§126 GWB', in Ulrich Immenga & Ernst-Joachim Mestmäcker (eds), *Wettbewerbsrecht: GWB* (C. H. Beck, 2007), mn 20.

7.2.3 *Culpa in contrahendo*

The damages action under *culpa in contrahendo* is relevant for contracts which are both above and below the threshold – broadly speaking, the legal figure presumes the existence of a previous trust relationship between an aggrieved tenderer and the contracting authority, or the breach of an implied duty.

The existence of a protected relationship

Using the *culpa in contrahendo*, one of the central questions is to determine the point in time at which one can assume that a relationship of trust has been formed. This moment varies with the type of procedure that is followed. However, for all procedures the relationship of trust is found to have been created on the part of the contracting authority when, in whichever formal way, the contracting authority invites expressions of interest. Variations between procedures relating to when a protected relationship came into existence thus mostly depend on what is required of the behavior of the tenderer. In an open procedure it is not necessarily the moment that a bid has been handed in, but some expressions of interest may suffice.²⁹³ For the restricted procedure and the negotiated procedure, the relevant point is said to be determined by the submission of documents by the tenderer. In the purely negotiated procedure, the point in time is again determined by the invitation of the contracting authority.

Breach of a duty

The protected relationship is characterized by several duties, for example the general duty of good faith (*Treu und Glauben*) of §242 BGB. Additional duties of care, clarification, information, and loyalty apply.²⁹⁴ For the field of public procurement, these are specified (although not exhaustively²⁹⁵) in the procurement regulations. The core duty of the contracting authority is to abide by the public procurement rules. For example, according to §25a VOB/A and §25b VOL/A, the contracting authority has a duty to limit itself only to those

²⁹³ K. STOCKMANN, '§126 GWB', in Ulrich Immenga & Ernst-Joachim Mestmäcker (eds), *Wettbewerbsrecht: GWB* (C. H. Beck, 2007), mn 21 with references to case law.

²⁹⁴ W. IRMER, *Sekundärrechtsschutz und Schadensersatz im Vergaberecht* (Peter Lang, 2004)146.

²⁹⁵ K. STOCKMANN, '§126 GWB', in Ulrich Immenga & Ernst-Joachim Mestmäcker (eds), *Wettbewerbsrecht: GWB* (C. H. Beck, 2007), mn 22.

selection criteria mentioned in the tender notice. Also, a tender can only be withdrawn in accordance with the recognized reasons in §26a VOB/A.

Fault requirement

Apart from §126 GWB with its specific interpretation as not containing a fault criterion, in accordance with the general German principles of liability, fault is a general requirement for the other liability bases. This means intent - or at least negligence - according to §276 BGB. Fault on the part of the contracting authority is so easily presumed that it is difficult to conceive cases which would not involve negligence.²⁹⁶ According to §280(1)s2 BGB, there is a reversal of the burden of proof, which results in the contracting authority having to prove that the breach of duty does not result from its behavior, and that the damage would have happened even without a breach of the relevant duty.²⁹⁷

7.2.4 The causal relationship

Under the *culpa in contrahendo* doctrine (sometimes referred to as the *cic*), the constitutive criteria regarding causality differ from those of §126 GWB. In order to adequately prove the existence of a causal link between the loss and a violation of the public procurement rules, it is required that the claimant would have been awarded the contract under the regular course of a procurement procedure. This is equally valid for a claim aimed at either the negative or the positive interest (based on *cic*).²⁹⁸

7.2.5 Mitigation of damages

The question is, to what extent does the action of the aggrieved bidder impact on the chances of a successful damages claim? Firstly, this concerns whether the aggrieved bidder must necessarily take an action for review or annulment once aware of the faults in a tender procedure; and secondly, how far a failure to challenge proceedings (or indeed the fact that the tenderer brought a challenge) may impact on the chances of success in claiming a

²⁹⁶ W. IRMER, *Sekundärrechtsschutz und Schadensersatz im Vergaberecht* (Peter Lang, 2004), 206.

²⁹⁷ W. IRMER, *Sekundärrechtsschutz und Schadensersatz im Vergaberecht* (Peter Lang, 2004), 207; K. STOCKMANN, '§126 GWB', in Ulrich Immenga & Ernst-Joachim Mestmäcker (eds), *Wettbewerbsrecht: GWB* (C. H. Beck, 2007), mn 22.

²⁹⁸ LG Frankfurt/Main, 02.02.2012, 3 O 151/11. In case the claimant's bid did not meet the requirements of the tender specifications either.

damage, as well as on the amount of damages recoverable.²⁹⁹ Some duties also fall to the aggrieved tenderer wishing to rely on the *culpa in contrahendo*. In what is characterized as a bilateral relationship, the tenderer loses protection under the *culpa in contrahendo* doctrine, for example, if he recognizes a breach of the public procurement rules without acting on it – a prohibition of “*dulde und liquidire*” (tolerate then liquidate).³⁰⁰

On the other hand, a contracting authority cannot contractually protect itself from secondary damages claims by including a notice in the tender documents that the bidders do not enjoy the right of obedience to public procurement rules.³⁰¹ However, the contracting authority can rely on the doctrine of ‘lawful alternative conduct’, according to which, if it can prove that in an alternative and legal course of action an aggrieved party would have sustained the same losses, these are not recoverable.

These general principles of lawful alternative conduct as well as the prohibition from ‘tolerating then liquidating’ have received a specific interpretation in the field of procurement in the national courts. The reason lies in the special and particularly formally defined legal framework for permissible or required actions that exist.

Regarding the tension between a tenderer being aware of the (potential) illegality in a tendering procedure and its participation, the courts have markedly changed course. From the initial (and traditional) prohibition on gaining advantage from facts one knows to be illegal, the courts have recognized the predicament which such a situation represents for tenderers.

²⁹⁹ “The omission to launch a feasible and reasonable challenge raises the question of *contributory negligence*. This issue is the subject of animated doctrinal discussion. Some commentators in German legal literature are convinced that contributory fault on the side of the bidder simply affects the quantum of compensation. [reference to Irmer] Others argue that the bidder does (or should) not get any damages at all [reference to Irmer, again].” M. BURGI, ‘Damages for Breach of Public Procurement Law. German Perspectives.’, in Duncan Fairgrieve & Francois Lichère (eds), *Public Procurement Law. Damages as an Effective Remedy*. (Hart Publishing, 2011), 26.

³⁰⁰ BGH 3.6.2004 WuW/E Verg 976. BGH 8.9.1998 WuW/E Verg 129. See in application Decision of VK Mecklenburg-Vorpommern, 20.03.2012, 1 VK 1/11.

³⁰¹ Y. SCHNORBUS, ‘Der Schadensersatzanspruch des Bieters bei der fehlerhaften Vergabe öffentlicher Aufträge’, (1999), 77, 81, quoting OLG Schleswig, ZVgR 1997, 170, 172.

The lawful alternative conduct has been specifically interpreted in relation to the recoverability of legal fees for the counselling pertaining to whether to challenge a bid or not, which were previously said to be incurred regardless of the outcome (legality/illegality) of the proceedings.

7.2.6 Liability based on non-contractual obligations

A further possibility in claiming damages is to bring an action in tort under §823 BGB. This poses a challenge to German doctrine which requires “*Schutzgesetzcharacter*” or for the law to have a protective character in order to rely on it for tort purposes. The question is therefore whether this can be said of public procurement law as a whole. By now, it is generally assumed that provisions dispose of the “protective norm” character, at least to the extent that the national public procurement law is transposing EU law.

Article §823 I BGB only protects absolute rights, which in the context of public procurement situations would probably be limited to “*engerichteten und ausgeübten Gewerbebetrieb*”. The recourse to this provision is therefore of a mainly theoretical nature.³⁰² One might, however, conceive of a claim in which a bidder is intentionally and specifically excluded from a bidding procedure to satisfy the §823 I BGB criteria.³⁰³

One aspect of potential importance is tortious liability under §823(2) BGB. This action’s revival is seen as desirable by some authors.³⁰⁴ However, this legal provision also operates under the limitations of the *Schutznormtheorie* – the main counterargument to the pertinence of this provision being that while the provisions within the GWB create subjective rights due to §97(7) GWB, this does not necessarily mean that they are also to be regarded as protective provisions for the purpose of 823(2) BGB.³⁰⁵ Although some uncertainty and criticism of this view persists, there are several court judgments affirming that an

³⁰² K. STOCKMANN, '§126 GWB', in Ulrich Immenga & Ernst-Joachim Mestmäcker (eds), *Wettbewerbsrecht: GWB* (C. H. Beck, 2007), mn 34.

³⁰³ M. BURGI, 'A Report about the German Remedies System.', in Steen Treumer & Francois Lichère (eds), *Enforcement of the EU Public Procurement Rules* (Djof Publishing, 2011), 29.

³⁰⁴ K. STOCKMANN, '§126 GWB', in Ulrich Immenga & Ernst-Joachim Mestmäcker (eds), *Wettbewerbsrecht: GWB* (C. H. Beck, 2007), 36.

³⁰⁵ Y. SCHNORBUS, 'Der Schadensersatzanspruch des Bieters bei der fehlerhaften Vergabe öffentlicher Aufträge', (1999), 77, 85 quoting OLG Düsseldorf, BauR 1999, 241, 246.

interpretation in conformity with the requirements of European law, at least for claims based on contracts within the scope of application of the European directives, has *Schutzgesetzcharakter*.³⁰⁶

Violations of the VOB/A and VOL/A could thereby in themselves qualify as illegalities – provided that they concern public procurement proceedings above the thresholds, again due to the German requirement of a legal instrument being of protective character. Moreover, the violation would have to be based on fault as an additional condition.³⁰⁷

This cause of action is significant in particular where a violation of the public procurement rules has occurred at a stage in which the creation of a trust relationship has not yet occurred to give rise to a protection under *culpa in contrahendo*. By way of example, these violations could be erroneous calls for tender, violations of publication duties, or errors made in the choice of procurement procedure.³⁰⁸

Several other and more specific actions can conceivably ground damages claims: German State liability can arise under either public law, in combination with Article 34 GG (Basic Law), or under various provisions which hold the individual servant (civil or non-civil servant) liable, or the State as employer vicariously liable. Individual liability of State employees³⁰⁹ can be incurred in tort for the negligent or wilful breach of an official duty owed to a third party; again the question arises as to whether a law serves the function of protecting a private interest. The official duty (the liability for breach of an official duty) extends to both civil servants under §839 BGB and non-civil servants under §823(1) BGB. The State could be held vicariously liable for its employees for fiscal tasks under §831(1) BGB. An intentional infringement against public policy, such as bribery, corruption or manipulation, might also result in liability under §826 BGB.³¹⁰ Additional liability claims, but these are of

³⁰⁶ OLG Schleswig, 6. 7. 1999, NZBau 2000, 100.

³⁰⁷ S. WILKE, *Die Bedeutung von Schadensersatz nach Vergaberechtsverößen im Rahmen der Vergabeöffentlicher Liefer- und Bauaufträge*. (Grin, 2005/2006), 23.

³⁰⁸ K. STOCKMANN, '§126 GWB', in Ulrich Immenga & Ernst-Joachim Mestmäcker (eds), *Wettbewerbsrecht: GWB* (C. H. Beck, 2007), mn 36.

³⁰⁹ G. BRÜGGEMEIER, 'Aansprakelijkheid van Toezichthouders', in C. C. van Dam (ed) (Ministerie van Justitie, 2006), 246.

³¹⁰ M. BURGI, 'Zukunft des Vergaberechts', (2009) NZBau, 609, 30.

minor importance, might be created through §§824, 826 BGB through “*dienstliches Fehlverhalten of Beamten*” or officious duties, under §839 BGB, Article 34 GG. However, these have regularly been rejected, as the public purchasing process is not recognized as an act of State sovereignty.³¹¹

7.2.7 Liability grounded in Competition law

Under specific circumstances, claims could also be based on the violation of competition law. This cause of action is possible in cases where a contracting authority has acted in the capacity as an undertaking, which is any market activity, and it takes a dominating position in his role as the market dominating buyer. Where this is the case, a violation of the prohibition from discrimination under §20 occurs, a provision which is clearly recognized as being a “*Schutzgesetz*” in nature in the sense of §33 (1)s1. The question of whether discrimination has occurred must be answered in light of the objective justification for differentiated treatment.

7.3 JUSTICIABILITY

This element in Germany is particularly modeled through the *Schutznorm* doctrine discussed above.

7.3.1 Time limits

Prescription is based on §852(1) BGB, as three years³¹² from the point of time that the damaged party had knowledge of both the damage and the identity of the tortfeasor.

7.3.2 Access to documents

Where a tenderer, in the course of review proceedings, has made use of the option to instigate the inspection of files under §111, he can also use the information gained in the exercise of that right in the proceedings for damages claims. Independently of review

³¹¹ A. DRÜGEMÖLLER, *Vergaberecht und Rechtsschutz. Der inter- und supranationale Rahmen und seine Ausgestaltung in Deutschland* (Springer, 1999), 308.

³¹² Under §§195 and 199 BGB.

proceedings, this right of access to information must be rejected for damages claims alone.³¹³

7.4 QUANTIFICATION

7.4.1 Recoverable losses

Recoverable losses are determined by the provisions contained in §§249 - 254 BGB. German liability is governed by the following general principle: the principle of compensation, which entails that only actually realized harms are compensated and no punitive function of damages claims is recognized. The principle of full compensation operates through an all or nothing approach to harm. Damages claims are a form of derivative protection of a right, the nature of which is first protected through primary protection and then transformed in material terms, hence secondary protection. Further, liability recognizes the preventive function of law.

§249(1) BGB reads:

Nature and extent of damages

(1) A person who is liable in damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred.

The situation is therefore not necessarily judged according to the *Differenzhypothese*, or hypothesis of difference, i.e. the comparison between the state that is and the state which would have existed had the infringement not occurred. The 'position' is not defined as either overall patrimony (and hence interest in the sense of the hypothesis of difference) or a subjective/objective valuation of the loss. Also, the moment in time that the real and potential states of the world would be compared at is indeterminate.³¹⁴ Since public procurement concerns pecuniary compensation, these two states have to be expressed and calculated as financial states.

³¹³ Y. SCHNORBUS, 'Der Schadensersatzanspruch des Bieters bei der fehlerhaften Vergabe öffentlicher Aufträge', (1999), 77, 99.

³¹⁴ H. LANGE, *Schadensersatz* (Mohr, 1979), 28.

Negative interest

The recoverable loss under §126 GWB is explicitly limited to “*the costs of preparing the bid or for the participation in an award procedure*”. However, the title of that provision is “negative interest”. In a very literal reading, it is possible to note that the legal concepts of the provision’s title (negative interest) and text are not congruent, and that bid preparation and participation costs do not seem to be covered cumulatively. Items of expenditure covered by the bid preparation costs include, for example, expenses relating to the acquisition of the procurement documentation, costs connected to obtaining required certification and selection requirements, as well as costs of designing the bid, submitting the bid, and participating in the procedure.³¹⁵ In both ways, the specific base for awarding damages departs from the generally accepted principles of liability. And while the title reads ‘negative interest’, the coverable damages are limited to costs of *preparing the bid or [read: and/or] for the participation in an award procedure*. However, the profits lost in another transaction (anticipatory profits),³¹⁶ which was precluded due to participation in the first (flawed) procurement procedure, are part of the negative interest, yet are not covered by the wording of §126 GWB.³¹⁷ The maximum amount recoverable as negative interest is limited to the amount grantable as positive interest.

In addition, there is precedent in which the court found a discrepancy between the losses covered in §126 and the *cic* which is based on causality. The causality required in the framework of the *cic* was said to be stricter, and those legal fees would have been incurred with or without the tortious conduct. The claimant did not plead further losses (which, as the court hinted, he might have been able to successfully claim under the *cic*). Regarding the pleaded losses, namely the legal fees, the claimant was unsuccessful.³¹⁸

Examples of successful claims based on §126 GWB remain rare, but where they were accorded, the losses that were covered are now outlined. In a claim under §126 GWB for bid

³¹⁵ W. IRMER, *Sekundärrechtsschutz und Schadensersatz im Vergaberecht* (Peter Lang, 2004), 268.

³¹⁶ M. BURGI, 'A Report about the German Remedies System.', in Steen Treumer & Francois Lichère (eds), *Enforcement of the EU Public Procurement Rules* (Djof Publishing, 2011), 33.

³¹⁷ T. ACKERMANN, 'Die Haftung des Auftraggebers bei Vergabeverstößen. Ein Beitrag zum Umgang mit den Vorgaben des EG-Rechts für nationales Privatrecht', (2000) 164 *ZHR*, 394, 402.

³¹⁸ LG Magdeburg, 02.06.2010, 36 O 25/10 (007), 36 O 25/10.

preparation and participation costs, the following were covered: labor costs, material costs as well as proportional general costs included as losses; i.e. the losses with regards to the bid and the review proceedings, but covering only the non-rejected bids.³¹⁹

Positive interest

It is therefore noticeable that §126 GWB is a departure from the general provisions of compensation. Due to its explicit wording, it is commonly accepted that §126 GWB does not grant the possibility to claim positive interest. For the other damage bases, the recoverable losses are determined in accordance with §249 ff BGB, including §252 BGB, which postulates:

Lost profits

The damage to be compensated for also comprises the lost profits. Those profits are considered lost that in the normal course of events or in the special circumstances, particularly due to the measures and precautions taken, could probably be expected.

The case law regarding the award of lost profits for aggrieved bidders who are able to prove that they would have obtained contracts (first ranked bidders) has undergone significant changes. Initially, the courts did not grant the positive interest, but limited damages claims to the negative interest. This period was followed by the acknowledgement that sufficient protection of a bidder would also mean granting the positive interest³²⁰ - under the condition that the aggrieved bidder, in the regular course of proceedings, would have stringently obtained the contract.³²¹ However, more recently, the BGH developed an additional condition to the award of the positive interest: for an aggrieved bidder to be able to claim the positive interest, the actual contract lost must, in “economically identical form”, have been awarded.³²² The rationale is that under considerations of private autonomy, as well as the principles of public procurement, a contracting authority is not bound to award a contract. There is no duty to contract and the procedure can be closed under the conditions detailed in §26 VOB/A. This view has been criticized because it allows contracting authorities

³¹⁹ LG Stade 6 civil Senate; 19.12.2003 6 O 405/02.

³²⁰ W. IRMER, *Sekundärrechtsschutz und Schadensersatz im Vergaberecht* (Peter Lang, 2004) 272, citing several cases between 1988 and 1993, also referring to BGH BauR 1998, 1232, 1237

³²¹ Confirmed for example in BGH, 3. 4. 2007, X ZR 19/06.

³²² Also confirmed in BGH, 3. 4. 2007, NZBau 2007, 523, 524.

to rather easily award a seemingly different contract, while at the same time evading further-reaching damages claims.³²³ The tenderer has to prove that without the violation of the public procurement rules, that is, under the regular progression of the tendering process, he would have obtained the award. The requirement of proof is still ambiguous: the tenderer had submitted the offer with the lowest price – the contracting authority cannot prove that another tenderer would have received the award.³²⁴

On a theoretical level, one has to revert again to the considerations on which the existence of a liability is built in the first place. Implicitly, the legislative *culpa in contrahendo* for public procurement seems to be built upon an assumption founded on the quasi-delictual version - i.e. the breach of information and loyalty requirements. This explains why, generally in Germany, the contracting authority cannot be forced into the conclusion of a contract, and the damages are hence limited to the negative interest. An illegal cancellation of a call for tenders in violation of §26 VOB/A can result in the granting of a claim of negative interest for all participating tenders.³²⁵

However, this rationale is cancelled in cases where the contracting authority concluded an identical contract with another tenderer. In these cases, it is not considered a forced conclusion of contract, and the courts regularly award the positive interest in damages.³²⁶

7.4.2 Valuation of damages

Under regular circumstances, a claimant bears the burden of allegation (*Darlegungslast*) and the burden of full proof under §286 ZPO for all constitutive criteria of liability,

³²³ W. IRMER, *Sekundärrechtsschutz und Schadensersatz im Vergaberecht* (Peter Lang, 2004), 274, who even suggests that a contracting authority might incorporate formal procurement errors in order to provide a loophole for further damages claims.

³²⁴ K. STOCKMANN, '§126 GWB', in Ulrich Immenga & Ernst-Joachim Mestmäcker (eds), *Wettbewerbsrecht: GWB* (C. H. Beck, 2007), mn 20; OLG Nürnberg NJW RR 1997, 854.

³²⁵ K. STOCKMANN, '§126 GWB', in Ulrich Immenga & Ernst-Joachim Mestmäcker (eds), *Wettbewerbsrecht: GWB* (C. H. Beck, 2007), mn 20; BGH 8.9.1998 WuW/E Verg 121.

³²⁶ T. ACKERMANN, 'Die Haftung des Auftraggebers bei Vergabeverstößen. Ein Beitrag zum Umgang mit den Vorgaben des EG-Rechts für nationales Privatrecht', (2000) 164 *ZHR*, 394, 419.

The amount of compensation in Germany is accorded pursuant to §287 ZPO since the quantification of the amount is insufficiently determined in order to fulfill the degree of proof called for under §286 ZPO.³²⁷ The provision reads:

§287 Schadensermittlung; Höhe der Forderung

(1) Ist unter den Parteien streitig, ob ein Schaden entstanden sei und wie hoch sich der Schaden oder ein zu ersetzendes Interesse belaufe, so entscheidet hierüber das Gericht unter Würdigung aller Umstände nach freier Überzeugung. Ob und inwieweit eine beantragte Beweisaufnahme oder von Amts wegen die Begutachtung durch Sachverständige anzuordnen sei, bleibt dem Ermessen des Gerichts überlassen. Das Gericht kann den Beweisführer über den Schaden oder das Interesse vernehmen; die Vorschriften des §452 Abs. 1 Satz 1, Abs. 2 bis 4 gelten entsprechend.

According to this provision, the court can proceed to estimate the damage incurred according to §287 ZPO.³²⁸ The provision constitutes an exception to the regular §286 ZPO burden imposed, and allows for an estimation of the amount of damages which must satisfy – according to most commentators - a lower level of certainty. A satisfactory level of probability suffices for the judge to ascertain the causality of the loss of a given amount. In a technical sense, it is not a change in who carries the burden of proof, but it alleviates the amount of evidence or substantiation (*'Darlegungslast'*) that is required.³²⁹ The degree of conviction a court must reach is lowered to that of the balance of probabilities. At the same time, the discretion of the court is limited.

Admittedly, it is difficult to draw specific conclusions on the use of §287 ZPO in damages claims for public procurement violations, precisely because there have been so few successful examples, and fewer still wherein the use of §287 ZPO was elaborated upon.³³⁰ Generally, the provision is particularly relevant for hypothetical causalities.³³¹ In Germany,

³²⁷ In the context of competition law, see J. O. RAUH, A. ZUCHANDKE & S. REDDEMANN, 'Die Ermittlung der Schadenshöhe im Kartelldeliktsrecht', (2012) *Wettbewerb in Recht und Praxis*, 173.

³²⁸ LG Stade 6 civil Senate; 19.12.2003 6 O 405/02.

³²⁹ BACHER, 'BeckOK ZPO §287', in Vorwerk/Wolf (ed), *Beck'scher Online-Kommentar ZPO* (Beck, 2012), rn 13-14.

³³⁰ This is different, for example, regarding the quantification of damages for violations of German competition law, whereby the infringer's profits can explicitly influence the determination of damages under §287 ZPO J. O. RAUH, A. ZUCHANDKE & S. REDDEMANN, 'Die Ermittlung der Schadenshöhe im Kartelldeliktsrecht', (2012) *Wettbewerb in Recht und Praxis*, 173, 173.

³³¹ BACHER, 'BeckOK ZPO §287', in Vorwerk/Wolf (ed), *Beck'scher Online-Kommentar ZPO* (Beck, 2012), rn 18.

the heads of damages that have been awarded are negative interest, positive interest, and reliance damages. Of the few cases that have been successful, the following picture emerges regarding the use of §287 ZPO in procurement cases.

In a judgment awarding damages on grounds of §126 GWB for the negative interest,³³² the quantification was undertaken in accordance with §287 (1) ZPO. Based on these considerations, the claimant has the right to damages for the preparation of the bid and participation in the tender: according to the court this included labor and material costs, together with a proportion of general costs, as well as the cost of processing the tender and the conduct of the bid challenge. Since two side offers and one lot were not eligible (rejected bids), the court estimated the excluded costs to amount to 1/3 of the total amount, which would be reduced to account for the rejected bids.

Regarding specific items, the court discusses the following: the claimant put forward that a 13% 'sector-surcharge' for some costs was conventional. This was rejected by the court in relation to the general costs, the costs of documentation and the technical expertise in the bid-challenge proceedings. The calculated vehicular travel costs were also rejected (the initial claim for €1.20 per km was replaced with a €0.40 per km valuation). As a result, the claimant was successful for €72,704.73.

Mitigation and conduct of the claimant at the valuation stage

Aside from the specific valuation of several items, the doctrinally more important arguments relate to the importance of the conduct of the claimant for the purposes of §287 GWB, i.e. whether the claim could be mitigated by contributory negligence. The court has held that "a bidder cannot be required to examine the legality of individual tenders. Further, the claimant as tenderer was allowed to trust that the defendant as contracting authority would conform with the legal requirements".³³³ Despite legal inquiry on behalf of the claimant, the defendant would have maintained the tender and left it unchanged. Therefore, the risk of illegality had to be borne by the contracting authority. Abusive conduct of the claimant in the sense of §242 BGB was not evident.

³³² LG Stade 6 civil Senate; 19.12.2003 6 O 405/02.

³³³ LG Stade 6 civil Senate; 19.12.2003 6 O 405/02.

Through the back door, namely in the valuation of damages, a criterion that is almost constitutive of a claim can potentially be re-introduced by a judge, who has great discretion in dealing with the matter according to his or her own convictions. The estimation is firmly understood as procedural law, although the impact in material terms could be substantial if the value of a claim is understood as such.

8 Case study: France

8.1 SYSTEMIC FEATURES

8.1.1 Sources of law

The legislative implementation measures for Directive 89/665³³⁴, Directive 92/50³³⁵ and Directive 2007/66³³⁶ in France contained no specific provisions for damages claims. This can be explained by the fact that damages claims for aggrieved tenderers have long been recognized under French administrative law.³³⁷ In addition, French administrative law is traditionally largely judge-made rather than based on explicitly legislative measures. However, the available causes of action were expanded through the sequence of implementations, and have over the last few years received several remarkable extension through case law developments which are also relevant for damages claims brought by aggrieved bidders.

³³⁴ Décret n° 2004-732 du 26 juillet 2004 modifiant le décret n° 2004-18 du 6 janvier 2004 pris pour l'application de l'article L.34-3-1 du code du domaine de l'Etat ; Décret n° 92-964 du 07/09/1992 relatif aux recours en matière de passation de certains contrats et marchés de fournitures et de travaux et modifiant le nouveau code de procédure civile et le code des travaux administratifs; Décret no 2009-1086 du 2 septembre 2009 tendant à assurer l'effet utile des directives 89/665/CEE et 92/13/CEE et modifiant certaines dispositions applicables aux marchés publics.

³³⁵ Décret n° 2001-210 du 7 mars 2001 portant code des marchés publics JORF "Lois et Décrets", Code des marchés publics; Décret n° 98-113 du 27/02/1998 relatif aux mesures de publicité et de mise en concurrence applicables à certains contrats de services dans les secteurs de l'eau, de l'énergie, des transports et des communications et portant modification du décret n° 93-990 du 03/08/1993 JO du 28/02/1998; Décret n° 98-112 du 27/02/1998 soumettant la passation de certains contrats de fournitures ou de prestations de services à des règles de publicité et de mise en concurrence et modifiant le décret n° 92-311 du 31/03/1992 JO du 28/02/1998, Décret n° 98-111 du 27/02/1998 modifiant le code des marchés publics en ce qui concerne les règles de mise en concurrence et de publicité des marchés de services JO du 28/02/1998, page 3115 ; Loi n° 97-50 du 22/01/1997 complétant, en ce qui concerne certains contrats de services et de fournitures, la loi n° 91-3 du 03/01/1991 relative à la transparence et à la régularité des procédures de marchés et soumettant la passation de certains contrats à des règles de publicité et de mise en concurrence et la loi n° 92-1282 du 11/12/1992 relative aux procédures de passation de certains contrats dans les secteurs de l'eau, de l'énergie, des transports et des télécommunications JO du 23/01/1997.

³³⁶ Implemented by : LOI no 2008-735 du 28 juillet 2008 relative aux contrats de partenariat (1) ; Décret no 2009-1456 du 27 novembre 2009 relatif aux procédures de recours applicables aux contrats de la commande publique ; Ordonnance no 2009-515 du 7 mai 2009 relative aux procédures de recours applicables aux contrats de la commande publique.

³³⁷ F. LICHÈRE, 'Damages for violation of the EC public procurement rules in France', (2006) *Public Procurement Law Review*, 171 cites the cases CE, 19 February 1930, Société Est et Sud Piketty, lebon p 196 for 'bid cost' and 'lost profit' CE, 13 May 1970, *Sieur Monti c/ Commune de Ranspach*, lebon p 322.

8.1.2 Jurisdiction: Administrative and Civil

French law has developed a separate branch of administrative law and exhibits a distinction between administrative and civil jurisdictions. This separation also translates to the law of damages and liability of private - as opposed to public - entities.³³⁸ The liability of administrative bodies in principle falls into the separate administrative law track of jurisprudence, rather than a unified one for civil and administrative law liability claims. The general rule is that all contracts applying the *code des marchés publics* (CMP) are within administrative jurisdiction. Generally, it is the administrative court of the place of execution which is competent.

8.2 CAUSES OF ACTION

Various causes of action for aggrieved third party bidders are available before the administrative judge: *le référé précontractuel* (pre-contractual summary procedure), *le référé contractuel* (adversarial/contractual procedure), the jurisprudentially developed *recours "Tropic Travaux"* and *le recours pour excès de pouvoir* (abuse of power).

The precontractual summary procedure³³⁹ was instituted by loi n° 92-10 du 4 janvier 1992 and loi n° 93-1416 du 29 décembre 1993 in implementation of the Remedies Directives. This procedure is aimed at ensuring the observance of procurement law in the process of the tendering procedure, therefore before contract signature. Standing is limited to those 'with an interest to conclude a contract and which interest is susceptible to being infringed'.³⁴⁰

³³⁸ J. GHESTIN & G. VINEY, *Traité de droit civil / T.II Les obligations 4e Partie Introduction à la responsabilité* (Librairie Générale de Droit et de Jurisprudence, 1995), 1.

³³⁹ Article L. 551-1 and following of the *code de justice administrative* (CJA).

³⁴⁰ CJA, art. L. 551-1. Interpreted in the case CE, 3 October 2008, *SMIRGEOMES*, "manquements qui, eu égard à leur portée et au stade de la procédure auquel ils se rapportent, sont susceptibles de l'avoir lésée ou risquent de la léser, fût-ce de façon indirecte en avantageant une entreprise concurrente"

The contractual procedure is in principle open only to parties to a contract. The transposition of Directive 2007/66 by Ordonnance n° 2009-515 of 7 May 2009, instituted the *référé contractuel* (summary proceedings). This procedure grants the judge powers relating to the modified remedies called for under Directive 2007/66 (such as ineffectiveness). However, Article L.551-16 of the *Code de justice administrative* explicitly excludes damages claims.³⁴¹

In an incisive judgment, the *Conseil d'Etat* in *Tropic Travaux* opened a new and specific procedure, through which third parties can also challenge a public contract. The novelty of the procedure lay in the fact that it gave third party competitors the possibility of challenging a contract in a full adversarial/contractual procedure:

*Tout concurrent évincé de la conclusion d'un contrat administratif est recevable à former devant le juge administratif un recours de pleine juridiction contestant la validité de ce contrat ou de certaines de ses clauses, qui en sont divisibles, assorti, le cas échéant, de demandes indemnitaires*³⁴².

The time limits, however, are very short – namely two months, beginning two months after the “appropriate advertisement” (*une mesure adéquate*) of the actual award.

Importantly, this procedure was interpreted further with regards to available damages claims in *Conseil d'Etat* du 11 mai 2011, *Société Rebillon Schmit Prevot*, n° 347002:

2. En vue d'obtenir réparation de ses droits lésés, le concurrent évincé a ainsi la possibilité de présenter devant le juge du contrat des conclusions indemnitaires, à titre accessoire ou complémentaire à ses conclusions à fin de résiliation ou d'annulation du contrat. Il peut également engager un recours de pleine juridiction distinct, tendant exclusivement à une indemnisation du préjudice subi à raison de l'illégalité de la conclusion du contrat dont il a été évincé.

Dans les deux cas, la présentation de conclusions indemnitaires par le concurrent évincé n'est pas soumise au délai de deux mois suivant l'accomplissement des mesures de publicité du contrat, applicable aux seules conclusions tendant à sa résiliation ou à son annulation.

3. La recevabilité des conclusions indemnitaires, présentées à titre accessoire ou complémentaire aux conclusions contestant la validité du contrat, est en revanche

³⁴¹ Article L. 551-16, (Créé, Ord. n° 2009-515, 7 mai 2009, art. 1er) : *À l'exception des demandes reconventionnelles en dommages et intérêts fondées exclusivement sur la demande initiale, aucune demande tendant à l'octroi de dommages et intérêts ne peut être présentée à l'occasion du recours régi par la présente section.*

³⁴² CE, 16 July 2007, *Sté Tropic Travaux signalisation*, n° 291545.

soumise, selon les modalités du droit commun, à l'intervention d'une décision préalable de l'administration de nature à lier le contentieux, le cas échéant en cours d'instance, sauf en matière de travaux publics.

Elles doivent également, à peine d'irrecevabilité, être motivées et chiffrées. Il n'appartient en effet pas au juge du contrat, saisi d'un tel recours contestant la validité du contrat, d'accorder au concurrent évincé une indemnité alors même que celui-ci n'aurait pas formulé de conclusions en ce sens. [emphasis added] »

An illegally evicted tenderer has a right to compensation and the damages claim is not subject to the same two month period. However, it is dependent upon an administrative decision. Furthermore, the claim to damage has to be presented (burden of pleading), motivated, and quantified – and otherwise risks being declared inadmissible for these deficiencies alone.

In the case of competing causes of action, where a regular contract has been concluded between a tenderer and the administration, liability is incurred through the contractual relationship: under the doctrine of 'absorption', all other parallel causes of action are assimilated by the contractual claims.³⁴³ Lacking a regular contractual relationship, the cause of action is based on extra-contractual liability, as no "implied contract is involved";³⁴⁴ to this, however, a subsidiary cause of action may be possible under unjustified enrichment.³⁴⁵

Given the above, in public procurement cases for violations of public procurement rules in the process of procuring a contract, the absence of a contractual relationship is regularly given so that damages claims are based on the general provision of tort law. The abuse of power action on the other hand can also be available.

Time Limits

In France, the prescription period is governed by the *prescription quadriennale*, under the law of 31 December 1968. The time limit starts to run from the first day of January following

³⁴³ CE 22 December 1922 cited in C. BERGEAL & F. LENICA, *Le contentieux des marchés publics* (Editions du Moniteur, 2010), 151, also 181 – 212.

³⁴⁴ F. LICHÈRE, 'Damages for violation of the EC public procurement rules in France', (2006) *Public Procurement Law Review*, 171 172.

³⁴⁵ C. BERGEAL & F. LENICA, *Le contentieux des marchés publics* (Editions du Moniteur, 2010), 162.

the claimant's becoming aware of the violation. Where special time limits were indicated above, those apply.

8.2.1 The constitutive criteria

There is a long-standing tradition in French law to grant damages for the liability of public bodies for illegal actions under the 'responsabilité sans faute' doctrine. The constitutive requirements comprise i) illegality as fault, ii) harm (*préjudice*), and iii) a causal link (*lien de causalité*).

Any illegal act committed by the administration entails fault on behalf of the administration.³⁴⁶ Unlike EU law, no determination of the seriousness of the breach of law is required.³⁴⁷ However, the faulty conduct must have caused harm, and the causality must be established, which normally requires a direct, actual and certain (*direct, actuel et certain*³⁴⁸) causal link between fault and harm. The requirement of direct and certain is juxtaposed against potential (*éventuel*) or hypothetical factors in order to delimit the spheres of recoverable and non-recoverable losses.³⁴⁹ There is a strong general principle of (full) compensation; claims against the public authorities are brought in front of the administrative courts. The fact that illegality automatically entails fault for the purposes of public procurement violations *de facto* creates a system of 'objective liability', under which any breach of public procurement law results in the satisfaction of this requirement as a constitutive criterion for liability.

Concerning public procurement and damages for aggrieved bidders, a very consistent and solid doctrine has been brought about through the case law. The finding of liability is not undertaken so much in the form of fault, harm and causal links, but centers on the question of the likelihood that a tenderer would have been successful. At the heart of the issue of

³⁴⁶ CE 26 January 1973, Ville de Paris c/ Sieur Driancourt.

³⁴⁷ Of course, one may present this conclusion in a different way, saying that illegality by definition entails the specific and sufficient seriousness of the mistake.

³⁴⁸ Seule constitue une perte de chance réparable, la disparition actuelle et certaine d'une éventualité favorable. Cass. civ. 1 21 novembre 2006.

³⁴⁹ W. MÜLLER-STOY, *Schadensersatz für verlorene Chancen - Eine rechtsvergleichende Untersuchung* (Albert-Ludwigs-Universität zu Freiburg, 1973), 6 referring to Mazeaud-Tuno and Tourneau.

establishing the recoverable losses is the doctrine of 'the lost chance', which has been judicially developed in the courts.

Recently, a court decision has explicitly linked "causality" to the lost chance as a causal element. However, in that case the assessment seemed to introduce a new element of causality, which had hitherto been absent – namely the requirement of a causal link between the *specific* violation and the losses sustained: in *Arts&Batiment*,³⁵⁰ the court of Appeal reasoned that there was a lack of causality between the precise violation that had occurred (in this case publicity deficiencies, as well as a lack of weighted criteria) in relation to the reasons why the tender was eventually discarded. It remains to be seen how far this reasoning will be further developed and applied by the courts.

In any event, the schism between the traditional constitutive criteria for liability and the specific public procurement assessment of the lost chance creates a conceptual vagueness which allows the lost chance to largely elude doctrinal classification. This feature is a structural reason for the controversy surrounding the lost chance in legal doctrine (as further discussed in Chapter 13).

8.2.2 The classification of chances

In the following, the categories of chances are surveyed. In public procurement cases, a two step test became established and increasingly rigidified. The first step consists of evaluating whether a tenderer has been deprived of any chance of being awarded a contract. Where that question is answered in the negative, the judge is held to proceed to an evaluation of whether a tenderer had a serious chance. The standard formula on the gradation between not being deprived of any chance, and regular and serious chances of being awarded a contract was clarified in an important judgment delivered in 2003:

*Considérant que lorsqu'une entreprise candidate à l'attribution d'un marché public demande la réparation du préjudice né de son éviction irrégulière de ce dernier, il appartient au juge de **vérifier d'abord si l'entreprise était ou non dépourvue de toute chance de remporter le marché** ; que, dans l'affirmative, l'entreprise n'a droit à aucune indemnité ; que, dans la négative, elle a droit en principe au remboursement des frais*

³⁵⁰ CAA Bordeaux, 27 October 2011, *SARL Arts & Batiment*, 10BX00835.

*qu'elle a engagés pour présenter son offre ; qu'il **convient ensuite de rechercher si l'entreprise avait des chances sérieuses** d'emporter le marché ; que, dans un tel cas, l'entreprise a droit à être indemnisée de son manque à gagner, incluant nécessairement, puisqu'ils ont été intégrés dans ses charges, les frais de présentation de l'offre qui n'ont donc pas à faire l'objet, sauf stipulation contraire du contrat, d'une indemnisation spécifique [emphasis added]*³⁵¹

The judgment provided for much needed clarification between the different categories of chances, and the steps to be undertaken in order to assess the nature of a chance.

However, one might still doubt whether different categories, that is, legally relevant different degrees of seriousness of chances, exist. Earlier jurisprudence seemed to imply a third category of chances, namely a merely 'serious or real' chance as opposed to a 'very serious' chance. From the case law rendered in the last ten years, one must consider that the formulation of a chance as 'serious' or 'very serious' is devoid of influence on the available damages.³⁵² The jurisprudence rendered since is inconclusive on this point, yet the notion of a merely 'serious' chance does not seem to have an impact on the recoverable damages – being the *manque à gagner*, lost profit, just as under the very serious chance is accorded. At the same time, the formula adopted therein has turned into steady jurisprudence.³⁵³ By the absence of testing of merely serious chance, one may deduce that the courts have stabilized a categorization resting on only two categories: testing (1) the non-deprivation of a chance on the part of a tenderer, and (2) the evaluation of whether the quality of this chance was of a 'very serious nature'. Seeing that step one results in the recovery of bid costs, and step two in the recovery of lost profit, the evidence is rather conclusive that this categorization is exhaustive and that the quality of chances are no more nuanced than these.

The first step consists of evaluating whether a chance existed at all; the second step, what the quality of that chance was. The jurisprudence has reached a stable point in which

³⁵¹ CE 4 June 2003, N° 249630.

³⁵² Lichère in 2006 maintained that the consequences of having a 'very serious' as opposed to a 'serious' chance were still disputed, as was the issue of whether the formulations made a difference in the calculation of the amount of the recoverable damages. F. LICHÈRE, 'Damages for violation of the EC public procurement rules in France', (2006) *Public Procurement Law Review*, 171, 176.

³⁵³ The same formulation has been recalled continuously by the relevant courts: e.g. CAA Lyon, 7 January 2010, *Sarl Chantelauze*.

the following types of chances are distinguished in a system of a *numerus clausus* character: Three types of categories of chances thus materialize: no chance (i.e. deprived of a chance); a chance, but one which isn't serious; and a serious chance. In the following, some examples are put forward for the respective categories:

The non-deprivation of a chance

While the doctrinal lost chance formulation is fixed, its use is versatile. From the first step of the test, the vagueness of the 'lost chance' leaves room for several parallel inquiries. Behind the finding that a tenderer was deprived of a chance stand two different evaluations: a) on one hand, 'not deprived' is used to express what in reality is, again, a finding on illegality. This is the case when the court, given the indications of the case file, fails to find that the contracting authority made an "incorrect material assessment" or "a manifest error of appreciation", for example. Under this approach, the court will review the process by which the contracting authority came to its decision. The nature of this review, however, remains to a certain extent external. The judge reviews the decision-making process, but does not substitute this with his/her own assessment in the absence of any illegality and therefore no link to the harm.³⁵⁴ Only the second form constitutes an assessment of the quality of a tenderer's chance, and whether the nature of a tenderer's implication was sufficient to amount to a chance. Here, a court substitutes its own assessment for that of the contracting authority.

Examples of disqualifying factors included the fact that a candidate was "not suitable according to its economic and financial standing or professional and technical knowledge or ability"³⁵⁵, or that a bid did not correspond to a contract notice.³⁵⁶ Despite a particularly low price, the fact that the qualification criteria were not met was held to deprive a tenderer of a chance:

³⁵⁴ CAA Paris, 18 September 2007, *SOCIETE ASF*.

³⁵⁵ F. LICHÈRE, 'Damages for violation of the EC public procurement rules in France', (2006) *Public Procurement Law Review*, 171, 172 – citing a case 4 June 1976.

³⁵⁶ F. LICHÈRE, 'Damages for violation of the EC public procurement rules in France', (2006) *Public Procurement Law Review*, 171 173 – citing *Sarfati*, June 30, 1999.

“qui n’a pas donné satisfaction au regard des critères de qualité architecturale et d’insertion dans le site, nonobstant son coût particulièrement bas, le requérant était dépourvu de toute chance d’obtenir le contrat de concession si la procédure d’attribution de celle-ci s’était déroulée régulièrement [emphasis added]”³⁵⁷

The result of the first step is either that a candidate was entirely devoid of a chance or, on the contrary, that they had a chance. The latter gives rise to the subsequent second step of whether that chance can be classified as serious or not.

Not deprived of but not serious chance

The second class of chances concerns cases in which a judge does not find a tenderer to have been deprived of all chances of winning a contract but in which the chance is not ultimately assessed as serious, that is to say, ‘the tenderer had a chance, but not a serious one’. More commonly, the court will state that in the particular context the tenderer does not have a right to compensation for lost profits. Due to the fixed linkage between the categories of chances and the recoverable losses, one may then deduce that the chance was not sufficient. However, courts’ decisions on this specific point are often unreasoned.

The judge used this assessment, for example, in the following case: a company participated in two stages of a competitive procedure to win a contract. In the end, the contract was illegally awarded to a competitor that had been eliminated during the first stage. The aggrieved bidder could not be said to have had no chance of being awarded the contract had the competition taken place in the regular fashion. Consequently, it had a right to compensation for the bidding costs. However, compensation for lost profits in that case was rejected:

*Considérant qu’il ne résulte pas de l’instruction que la société Golf Conseil, qui avait été retenue, à l’issue de la première place du concours, parmi les cinq entreprises, sur les douze en compétition, pouvant participer à la seconde phase, **aurait été dépourvue de toute chance d’obtenir le marché si le concours s’était déroulé régulièrement** ; que le syndicat intercommunal à vocation unique pour l’étude et pour la réalisation du golf de Cognac est dès lors pas fondé à se plaindre que par le jugement attaqué le tribunal administratif lui a reconnu un droit à indemnité correspondant aux frais qu’elle a inutilement exposés pour participer au concours ;*

³⁵⁷ CE 30 June 1999, N° 193925 Lebon 7 / 10 SSR.

*Considérant, en revanche, que dans les circonstances de l'affaire il n'y a pas lieu de majorer cette somme d'une indemnité correspondant au manque à gagner évoqué par la société [emphasis added]*³⁵⁸

Serious chance

Judges often have to make technical assessments in their evaluations of whether chances qualify as serious or not. This is typically done by (1) determining the criteria which would have decided an offer in the concrete case, here the relationship between the lowest price and other criteria is especially relevant; (2) evaluating the contracting authorities' (or relevant selection commission) material assessments of the offers submitted by competing bidders as to their validity most importantly, but also in relation to quality; (3) coming to a conclusion as to the relatively better one; and (4) assessing whether the offer was theoretically acceptable to the contracting authority.³⁵⁹ Mostly, the parties in court will then rely on expert opinions and technical notices in order to sustain the validity and quality of their bids.³⁶⁰

(1) Price versus other criteria

When assessing types of chances, findings for a serious chance include offering the lowest bid (even if the selection was also geared at criteria other than price, under the most advantageous/economical offer)³⁶¹ on a "presumption of a serious chance for the bidder with the lowest offer",³⁶² but this "assumption can be reversed".³⁶³ Reasons for a reversal of a serious chance due to the lowest price include the differential weighting of other criteria.

³⁵⁸ CE 23 March 1994, *Syndicat intercommunal à vocation unique pour l'étude et pour la réalisation du golf de Cognac*, 1 / 4 SSR.

³⁵⁹ On the realization of a natural history museum and related technical expertise see, for example, CE, 8 February 2010, *Commune de la Rochelle*.

³⁶⁰ CE, 8 February 2010, *Commune de la Rochelle*.

³⁶¹ F. LICHÈRE, 'Damages for violation of the EC public procurement rules in France', (2006) *Public Procurement Law Review*, 171, 174.

³⁶² F. LICHÈRE, 'Damages for violation of the EC public procurement rules in France', (2006) *Public Procurement Law Review*, 171, 174, citing Administrative Court of Appeal of Nancy, 31 May 2001, *Société RTP*; Administrative Court of Appeal of Lyon, 8 November 2001, *SARL Pugny BTP*; Administrative Court of Appeal of Douai, 21 May 2002, *Société Jean Behotas*; Administrative Court of Appeal of Bordeaux, 10 February 2005, *SA Urbaco*.

³⁶³ F. LICHÈRE, 'Damages for violation of the EC public procurement rules in France', (2006) *Public Procurement Law Review*, 171, 174.

(2) Validity and objective quality, as well as (3) relative quality of bids

After establishing what criteria the contracting authority would have used to award a contract, the aggrieved tenderer's bid is scrutinized in terms of *validity*. This means scrutiny of a more formal type as to whether in theory, without evaluation, for example, all required documents were contained or, when specific requirements were set, whether these were met. In the second instance, the quality is assessed under the standard of the tender documentation; where any external or expressly stated criteria are used, this amounts to an assessment of the objective quality of a bid. Another type of assessment which is often performed by the courts is one of relative quality. This implies an evaluation of a bid in comparison to bids submitted by other tenderers and involves a hierarchy of tenders.

(4) Theoretical acceptability and possibility to refuse (declare a bid offer to be unfruitful)

On the classification of the existence and seriousness of a chance, the courts are open to the argument that even if the aggrieved bidder is the only remaining candidate, if the final bid and the confirmed estimation are very far apart, even more than double, that a bid is unacceptable:

« que dans ces conditions, compte tenu de l'importance de l'écart qui subsistait, après négociation, entre l'offre de la société requérante et l'estimation du marché, dont il ne résulte pas de l'instruction qu'elle aurait été irréaliste, de la possibilité toujours ouverte à la RATP de déclarer, ainsi qu'elle le fait valoir, la consultation infructueuse en l'absence d'offre acceptable, et alors même que la société requérante était la seule à présenter une candidature recevable » [emphasis added]³⁶⁴

This judgment is a rather recent one, and the argumentation – although entirely plausible in terms of the freedom to contract logic – opens up a new solid line of defense for contracting authorities, as it will in most cases be impossible to prove that negotiations would indeed have been fruitful.³⁶⁵ At the same time, the abovementioned case is isolated and generally strong presumptions in favor of the acceptability of a bid are being made – the fact that an offer lay 3% below the contracting authorities' price estimation, for example, resulted in

³⁶⁴ CAA Paris, 8 March 2011, *SOCIETE ETABLISSEMENTS CARRE*.

³⁶⁵ Under German law, this line of argumentation is perfectly common and acceptable, but the case law has already developed further, the rebuttal being that the will to contract is proven if the contract has actually been awarded or if an economically identical one has been retendered. To the author's best knowledge, these considerations are not yet common in French litigation.

establishing a serious chance because it was therefore not established that the price “*aurait fait obstacle à ce que son offre puisse être retenue*”³⁶⁶.

8.3 QUANTIFICATION OF DAMAGES

8.3.1 Recoverable losses

As in many legal orders, the point of departure, at least on a superficial level, is that of integral or full compensation. Although there are clearly some important nuances in relation to the exhaustive nature of compensation, it is nevertheless regarded as one of the founding principles of liability, and the law of damages.

The lost chance

The strong version of the lost chance doctrine postulates that the lost chance itself is the *préjudice*, the harm, which is covered by liability, and that it is hence recoverable. Based on this logic, the compensation for a lost chance can be labeled as full, since the compensation refers not to harm in comparison with a hypothetical state of mind, but rather to the full compensation of the chance itself.

La réparation d'une perte de chance doit être mesurée à la chance perdue et ne peut être égale à l'avantage qu'aurait procuré cette chance si elle s'était réalisée. (Cass. Civ.2e - 9 avril 2009)

While the approach taken has been marked by uncertainty, the last ten decades of public procurement jurisprudence in France (at least in those decisions taken by the higher jurisdictions) have portrayed an effort to come to a closing stance on this issue. The Cour de cassation held:

*La réparation du préjudice consistant dans la perte d'une chance doit être mesurée à la valeur de la chance perdue et ne peut être égale à l'avantage qu'aurait procuré cette chance si elle s'était réalisée.*³⁶⁷

This was mirrored by the Conseil d'Etat:

³⁶⁶ CE, 8 Février 2010, *Commune de la Rochelle*.

³⁶⁷ Cass. Com 7 Janvier 2004, n° 01-17.426.

*...l'indemnisation doit être évaluée à la fraction du dommage imputable à la perte de chance*³⁶⁸

Looking at the public procurement cases in which damages were granted, such proportional liability is confined to the categories of not having been deprived of all chances, serious, and very serious chances. In so far as these categories result in different heads of damages being claimable, one may speak of a 'categorized proportional liability'. Therefore, the lost profit can still be said to be subject to the full compensation principle, to which recent court pronouncements subscribe strongly. Damages are not to be only partially compensated for, and the principle of proportional liability is not (officially) accepted in public procurement cases:

*"Droit au remboursement de l'intégralité du manque à gagner qu'il aurait perçu en en devenant l'attributaire."*³⁶⁹

De facto, a categorized proportional liability effectively mediates between the two different loss of chance theories by combining a limited proportionality in strict categories with differing burdens of proof for different heads of damages.

Bid costs and lost profit

The finding that an aggrieved tenderer was not deprived of all chances to win a contract resulted in a right to claim the costs of the bidding procedure, but not the lost profits.³⁷⁰ The fact that the aggrieved tenderer had a serious chance resulted in a claim not just for the bidding costs, but also for the lost profits.³⁷¹ This was already held in a 1980 case (and subsequently consistently reconfirmed):

CONSIDERANT QU'IL RESULTE DE L'INSTRUCTION QUE CETTE DECISION ILLEGALE EST DE NATURE A ENGAGER LA RESPONSABILITE DU CENTRE HOSPITALIER DE SECLIN DES LORS QU'ELLE A PRIVE LES ETABLISSEMENTS AUBRUN D'UNE CHANCE SERIEUSE D'EMPORTER L'ADJUDICATION DES TRAVAUX ; QUE, PAR SUITE, LES ETABLISSEMENTS AUBRUN ONT

³⁶⁸ CE , 5 January 2000, *Telle*.

³⁶⁹ CE, 27 January 2006, *Commune d'Amiens*.

³⁷⁰ CE, 23 March 1994, *golf de Cognac*.

³⁷¹ CE, 8 Février 2010, *Commune de la Rochelle*.

DROIT A UNE INDEMNITE EGALE AU MANQUE A GAGNER RESULTANT DE CETTE DECISION [emphasis added]³⁷²

Although a tender was sometimes said to have “only” had a serious chance, the consequences in terms of heads of damages did not differ from those of a “chance très sérieuse” – for both cases, the consequence would be a loss of profit.

Regarding the relationship between damages for lost profit and bidding costs, it is unsettled as to whether a parallel claiming of heads of damages is possible. The courts have sometimes decided that bidding costs are “necessarily included” in lost profits, unless otherwise stated in the tender notice:

*Considérant que lorsqu'une entreprise candidate à l'attribution d'un marché public demande la réparation du préjudice né de son éviction irrégulière de ce dernier, il appartient au juge de vérifier d'abord si l'entreprise était ou non dépourvue de toute chance de remporter le marché ; que, dans l'affirmative, l'entreprise n'a droit à aucune indemnité ; que, dans la négative, elle a droit en principe au remboursement des frais qu'elle a engagés pour présenter son offre ; qu'il convient ensuite de rechercher si l'entreprise avait des chances sérieuses d'emporter le marché ; que, dans un tel cas, l'entreprise a droit à être indemnisée de **son manque à gagner, incluant nécessairement, puisqu'ils ont été intégrés dans ses charges, les frais de présentation de l'offre qui n'ont donc pas à faire l'objet, sauf stipulation contraire du contrat, d'une indemnisation spécifique** ; [emphasis added]³⁷³*

There is no accumulation of the two types of loss, unless stipulations to another effect have been made, for example, through a notice from the contracting authority stating that it would reimburse tenderers for a part of their investment in the bid submission.

In the 2003 *ETPO* judgment, the Conseil d'Etat held:

*Considérant en revanche, que les frais exposés par le groupement pour l'établissement de son offre, **en l'absence de stipulations contractuelles prévoyant leur prise en charge par le maître d'ouvrage, sont au nombre de ceux qui lui incombent normalement d'engager pour obtenir l'attribution du marché et qui devaient trouver leur contrepartie dans la rémunération afférente à la réalisation de ce dernier** ; qu'ainsi le GROUPEMENT D'ENTREPRISES SOLIDAIRES ETPO GUADELOUPE, SOCIETE BIWATER, SOCIETE AQUA TP **n'est pas fondé à en demander l'indemnisation** [emphasis added]³⁷⁴*

³⁷² CE, 28 March 1980, *Centre Hospitalier de Seclin*, 1 / 4 SSR, 11292.

³⁷³ CE 4 June 2003, N° 249630.

³⁷⁴ CE 4 June 2003, N° 249630.

While the aggrieved bidders had the right to be compensated for the loss of benefits resulting from works procured illegally, at the same time, where no explicit deviating provisions had been made to the contrary, the bidding costs for submitting the offer would not be compensated, because they formed part of a normal business risk for partaking in a procedure.

8.3.2 The burden of proof

As Lichère notes, the formulation of the initial stage of establishing whether an aggrieved bidder was “not deprived of any chance of obtaining a contract” moves the burden of proof away from the claimant, in favor of the allegedly aggrieved bidder: first of all, the lack of a chance must be established through its negative formulation, the presumption implicitly being that a chance existed; secondly, it appears that the “conviction” (as distinct from the evidence) of a judge is sufficient to fulfill the first step of scrutiny.³⁷⁵

The same is true for the finding that an aggrieved bidder had a serious chance. Although the formulations vary more widely, at times the courts deploy a negative formulation which effectively shifts the burden of proving that an aggrieved bidder did not have a serious chance towards the contracting authority:

*compte tenu de la supériorité de la valeur technique de l'offre de la société Goppion sur celle de la société Atelier Blu, seule autre entreprise ayant déposé une offre, de ce que les stipulations précitées de l'article 2.1.2 du II de la section IV du règlement de consultation prévoient que le critère de technicité est prioritaire par rapport à celui du prix, et de **ce qu'il ne résulte pas de l'instruction que le prix proposé par la société Goppion, d'ailleurs inférieur de 3% à l'estimation du maître d'oeuvre, aurait fait obstacle** à ce que son offre puisse être retenue, la société Goppion est fondée à soutenir qu'elle a perdu une chance sérieuse d'emporter le lot n° 1 du marché de restructuration du muséum d'histoire naturelle de La Rochelle ; [emphasis added]³⁷⁶*

However, the right to receive compensation for bid costs can be forfeited where they are not explicitly claimed, or where they are not sustained in the form of receipts: ³⁷⁷

*que toutefois, la société requérante, qui **n'a jamais demandé le remboursement des frais qu'elle a engagés** pour soumissionner, et qui en réponse au mémoire du 2*

³⁷⁵ F. LICHÈRE, 'Damages for violation of the EC public procurement rules in France', (2006) *Public Procurement Law Review*, 171, 173.

³⁷⁶ CE, 8 Février 2010, *Commune de la Rochelle*.

³⁷⁷ CAA Paris, 8 March 2011, *SOCIETE ETABLISSEMENTS CARRE*.

décembre 2010 de la RATP lui opposant le défaut de chiffrage de ce chef de préjudice, **n'a produit aucun élément permettant d'apprécier l'étendue et le montant de son droit à réparation à ce titre, doit être réputée avoir renoncé à être indemnisée des dépenses qu'elle a exposés pour présenter son offre** ; [emphasis added].

At the same time, the fact that an aggrieved bidder was able to secure subsequent independent contracts, which effectively charge his capacity, does not invalidate his compensation claim for a lost contract – a tenderer can thus be “effectively paid twice”.³⁷⁸

8.3.3 Valuation methods

In a recent ruling, the Conseil d'Etat itself pronounced on the calculation of lost profits. This is remarkable, mainly because the quantification methods of damages are usually seen to belong to the discretion of the judge, and are rarely scrutinized by higher courts:

*Considérant toutefois, que la cour, après avoir relevé l'irrégularité de la procédure de passation de ce marché, a jugé que la société avait été privée d'une chance sérieuse d'emporter les lots 1 et 8 et qu'elle devait être indemnisée pour ce motif de son manque à gagner ; **qu'en évaluant ce manque à gagner à partir d'une marge brute et non à partir du bénéfice net que lui aurait procuré le marché si elle avait obtenu les lots n° 1 et 8, la cour administrative d'appel de Lyon a commis une erreur de droit** ; qu'ainsi la COMMUNAUTE DE COMMUNES DU PAYS D'ARLANC est fondée à demander l'annulation de l'arrêt de la cour administrative d'appel de Lyon en tant seulement qu'il évalue le préjudice subi par la société Chantelauze* [emphasis added].³⁷⁹

The quantification of damages is based on a bifold reasoning: 1) the estimation of turnover, 2) the profit rate applicable.³⁸⁰ While the usual profits can be taken into account,³⁸¹ the lost profit is calculated on the basis of the net profits which would have accrued to a tenderer in the specific market, rather than at the rate of gross profit of overall activities.³⁸² Damages for

³⁷⁸ F. LICHÈRE, 'Damages for violation of the EC public procurement rules in France', (2006) *Public Procurement Law Review*, 171, 177; CE, 27 January 2006, *Commune d'Amiens*.

³⁷⁹ CE, 11 February 2011, *communaute de communes du pays d'Aranc*.

³⁸⁰ F. LICHÈRE, 'Damages for violation of the EC public procurement rules in France', (2006) *Public Procurement Law Review*, 171 177.

³⁸¹ F. LICHÈRE, 'Damages for violation of the EC public procurement rules in France', (2006) *Public Procurement Law Review*, 171 177.

³⁸² CE, 11 février 2011, *communauté de communes du pays d'Aranc*.

overheads are usually not granted.³⁸³ The existence of an extreme level of competition lowers the level of damages.³⁸⁴ In the estimation of the applicable profit rates, arguments relating to the relevant market are accepted, for example, referring to the market for glass showcases, which has a 15% profit margin, rather than to the general glass market, which has an estimated 4.23% share.³⁸⁵ Relatively generous percentages have been accepted in recent cases (ranging from 1.25%, up to 5%, 11.63% and 34%).³⁸⁶ The profit margins observed do not exhibit normal or standardized rates, but rather they are characterized by an increasingly specialized, case by case assessment. This corresponds to a trend moving away from abstract towards concrete quantification of damages.

Once liability is incurred, the damages may cover liability for both material and immaterial damages. In claims for immaterial damages, such as commercial reputation, the characteristics of the market can be taken into account – for example a high level of competition precluding recovering a loss of commercial reputation.

QU'EN REVANCHE IL N'EST PAS ETABLI QUE LEUR EVICTION ILLEGALE AIT ENTRAINE POUR LES ETABLISSEMENTS AUBRUN UNE ATTEINTE A LEUR REPUTATION COMMERCIALE PREJUDICIALE A L'ACTIVITE DES ANNEES SUIVANTES ; QUE, DANS CES CONDITIONS, COMPTE TENU DE LA SEVERITE DE LA CONCURRENCE EXISTANT POUR L'ADJUDICATION DE CE MARCHE QUI LIMITAIT LES BENEFICES POUVANT ETRE NORMALEMENT ATTENDUS DE L'EXECUTION DES TRAVAUX; [emphasis added].³⁸⁷

Quantification of lost profits

In *Societe Eurovia*, the court granted damages for lost profit, including (in absence of stipulations to the contrary in the tender contract) bid preparation costs, but excluding the company's general/fixed costs. Lost profit was determined, not by the *brut* marginal percentage, but based on the net benefit that would have been obtained. The net margin was assessed at "habitually 10%". This is in comparison to the net margin in 2006 which, in

³⁸³ F. LICHÈRE, 'Damages for violation of the EC public procurement rules in France', (2006) *Public Procurement Law Review*, 171 178.

³⁸⁴ F. LICHÈRE, 'Damages for violation of the EC public procurement rules in France', (2006) *Public Procurement Law Review*, 171, 177.

³⁸⁵ CE, 11 February 2011, *communaute de communes du pays d'Arlanc*.

³⁸⁶ F. LICHÈRE, 'Damages for violation of the EC public procurement rules in France', (2006) *Public Procurement Law Review*, 171, 177.

³⁸⁷ CE, 28 March 1980, *Centre Hospitalier de Seclin*.

terms of turnover, is established at 2.74%. The offer of the company is taken as the base value, amounting to €2,123,899, therefore the loss is fixed at €59,000.³⁸⁸

The applicable interest rates

The interest rate applicable is the legal rate, and starts to run on the date of receipt of the date for the first preliminary application for damages.³⁸⁹ Applying Article 1154 of the Civil Code, compound interest (i.e. interest accrual on interest) can be granted where this has been judicially applied for or by special agreement and when due for over a year.

³⁸⁸ CAA Nancy, 9 February 2012, *Societe Eurovia*.

³⁸⁹ CE, 11 February 2011, *communauté de communes du pays d'Arlanc*.

9 CASE STUDY: THE UNITED KINGDOM

The following chapter provides an overview of damages claims in the EU Member State of the United Kingdom.³⁹⁰ This overview primarily covers England, Wales and Northern Ireland, but since the procurement directives are very similarly implemented in Scotland, the divergence between jurisdictions seems by and large negligible. The case law examined highlights the impression that a unitary interpretation is pursued in this specific area of law in relation to damages claims.³⁹¹

9.1 SYSTEMIC FEATURES OF PROCUREMENT CLAIMS

9.1.1 Sources of Law and Implementation of Directive 2007/66

In the UK,³⁹² the Public Contracts Regulations 2006 and the Utilities Contracts Regulations 2006 (and subsequent amendments, 'the Regulations') implemented the substantive and remedial directives. The respective implementation measures for Directive 2007/66 were

³⁹⁰ The 'bible' of UK public procurement is S. ARROWSMITH, *The Law of Public and Utilities Procurement* (Sweet & Maxwell, 2005), although pending the new edition, this is slightly outdated. Of relevance to practitioners: S. ROE & D. HARVEY, 'Public Procurement 2011', in *Getting the Deal Through* (Sweet & Maxwell, 2011). On damages in the UK: D. PACHNOU, *The effectiveness of bidder remedies for enforcing the EC public procurement rules: a case study of the public works sector in the United Kingdom and Greece* (University of Nottingham, 2003); M. BOWSER & P. MOSER, 'Damages for breach of the EC public procurement rules in the United Kingdom', (2006) *Public Procurement Law Review*, 195; F. BANKS & M. BOWSER, 'Damages Remedy in England & Wales and Northern Ireland', in Duncan Fairgrieve & Francois Lichère (eds), *Public Procurement Law. Damages as an Effective Remedy* (Hart Publishing, 2011); S. ARROWSMITH, *The Law of Public and Utilities Procurement* (Sweet & Maxwell, 2005), 1379-1385; M. TRYBUS, 'An overview of the United Kingdom Public Procurement Review and Remedies System with an Emphasis on England and Wales', in Steen Treumer & François Lichère (eds), *Enforcement of the EU public procurement rules* (DJØF Publishing, 2011), 227-228; C. BOVIS, *EC public procurement: case law and regulation* (Oxford University Press, 2006), 594. To the author's best knowledge there is a dearth of literature dealing specifically with the issue of the quantification and valuation of procurement damages. The findings in this chapter are therefore largely based on own research in the relevant case law databases.

³⁹¹ The reader is asked to excuse the subsequent imprecise denomination of the different jurisdictions.

³⁹² In Scotland, the Public Contracts and (Scotland) Regulations 2006 were consolidated and changed to accommodate the ECJ *Uniplex* ruling through the Public Contracts (Scotland) Regulations 2012 (SSI 2012 No 88) and the Utilities Contracts (Scotland) Regulations 2012 (SSI 2012 No 89).

carried out through the 2009 (Amendment) Regulations.³⁹³ The most recent amendments were undertaken through the Public Procurement (Miscellaneous Amendments) Regulations 2011, which contained minor modifications and brought the time limits for bringing proceedings in line with the ECJ ruling in *Uniplex*³⁹⁴.

Public Contracts regulation 47C(2) states that compliance with the regulations is “a duty owed to an economic operator”. The damages provision has not been altered and continues, in regulation 47J(2)(c), to state that the court “may award damages to an economic operator which has suffered loss or damage as a consequence of the breach, regardless of whether the court also acts as described in sub-paragraphs (a) [declaration of ineffectiveness] and (b) [imposition of penalties]”.³⁹⁵

A particular damages clause is contained in Regulation 45I of the Utilities Contracts Regulations 2006, which reflects the divergent approach that is also taken with respect to the damages provisions in Directives 89/665 and 92/50:

“(3) Where the Court is satisfied that an economic operator would have had a real chance of being awarded the contract if that chance had not been affected by the breach mentioned in paragraph(1)(a), the economic operator is entitled to damages amounting to its costs in preparing its tender and in participating in the procedure leading to the award of the contract.”

The UK thus has no statutory regulation of damages that goes beyond the wording of the Directives, and the details on damages claims in public procurement are developed by case law.

9.1.2 Jurisdiction

Legal actions for procurement law violations are brought in first instance in front of the High Court of Justice,³⁹⁶ with the option to appeal to the civil division of the Court of Appeal. After

³⁹³ Public Contracts (Amendment) Regulations (SI 2009 No 2992), and the Utilities Contracts (Amendment) Regulations (SI 2009 No 3100).

³⁹⁴ Case C-406/08 *Uniplex (UK)* [2010] ECR I-00817.

³⁹⁵ For Scotland, see the identical provision regulation 48(b)(iii) Public Contracts (Scotland) Regulations 2012.

³⁹⁶ Usually the Queen’s Bench Division, but sometimes its Technology and Construction Court element, wherein construction or engineering matters are dealt with. See M. TRYBUS, 'An overview of the United Kingdom Public Procurement Review and Remedies System with an Emphasis on England and Wales', in Steen Treumer & François Lichère (eds), *Enforcement of the EU public procurement rules* (DJØF Publishing, 2011), , 203.

the Constitutional Reform Act 2005, the Supreme Court of the UK became the court of last instance.³⁹⁷ The procedural rules are contained in the Civil Procedure Rules 1998.³⁹⁸

9.2 CAUSES OF ACTION FOR DAMAGES CLAIMS

9.2.1 Judicial review

Government contracts have historically been rather unregulated in the UK, subject only to municipal guidelines which, however, would not create rights capable of being invoked in courts. Principles of judicial review were developed as a control mechanism for the exercise of administrative powers. Their application is disputed in public procurement, because judicial review was traditionally required to contain a 'public law element'.³⁹⁹ Contracts concluded by governments were regarded as private contractual arrangements and consequently in many cases were not open for judicial review as they lacked the required public law element. The Regulations have been held to constitute a "statutory scheme of relief" and, as in a private law situation, not to benefit from public judicial review.⁴⁰⁰ Bowsher makes three exceptions to this general claim, being that, after all, public remedies in the form of judicial review must be available. These are 1) another breach of public law obligations under EC law or domestic law (due to the risk of having to bring two proceedings for identical factual situations); 2) gaps in the statutory obligations; and 3) instances where a contract falls outside of the scope of the substantive law of the Regulations (at the national level, but as a result of the scope of the substantive Directives at EC level) for general violations of procurement principles, such as the general principle of transparency.⁴⁰¹

³⁹⁷ Or the Court of Session of the Sheriff Court for Scotland. On public contract litigation, see P. CRAIG & M. TRYBUS, 'Angleterre et Pays de Galles/England and Wales', in Rozen Noguellou, et al. (eds), *Droit comparé des contrats publics* (Bruylant, 2010), 357.

³⁹⁸ Civil Procedure Rules 1998 (SI 1998 No. 3132).

³⁹⁹ S. ARROWSMITH, *The Law of Public and Utilities Procurement* (Sweet & Maxwell, 2005), 79- 85, providing an overview of the public law element variations with regards to procurement cases.

⁴⁰⁰ R. (on the application of Cookson & Clegg) v Ministry of Defence, see M. BOWSHER & P. MOSER, 'Damages for breach of the EC public procurement rules in the UK', (2006) *Public Procurement Law Review*, 195.

⁴⁰¹ See M. BOWSHER & P. MOSER, 'Damages for breach of the EC public procurement rules in the UK', (2006) *Public Procurement Law Review*, 195, 198.

For breaches of public law duties, a legislative intention to grant a damages remedy will not regularly be implied.⁴⁰² In this respect, there was no general damages action for unlawful actions of public bodies. A tort for breach of a statutory duty requires a statutory instrument which confers a right to damages. Misfeasance in public office was the alternative, but the constitutive criteria giving rise to that tort were onerous as they required intentional conduct. Prior to the implementation of the Remedies Directive, section 19 of the Local Government Act 1988 provided the possibility of claiming damages for violations of the public procurement rules for an implied contract and potentially allowed the recovery of bidding costs for the reason that a fair consideration of one's bid was implicit in a tender offer.⁴⁰³

The constitutive requirements under English law depend on the action chosen to pursue a claim. *Harmon* is the main authority in relation to a successful claim for damages in the area of public procurement and remains unmatched in its systemic consideration of the various actions for damages claims open to an aggrieved tenderer. It comprises a discussion of three concurrent possible causes of action in UK law that allow the bringing of a successful damages claim: 1) breach of statutory duty (Public Works Regulations and Directives) and the Treaty of Rome, 2) implied contract, and 3) misfeasance in public office.

The dispute was a very important one in monetary terms, regarding the fenestration of the exterior wall of the UK Parliament in Westminster. The aggrieved bidder alleged several violations by the contracting authority and that the House of Commons had illegally awarded the contract to a competitor.

It is clear that the House of Commons in several important respects failed to follow public procurement rules. It advertised the contract under "overall value for money", without specifying further criteria. Therefore, the lowest price would have to be the decisive factor. The House then accepted a variant of Seele/Alvis, even though this made significant design changes. The House encouraged a 'buy British' policy (unlawfully), applied arbitrary methods to favor the Seele/Alvis tender, and entered into unlawful post-tender

⁴⁰² S. ARROWSMITH, *The Law of Public and Utilities Procurement* (Sweet & Maxwell, 2005), 1379.

⁴⁰³ This implied contract was examined in *Blackpool and Fylde Aero Club Ltd. V. Blackpool B.C* [1990] All E.R. 237. It also came up again in *Sidey Ltd v Clackmannanshire Council* [2011] ScotCS CSOH 194.

negotiations. It then failed to set out the true reasons for its rejection of Harmon's bid in the notification letter to Harmon.

9.2.2 Breach of statutory duty

A statutory duty of compliance with procurement law is established by regulation 47A:

- (1) This regulation applies to the obligation on—*
- (a) a contracting authority to comply with—*
 - (i) the provisions of these Regulations, other than regulations 14(2), 30(9), 32(14), 40 and 41(1); and*
 - (ii) any enforceable EU obligation in respect of a contract or design contest (other than one excluded from the application of these Regulations by regulation 6, 8 or 33); and*
 - (b) a concessionaire to comply with the provisions of regulation 37(3).*
- (2) That obligation is a duty owed to an economic operator.*

The breach of statutory duty, as the *Harmon* judgment clarified, was the point of departure for the violation of the Regulations – going back to the ruling in *Matra*, in which the court had assimilated claims under the EU directives to actions for damages under the “domestic characterisation” for breach of law. The House of Commons was therefore held to have breached the Public Works Regulations and Directives and Article 6 of the Treaty of Rome.

9.2.3 Implied contract

In addition, *Harmon* confirmed the case law which initially developed the doctrine of implied contract in public procurement damages. In this particular case, the implied contract doctrine results from considerations of fairness and equality in competitive tenders:

“25 It may not be difficult to conclude that the first part of the contract contended for by the petitioners, that is consideration of tenders in accordance with principles of fairness and equality, was indeed the intention of both parties. That conclusion must, almost inevitably, flow from my consideration of the public law remedies sought by the petitioners.”⁴⁰⁴

“...it is now clear in English law that in the public sector where competitive tenders are sought and responded to, a contract comes into existence whereby the prospective employer impliedly agrees to consider all tenderers fairly.”⁴⁰⁵

⁴⁰⁴ *Sidey Ltd v Clackmannanshire Council* [2011] ScotCS CSOH 194.

⁴⁰⁵ *Harmon CFEM Facades (UK) Ltd v. The Corporate Officer of the House of Commons* [1999] EWHC Technology 199 (the ‘*Harmon*’ case) at 216.

The *Harmon* case clearly supports the theoretical possibilities for an implied contract based on principles of fairness and equality of treatment. The precise conditions giving rise to such a contract remain open.

In the 1990 *Blackpool* case, the court had set a relatively high threshold for implying a contract:

*"I readily accept that contracts are not to be lightly implied. Having examined what the parties said and did, the court must be able to conclude with confidence both that the parties intended to create contractual relations and that the agreement was to the effect contended for".*⁴⁰⁶

Based on the *Blackpool* case, *Harmon* repeated that an invitation to tender is not normally an offer, and for an implied contract to arise, additional criteria must be met. Several characteristics of the procedure were taken into account: the type of procedure was considered (it was a restricted procedure), and additionally, the fact that the procedure of the statutory regime in the Public Works Regulation was not followed (the contracting authorities had discussions with one tender which went beyond mere negotiations or clarification). In the recited case law, implied duties recognized by the court oscillate somewhere between considering all tenders duly received (*Blackpool*), acting "reasonably" (*Fairclough*) or merely according to views "honestly held" (*Pratt*).⁴⁰⁷ In *Harmon*, the court extended the implied duties to principles of fairness and equality as part of a preliminary contract.⁴⁰⁸

In *Harmon*, the following implied terms were found: (a) submitted alternatives would be considered alongside a compliant, revised tender from that tenderer; (b) any alternative

⁴⁰⁶ *Blackpool and Fylde Aero Club Ltd. V. Blackpool B.C* [1990] All E.R. 237 at p.1202F–G.

⁴⁰⁷ See S. ARROWSMITH, *The Law of Public and Utilities Procurement* (Sweet & Maxwell, 2005), 107- 113. See the references in fn 410.

⁴⁰⁸ Arrowsmith advances an interesting argument as to the unilateral or bilateral nature of the implied contract. If the contract were recognized as a bilateral relationship, certain duties could be incumbent not only on the contracting authority, but also on the tenderers. S. ARROWSMITH, *The Law of Public and Utilities Procurement* (Sweet & Maxwell, 2005), 107- 113.

would only be alternative in detail, and not of an entirely changed design; and (c) tenderers who responded would be treated equally and fairly.⁴⁰⁹

Plaintiffs in *Sidey* argued a breach of an implied contract,⁴¹⁰ but the court found that the notion of being ‘economically advantageous’ “lack[ed] the necessary degree of precision to qualify as an implied term”.⁴¹¹

Another line of cases has been equally reluctant in acknowledgement of implied contracts: this line of cases had to consider the contractual claims due to the divergent time limits of those claims (six years) as opposed to Regulations claims (now 30 days). In this context, in *Montpellier Estates*,⁴¹² the court held that the implied contract action could not be used to extend the applicable time limits under the Regulations. The court stated in relying on decisions in *JBW Group*, *Lion Apparel* and *Varney*:

“465 LCC accepts that a contracting authority may be under an implied obligation to consider tenders in good faith, however Mr. Williams submits that the implication of further obligations are not necessary to give efficacy to the contract, nor could there be a common intention that any implied obligations should extend further than the duties imposed upon the contracting authority by virtue of the EU public procurement regime. In short, he submits, the implied contract adds nothing to the claim.

466 In JBW Group Ltd v Ministry of Justice [2012] EWCA Civ 8; [2012] 2 CMLR 10, Elias LJ stated:

“58. [The applicant] accepted that if he had succeeded in establishing that there was a service contract, this would add nothing to his case. It would then be unnecessary to imply any contract. Initially he suggested that even then the implied contract argument

⁴⁰⁹ See answers to Issue 7 in *Harmon* in particular 214-218.

⁴¹⁰ Citing “*Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* (Bingham LJ at [1990] 1 W.L.R., p.1202); *Fairclough Building Ltd v Port Talbot Borough Council* (Parker LJ at (1992) 33 Con. L.R., p.28; Nolan LJ at p.33); *Harmon CFEM Facades (UK) Ltd v Corporate Officer of House of Commons* (at paras 206, 214 and 216); *Pratt Contractors Ltd v Transit New Zealand* (at paras 44, 47 and 49); *J & A Developments Ltd v Edina Manufacturing Ltd* (paras 4, 38 and 50)”, see para 11, *Sidey Ltd v Clackmannanshire Council* [2011] ScotCS CSOH 194; WL 5828924.

⁴¹¹ ““Economically advantageous” is a term which is highly likely to be dependent upon the subjective stance of the party considering the question. I would find it difficult to see that parties in the position of the petitioners and respondents would agree on such a subjective term without further definition and qualification.” *Sidey Ltd v Clackmannanshire Council* 2011 WL 5828924, para 25.

⁴¹² *Montpellier Estates Ltd v Leeds City Council* [2013] WL 425703. In an initial application to strike out parts of the claim, the Court had rejected the application holding that *Harmon* was the authority for the potential of an implied contract to arise, see *Montpellier Estates Ltd v Leeds City Council* [2010] WL 2515015.

might entitle him to bring a claim for six years rather than within the much stricter three-month period permitted under the Directive. However, in reply he resiled from that position and conceded that it would be inconsistent with the purpose of the Directive to imply any such contractual right.

59. That concession was, in my view, rightly made and is consistent with the decisions of two first-instance judges, Morgan J in *Lion Apparel Systems Ltd v Firebuy Ltd* [2007] EWHC 2179 (Ch) at [212] and Flaux J in *J Varney and Sons Waste Management Ltd v Hertfordshire CC* [2010] EWHC 1404 (QB) at [232]-[235] citing *Monro v Revenue and Customs Commissioners* [2008] EWCA Civ 306 .”

467 Accordingly, MEL cannot use an implied contract to extend the three-month limitation period in the Regulations. In any event I agree with Mr. Williams that the implied contract claim adds nothing to the claim under the Regulations.”

Implied contracts are firmly recognized in jurisprudence, however, the precise extent of their obligations as well as the inter-relationship with parallel causes of action, particularly with regards to time-limits, are not settled in case law.

9.2.4 Misfeasance in public office

Misfeasance in public office was an additional possible cause of action recognized in *Harmon* through which an aggrieved tenderer could claim damages. Generally, this tort requires an intentional unlawful act or omission risking injury.⁴¹³ Due to the ‘bad faith’ requirement, this cause of action is regarded as quite onerous to deliver any advantages to an aggrieved tenderer.⁴¹⁴

In *Harmon*⁴¹⁵ the court considered misfeasance, building on the authority of the *Three Rivers* case in order to assess the knowledge that acts were unlawful and knowledge or foresight of the probable injury to the plaintiff.⁴¹⁶ The court concluded that the main person responsible for the new parliamentary building project, Mr. Makepeace, was to be regarded as a public official and continued: “In my judgment, it is thus clear that Mr. Makepeace had more than merely well founded doubts about the propriety of the process leading to the

⁴¹³ S. ARROWSMITH, *The Law of Public and Utilities Procurement* (Sweet & Maxwell, 2005), 1379-1380.

⁴¹⁴ M. BOWSER & P. MOSER, 'Damages for breach of the EC public procurement rules in the UK', (2006) *Public Procurement Law Review*, 195.

⁴¹⁵ *Harmon*, on the issue of misfeasance in public office, see 241-256.

⁴¹⁶ *Three Rivers District Council v Bank of England* [1999] EU LR 211. The categories by which to assess knowledge are actual knowledge, willfully shutting one’s eyes to the obvious or willfully and recklessly failing to make inquiries that an honest and reasonable man would make.

award of the contract to Seele/Alvis for Option B2 without proper competition” (para 256). Although Mr. Makepeace was aware of legal problems, he did not seek legal advice. In that, he was at least to be regarded as reckless.⁴¹⁷ Therefore, misfeasance in public office was an additional head under which the House of Commons was held liable.⁴¹⁸

9.2.5 The lost chance in the UK as a causality criterion

Instead of the balance of probabilities, *Harmon* addressed causality through the lost chance theory. The lost chance was understood in the form of proportional liability. The court applied *Allied Maples Group*⁴¹⁹. Regarding the heads of damages for both lost profits and bid costs, the court in *Harmon* held, in a statement worth quoting at length:

In summary therefore Harmon is entitled to recover its tender costs, taken by themselves, on the grounds that it ought to have been awarded the contract and would then have recovered its costs. If, notwithstanding, H of C had decided to place the contract elsewhere then Harmon would have been deprived of the chance of recovering its costs. I assess that chance as virtually certain - say 90% - for I do not consider H of C would have been so perverse as not to accept Harmon's tender. It is not therefore truly an expression of a chance for the purposes of "loss of a chance" but more of probability. If H of C had decided to go for some other course such as to award the contract on the basis of a version of Option B2, but after giving the other tenderers the opportunity to tender on the basis of that option or to award it on the basis of a performance specification complying with certain design criteria but with the detailed design being provided by the tenderer, I consider Harmon would have stood as good a chance as any and better than most of being awarded the contract. Unlike the primary scenario (lowest price) there can be no certainty but there is surely a real and substantive chance that Harmon would have been awarded the contract. I therefore assess its chance of doing as 70%. (I develop my reasons later.) I consider it quite improbable that H of C would run the risks inherent in starting all over again, but would have accepted Harmon's tender which was the lowest. Harmon's capabilities were denigrated solely to advance Seele/Alvis and Option B2.

⁴¹⁷ The incident also entailed a parliamentary investigation published in the *Report of the Inquiry into Harmon v Corporate Officer of the House of Commons* by Sir Thomas Legg and Mr. Peter Bosworth, available at <http://www.parliament.uk/documents/foi/foi-2012-Sir-Thomas-Legg-report-March-2000-F12-349.pdf>.

⁴¹⁸ Deceit is another possible cause of action, which was considered in *Montpellier Estates Ltd v Leeds City Council* [2013] WL 425703. Again, the burden of proof is so onerous that breaches of the regulations are probably easier to establish. A possible advantage might lie in the much longer time limits.

⁴¹⁹ *Allied Maples Group v. Simmons & Simmons* [1995] 3 All ER 907. In *Allied Maples Group*, Stuart Smith L.J. had distinguished three scenarios to establish the causal link. The first is the question of causation as a historical fact, or its dependence on future uncertain events. The causality of these two ought to be judged according to the balance of probabilities test. In a third category, involving the hypothetical actions of third parties, the plaintiff only needed to succeed in showing that he had a “substantial chance rather than a speculative one” (pages 914-916 thereof).

On one hand, the UK jurisprudence therefore quite strongly supports the idea of the ‘true’ proportional lost chance theory. However, in strands of law other than public procurement this approach is highly contentious. While the procurement authority is clearly stated, it remains a fact that *Harmon* does not – even several years after pronouncement – have a sufficient number of follow-up cases to warrant a statement to the effect that the lost chance doctrine is consistently applied. In addition, apart from the existential question of whether a court may make use of the lost chance doctrine, the question of how probabilities are assessed remains entirely open.

Causality between breach and loss is regularly addressed in the lost chance theory. “The bidder will be able to show that a breach of duty will cause him to suffer loss or damage, or the risk of loss or damage, if he had a chance (which the law recognises sufficiently good to merit consideration) that if the breach had not been committed, the contract would be awarded to it and the breach causes the bidder to lose that chance: *Matra Communications SA v Home Office*.”⁴²⁰

Not every breach has the required material effect on the position of a tenderer, and hence not every breach results in the possibility of an action for damages. For example, “[a]s regards that limited instance of breach, it would have made no difference to the outcome of the tendering process so far as Varney is concerned and, therefore, it is difficult to see what, if any, damages Varney has suffered as a consequence of that breach.”⁴²¹

In *Letting International*, the court held that “the claimant is not precluded from claiming that there has been a breach of regulation 30 provided that it can show that it has suffered in the words of Moore- Bick LJ “the loss of a significant chance of obtaining the contract” and it is unnecessary to show actual loss.”⁴²²

In *Mears*, the court assessed the chances for several alleged breaches independently. It found:

⁴²⁰ *Mears Ltd v Leeds City Council* (No 2) [2011] EWHC 1031 (TCC), para 209.

⁴²¹ *J Varney & Sons Waste Management Ltd v Hertfordshire CC* [2010] WL 2131723.

⁴²² *Letting International Ltd v Newham LBC* [2008] WL 2696950, para 141.

“At this stage I consider that there is a real or significant, rather than a fanciful chance that Mears would have been successful given that Mears and the other tenderers were not provided with the weightings to be applied and with knowledge of the correct weightings the tenderers would have had the opportunity to concentrate on the answers to the questions which gave the greater share of the marks. Mr. Small's analysis for the questions where Mears complained about the Model Answers shows that Mears would have been able to narrow the gap but not sufficiently to achieve third place, just by taking account of those limited questions. That supports the view that, on the current evidence, there is more than a fanciful chance. Such a finding does not pre-determine what might be the outcome on a full analysis but is sufficient for me to decide that, in principle, Mears is entitled to relief under the Regulations.”⁴²³

Therefore, in the UK, if one takes a closer look at the lost chance theory, it is used in a variable number of ways in relation to procurement damages claims. The principal authority of *Harmon* used a probability approach in relation to the lost chance. In other cases, causal losses were required to be proven (*Varney*) or - more favorably to aggrieved tenderers - the lost chance was seen as an independent loss (*Letting International*).

9.3 JUSTICIABILITY OF DAMAGES CLAIMS

9.3.1 Informing the contracting authority prior to damages claim is no longer necessary

Prior to the Amendment Regulations of 2009 which transposed Directive 2007/66, aggrieved tenderers had to inform the contracting authority - before pursuing litigation – of their intention to bring proceedings under the Regulations, pursuant to old 47(7)(a)⁴²⁴. The information given had to identify the regulation⁴²⁵ and the alleged breaches.⁴²⁶ This

⁴²³ *Mears Ltd v Leeds City Council* [2011] WL 5105153, para 214.

⁴²⁴ The regulation stated:

(7) Proceedings under this regulation must not be brought unless— (a) the economic operator bringing the proceedings has informed the contracting authority or concessionaire, as the case may be, of the breach or apprehended breach of the duty owed to it in accordance with paragraph (1) or (2) by that contracting authority or concessionaire and of its intention to bring proceedings under this regulation in respect of it; and (b) those proceedings are brought promptly and in any event within 3 months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending the period within which proceedings may be brought.

⁴²⁵ See para 48 of *M Holleran Ltd v Severn Trent Water Ltd* *M Holleran Ltd v Severn Trent Water Ltd* [2004] EWHC 2508 (Comm), referring to *Luck v London Borough Tower Hamlets* [2003] 2 CMLR 12.

⁴²⁶ For the requirement to have brought a complaint, see the case *Luck v London Borough Tower Hamlets* [2003] 2 CMLR 12, discussing the information requirement which used to be 32(4) of the 1993 Regulations. The Court found that plaintiff had not complied with information duties in

requirement has since been dropped. The requirement in regulation 47D(6) now dictates that “proceedings are to be regarded as started when the claim form is issued.”

9.3.2 *De minimis*/threshold

For an EU law obligation to arise, either the financial thresholds of the Regulations must be met, or the contract must have a certain cross-border interest.⁴²⁷ This is of consequence for the remedy of damages to be available. For example the defendants in *Sidey* argued that “[t]he breach of a legitimate expectation did not give rise to a right in damages and gave no more to a right to a declaratory conclusion.”⁴²⁸ In *Sidey*, the court concluded against a cross-border interest, and based this on the nature and the value of the contract, but also on the professional appreciation of the respondent’s procurement officer.⁴²⁹

9.3.3 Standing

Regulation 47C(1) of the Public Contracts Regulations states: “A breach of the duty owed in accordance with paragraph (1) or (2) is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage and those proceedings shall be brought in the High Court.”

The court referred to the AG in *Nachrichtenagentur GMBH C-454/06*⁴³⁰ in a case challenging the London ticketing service, judging that the possibility of harm must be presumed where not manifestly excluded.⁴³¹

para 32: “In the present case the solicitors’ letters identified neither the regulation in question (“this regulation”, i.e. reg 32 of the 1993 Regulations), nor “the breach or apprehended breach of the duty owed to him”. Therefore, subject to the next issue, any claim under the Regulations is barred.” The issue of whether the claimant has properly informed the authorities was also dealt with, for example, in *Keymed Ltd v Forest Healthcare NHS Trust* [1998] EuLR 71, 90-91. The same rule in Utilities Regulation 32(4)(a) was considered in *M Holleran Ltd v Severn Trent Water Ltd* [2004] EWHC 2508 (Comm).

⁴²⁷ The Court applied the CJEU Joined Cases C-147/06 and C-148/06 *SECAP and Santorso* [2008] ECR I-3565 in *Sidey Ltd*, Re Judicial Review [2011] ScotCS CSOH 194, finding that there was no cross border interest.

⁴²⁸ *Sidey Ltd*, Re Judicial Review [2011] ScotCS CSOH 194, para 13.

⁴²⁹ “It seems to me that such employees familiar both with the nature and scope of the contract in question and with the placing of contracts of this sort in general would be likely to be aware whether or not a contract had the potential to generate any cross border interest.” Para 19, *Sidey Ltd*, Re Judicial Review [2011] ScotCS CSOH 194.

⁴³⁰ Case C-454/06 *pressetext Nachrichtenagentur* [2008] ECR I-4401.

9.3.4 Time limits

The 2011 Amendments changed the general time limit within which any court proceedings are to be started. The new time limit is set at 30 days from the date when the economic operator “first knew or ought to have known that grounds for starting the proceedings had arisen”. The courts have discretion to extend this time limit where they consider that there is a good reason for doing so,⁴³² but not to more than 3 months after the date when the economic operator had knowledge. The Amendments take into account the judgment of the CJEU in *Uniplex* which held certain features of the previously applicable time limits to be incompatible with EU Law.⁴³³

The time limits as provided for in the Regulation are now brought into line with respect to the starting point, which ordinarily requires “knowledge” of the breach (i.e. under s. 14A of the Limitation Act 1980). It was further disputed as to which event “grounds” refers to, i.e. knowledge of the infringement only or also of the resulting consequences and losses.⁴³⁴

⁴³¹ See the Opinion of the Advocate General in Case C-454/06 *pressetext Nachrichtenagentur* [2008] ECR I-4401, especially paragraphs 143 and 148. She pointed out that limited standing for applicants who had an interest in the relevant contract and who could show existing or imminent harm served to exclude applicants with no prospect of success but “the possibility of harm ... must be presumed where it is not manifestly excluded”. *Electronic Data Systems Ltd v Transport Trading Ltd* [2008] EWHC 2105 (QB), para 21.

⁴³² The reasons for exercising discretion are “the length of and reason for any delay; the extent to which the plaintiff is to blame for any delay; the extent to which the defendant may have induced or contributed to the delay; and whether the defendant has been or will be prejudiced by the delay or the grant of an extension”: *Keymed v Forest Health Care NHS Trust* [1998] Eu LR 71 at p 96B. It was also examined in *Gillen & Anor v Inverclyde Council* [2010] ScotCS CSOH 19. Also, “In exercising its discretion in such applications the court retains its duty to protect the right of access to the courts. However, there are special weightings which must be given. Thus the requirement under European and Irish law that such applications be brought rapidly is important. So too is the nature of the contract under review. This public contract calls into play the special importance of time and thus the nature of the prejudice to the parties if they are delayed. The court may also consider any prejudice to the public, the common good.” *Dekra Eireann Teoranta v. Minister for the Environment and Local Government* [2003] IESC 25.

⁴³³ The 2006 Regulations provided that proceedings must be brought within three months, but open the possibility of either shortening or lengthening that time period – where there is good reason to do so, or on the other hand, restricting it in cases where a tenderer may not be evaluated to have acted “promptly” enough, i.e. Regulation 2006 old Article 47(7)(b). *Uniplex* was applied in the *Sita* case, *Sita UK Ltd v Greater Manchester Waste Disposal Authority* (Rev 1) [2010] EWHC 680 (Ch).

⁴³⁴ An application for damages was time-barred in *Sita*, “He [counsel of pursuer] says that as a matter of construction that includes not merely the infringement (of which the complainant now has to be aware) but also the fact that loss has been caused.” *Sita UK Ltd v Greater Manchester Waste Disposal Authority* (Rev 1)

The question remains as to how the shorter statutory time limit should be read in relation to the longer time periods for both breach of statutory duty and implied contract – they both have a 6 year prescription period, but differ from each other in that the breach of statutory duty which was already at issue in the *Harmon* case would still rely on the Regulation, which promulgates the shorter time period, while implied contract would be a claim of action falling outside of the scope of the regulation. The issue is still open.⁴³⁵

Equivalence

The courts had to deal with the question of whether there was an equivalent comparator claim to a damages claim arising out of the (then) 1993 Regulations. The issue arose because it was argued that the shorter time limitation period of the Regulations would breach the principle of equivalence of time limitation periods for national causes of action. The proposed national equivalents were claimed for breach of statutory duty. This was rejected as simply too wide a category.⁴³⁶ In addition, damages claims under 19(7)(b) Local Government Act 1988 were proposed as an adequate comparator, but rejected because the objectives of the Act were much more limited. Also, the prohibitions of the Act were more specific, and while the Regulations draw up detailed procedural rules and grant damages in general, the Act was confined to tendering expenses.⁴³⁷

These findings of *Matra* were challenged by counsel, which argued that it was inappropriate to compare two entire legislative frameworks, that the correct approach was to look at the purpose of one remedy and compare it with another, and that a regulation 32 claim was no different from any other claim against a local authority. No adequate reason had been given as to why the "breach of statutory duty" was too broad a category.⁴³⁸ The

[2010] EWHC 680 (Ch), para 30. The standard was held to be "knowledge of the facts which apparently clearly indicate, though they need not absolutely prove, an infringement."

⁴³⁵ See M. BOWSER & P. MOSER, 'Damages for breach of the EC public procurement rules in the UK', (2006) *Public Procurement Law Review*, 195, fn 35.

⁴³⁶ Stressing the "need to find in the domestic law not merely a cause of action for reparation, but one for reparation of conduct of a public authority in the exercise of its powers." *Matra Communications v Home Office* [1999] 1 WLR 1646, (1659F-G).

⁴³⁷ *Matra Communications v Home Office* [1999] 1 WLR 1646.

⁴³⁸ *Gillen & Anor v Inverclyde Council* [2010] ScotCS CSOH 19, para 42.

challenges were rejected by the court, which held that, “[o]n that basis, a general claim for breach of statutory duty is in a different category and cannot be regarded as a comparator. It is more concerned with compensation, than rectification.”⁴³⁹

Overall, there are a number of damages claims which have been regarded as time-barred or in which an aggrieved tenderer failed to satisfy the old notification requirement. However, this fact demonstrates that aggrieved tenderers are increasingly considering litigation. Awareness of the very strict time-limits is now starting to build up, and in the future, actions will be brought in time, giving rise to substantial consideration on the merit of damages claims.

9.3.5 Access to Documents

Discovery in procurement proceedings was discussed in *Croft House Care*⁴⁴⁰ and the judge found that, in principle, tender documents may be confidential, in particular where third parties’ tender submissions are concerned. In *Science Research Council v Nassé*⁴⁴¹, the court held that “the ultimate test is whether disclosure and inspection is necessary for disposing fairly of the proceedings.” The court referred to this test again in para 34 of *Croft House Care*:

*“The principle as set out in Science Research Council v Nassé [1980] AC 1028 requires a balancing exercise. Similarly in the Varec case [2008] ECR I-581 , para 47 it was said that there had to be balance between the right to confidentiality and the need for the claims to be disposed of fairly. As Coulson J pointed out in Amaryllis v HM Treasury (No 2) [2009] BLR 425, *374 para 52 the ruling in the Varec case is simply a case where, in considering the public interest in open administration of justice and the interest in maintaining commercial confidentiality, the facts of that case led the court to find that the commercial confidentiality of the businesses’ secrets outweighed the other interest.”*

Although the judge considered the *Varec* ECJ case, it distinguished it on the grounds of the different interests at stake. *Varec* balanced the public interest in open administration of justice with commercial confidentiality. In *Croft House Care*, on the other hand, the balancing concerned “the right of third parties to confidentiality against the necessity for the

⁴³⁹ *Gillen & Anor v Inverclyde Council* [2010] ScotCS CSOH 19, para 44.

⁴⁴⁰ *Croft House Care Ltd & Ors v Durham County Council* [2010] EWHC 909 (TCC).

⁴⁴¹ *Science Research Council v Nassé* [1980] AC 1028.

documents to be provided for the purpose of a fair trial”.⁴⁴² Based on the facts, the *Croft House Care* case differed because of the unaccomplished state of the procurement process therein, which would have meant that disclosure would inhibit the possibility of conducting the tendering process again properly.

Elaborate discussions have taken place concerning a so-called confidentiality ring, in particular the practical impossibility of this option in small business circles, where it would be difficult to appoint one director with confidentially oversight who would consequently not be involved in future tenders.

66. “I have therefore come to the conclusion on the facts of this case that the need for an effective review of the procurement process, including as part of that review, the need in this case under CPR Part 31 for documents to be disclosed to and inspected by the directors and personnel of the Claimants if there is to be a fair hearing, is dominant in the balancing exercise which I have to perform. I do not accept that there is any insurmountable difficulty or impracticality in the Council re-running, if necessary, the procurement process though they will certainly need to review that process in the light of any decision which has then been made by the court and the extent to which information has been provided to and reviewed by some potential tenderers and not others. That however is all part of the necessary decision which the Council would have to make when deciding on the principles and details of any new procurement process.

67. What is not acceptable is that a party should be precluded from an effective remedy because of concerns that, if the remedy is granted, there may be difficulties in re-running the procurement process. Whilst in some cases it might be necessary and permissible to impose a confidentiality ring, that is not a solution which can apply to the Claimants in the circumstances of this case. Such a process would be unfair to the Claimants who are small family businesses without large and elaborate administrative structures and where the appointment of a person to act within the confidentiality ring is not a practical possibility.”⁴⁴³

The cases of discovery are too extensive to cover exhaustively. However, the selected samples are a good indication of the kind of balancing the courts undertake and the fact that procedural justice values are inherent in the kinds of compromises struck. The nature of the enterprise is one closely related to the facts at issue, and this illustrates the particularization function of procedural law – i.e. the tailoring of applicable laws to the individual circumstances of individual cases.

⁴⁴² *Croft House Care Ltd & Ors v Durham County Council* [2010] EWHC 909 (TCC), para 43.

⁴⁴³ S. ROE & D. HARVEY, 'Public Procurement 2011', in, *Getting the Deal Through* (Sweet & Maxwell, 2011).

9.4 QUANTIFICATION

It has been already noted that the *Harmon* decision remains the principal decision in a successful damages suit. Many damages claims have failed due to time limits⁴⁴⁴ or the old notification requirement,⁴⁴⁵ while in others, it was simply that no (sufficient) violation of the procurement rules was determined.⁴⁴⁶

In *Mears*, the court found the plaintiff to deserve damages, but did not enter into a discussion of the extent of the latter. Among the already small number of cases it is even rarer for the court to enter into the question of heads of damages.

9.4.1 Available Heads of Damages

The judge in *Harmon* held that it was not necessary to distinguish the bases of the claims (i.e. statutory breach or other obligations) in order to assess the damages.⁴⁴⁷

Tender costs and lost profit

If damages are assessed on the basis of tort, then the claimant is to be put in the position that he would have been in had the tort not occurred. The question is whether this means that the positive lawful act replaces the wrongful action or not. For tendering procedures, this translates into a drastic change in the hypothetical assessment of the claimant's position: s/he is put in a position as though the tender procedure had never occurred. This would typically mean the possibility of recovering bid costs, but only those. In the alternative scenario, where the position is the lawful continuation of the tender procedure, lost profits

⁴⁴⁴ For example, *Sita UK Ltd v Greater Manchester Waste Disposal Authority* (Rev 1) [2010] EWHC 680 (Ch).

⁴⁴⁵ For example, *Gillen & Anor v Inverclyde Council* [2010] ScotCS CSOH 19.

⁴⁴⁶ See, for example, *Brent London Borough Council v Risk Management Partners Ltd* [2009] EWCA 490. In lower instances the damages claim was upheld, but judgment was overturned by the Supreme Court, stating that the contracting authority would be allowed to benefit from the *Teckal* exemption.

⁴⁴⁷ *Harmon*, para 302.

would be awarded, but calculated as income through the contract, minus costs. The correct hypothetical comparator is also subject to some disagreement in the UK.⁴⁴⁸

In the *Harmon* case, the general issue was whether the plaintiff was entitled to recover tender costs, gross margin, or loss of profit damages.⁴⁴⁹ In *Harmon II*, the judge made clear that “Had Harmon been awarded the contract then it would have recovered the costs of tendering from the amounts paid to it under the contract. Accordingly this claim is relevant only if nothing is awarded in respect of loss of gross margin”.⁴⁵⁰

The judge awarded tender costs in full because it was found to be “virtually certain” that the claimant would have obtained the contract, but specified that this was not an assessment of the ‘strength’ of a chance, but an expression of probability. Only in a hypothetical argument does the judge in fact lower that probability to an ‘uncertain’ chance, and hence to an expression of a lost chance of 70%, for which he would have granted 70% compensation.⁴⁵¹

The fact that the lost profits were made available to the aggrieved tenderer was due to the consideration that despite being a claim for ‘statutory breach’, the “opportunity to be awarded a contract” struck the judge as a contractual one – hence requiring the tenderer to be put into the position he would have been in without the breach of contract. As a contractual remedy, this head of damage can include pure economic losses such as prospective profits.⁴⁵²

⁴⁴⁸ Arrowsmith interprets the rightful position to be one in which the procedure would have been lawfully conducted. This is criticizable from a contractual point of view under fn 81, citing Bowsher, arguing that damages ought to be limited to bidding costs, as though the procedure had not occurred. This view is based on the argument that a contracting authority cannot be required (from a private law point of view) to award a contract at all. S. ARROWSMITH, *The Law of Public and Utilities Procurement* (Sweet & Maxwell, 2005), 1381.

⁴⁴⁹ *Harmon*, issue 26.

⁴⁵⁰ *Harmon CFEM Facades (UK) Ltd v. The Corporate Officer of the House of Commons* [2000] EWHC Technology 84, para 18, (‘*Harmon II*’).

⁴⁵¹ M. BOWSHER & P. MOSER, ‘Damages for breach of the EC public procurement rules in the United Kingdom’, (2006) *Public Procurement Law Review*, 195, 207.

⁴⁵² M. BOWSHER & P. MOSER, ‘Damages for breach of the EC public procurement rules in the United Kingdom’, (2006) *Public Procurement Law Review*, 195.

In *Aquatron*, the court awarded £122,149.20 pounds sterling (GBP) in damages for lost profits. The bid submitted by the tenderer was £222,300 GBP for a three-year contract for service and repair of breathing apparatus compressors to be tendered in an open procedure. The contract was to be awarded under the “economically most advantageous” option, which requires the call for tenders to specify the criteria to be used in the evaluation. As the contracting authority used criteria which had not been previously specified, it had breached the Procurement Regulations. After establishing the breaches, the court continued to examine whether “losses flowed to the pursuers as a result of their exclusion prior to the evaluation stage” (para 93). The court proceeded to make a comparative evaluation of the tenders between Aquatron (claimant) and MB Air Systems (the other remaining competitor). Significantly, the court found that none of the published criteria were pertinent for a contract such as the one at issue – with the exception of the price criterion. Therefore the price was regarded by the court to be the only decisive criterion for the hypothetical comparative evaluation of tenders. Since Aquatron’s bid was lower, the court concluded that it should have been awarded the contract.

Interestingly, the court makes an *a contrario* argument: “Even if a much wider number of considerations were permissible, such as quality and technical merit, the pursuers’ tender *would still have stood at least an even chance* of acceptance and I would have regarded it as open to the court *to make an award for the loss of such a chance* on the basis that a claim for loss of a chance to obtain a contract is included in averments claiming the full contract value. I would have assessed this loss at half of that contract value.” (para 103).

Overall, the cases in which lost profits have successfully been awarded remain extremely isolated. However, in several instances the courts have only ruled on the liability of the contracting authority, leaving the assessment of damages to a potential settlement process.

Aggravated damages

In *Harmon*, the aggrieved tenderer claimed damages not only regarding bid costs and lost profit, but also aggravated/exemplary damages. The latter was refused, and the judge did not award aggravated damages because it was “a bad case but not exceptional (...) and not

unconstitutional”.⁴⁵³ However, in principle, misfeasance actions can give rise to aggravated damages.

*Interest rates in the UK*⁴⁵⁴

There is overall uncertainty and broad discretion enjoyed by the courts with regard to interest rates generally, and also to claims in public procurement disputes.

CPR rule 16.4(1)(b) and (2) require the claimant to state that he is seeking interest, on what basis and for what periods, at what rate. In the *Harmon* litigation, for example, the question of the applicability of interest was raised by both parties, although the issue was excluded. The applicants applied for an 8% statutory margin, while for example in respect of tender costs, the defendant had offered Harmon an interim payment that was based at 2.5% above the base rate of 1 July 1995⁴⁵⁵.

Legal costs

The successful plaintiff does not always recover all legal costs connected to a procurement action. The cost order can be reduced, as happened in *Mears*:

*“Therefore, a proportionate costs order was appropriate to reflect the extent to which the successful party had not been selective in the points it had taken and should not recover all of its costs, Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd [2008] EWHC 2280 (TCC), 122 Con. L.R. 88 and BSkyB Ltd v HP Enterprise Services UK Ltd [2010] EWHC 862 (TCC), 131 Con. L.R. 42 applied. A substantial discount of 65 per cent was required to reflect the significant issues on which the local authority had succeeded balanced against the fact that M was the successful party overall.”*⁴⁵⁶

Therefore the legal costs can take into account the success of plaintiffs in the overall number of claims.

9.4.2 Valuation

In *Harmon*, the judge discussed many damages issues, but main quantification questions were excluded, such as those concerning the costs of the bid preparation, what the gross

⁴⁵³ *Harmon*, para 359.

⁴⁵⁴ This issue is also discussed as a case study in the horizontal comparative part, see Chapter 12.2.3.

⁴⁵⁵ Which was 6.75%, which with the additional 2.5% amounts to a 9.25% rate of interest.

⁴⁵⁶ *Mears Ltd v Leeds City Council* (No 2) [2011] EWHC 1031 (TCC); WL 5105153.

margin was and which components thereof were recoverable. Was the plaintiff entitled to damages through a gross margin or by reference to the profit that would have been earned if it had carried out the fenestration tender? And, on the basis of the lost chance, if damages were made out to be a proportion of gross margin or lost profit, what proportion ought this to be? ⁴⁵⁷

In addition, in proceeding to quantify, the judge found that the estimated profit by Harmon would have to be tested against the events which actually occurred when the successful tenderer performed the contract.⁴⁵⁸ The defendants also argued that the intra group margins (of 25%) gained by other group companies could not be recovered. This was rejected.

Further, in the few cases in which damages have been awarded,⁴⁵⁹ there is often no further discussion of the quantification aspect. In *Harmon* we have an illustration of the quantification, which is confined to percentages of the final amount. The amount itself, however, was first left to the settlement between the parties. The judge did address this again in *Harmon II*, which almost read as a pre-trial quantification discovery.

On lost profit

In *Harmon*, the court established a profit margin of between £4.5 and £5.4 million GBP, a base estimation that the court also relied on in *Harmon II* in order to address the question of how much of an interim payment it would be able to grant (interim payments basically being made up only to amounts as can be securely assumed to be granted in a procedure for the “precise” calculation of the amount).

The judge assesses the margin to represent the order of 15%, which he finds “one would expect for specialist work of this kind carried out by major contractors where

⁴⁵⁷ These were issues 12, 15 and 21 respectively.

⁴⁵⁸ *Harmon*, para 308.

⁴⁵⁹ For example *Mears Ltd v Leeds City Council (No 2)* [2011] EWHC 1031 (TCC); WL 5105153 in which the judge, in the face of insufficiently clear criteria, concluded that the claimant had had a “real or significant as opposed to a fanciful chance that Mears would have been selected” for the next stage of the tender. However, the amount of damages was not discussed.

relatively high net profits are to be sought to counter the significant risks encountered during carrying out such work and, of course, the nature of the industry”⁴⁶⁰

In para 314 of *Harmon*, the judge indicated that some of the overhead costs claimed by Harmon would have to be valued against whether Harmon in fact mitigated its losses or whether it could have taken on more work. The duty to mitigate losses was, however, one of the excluded issues. In *Harmon II* the judge again referred to these losses, but unconvinced of the evidence (and given that he was only judging the interim payment) he based his assessment on the most conservative figure he arrived at for gross margin of £4.5 million GBP. The base of £4.5 million was adjusted by several factors,⁴⁶¹ yielding around £5 million GBP. Taking into account the nature of the interim payment proceedings, he adjusted this figure by 25%, which the judge assessed to be the maximum adjustment possible in a final judgment. Further, he held that had Harmon been awarded the contract, it would not have gone into liquidation, and would have made a profit of £3.7 million ($4.5 - [4.5 \times 25\%]$). Of this, the judge estimated Harmon to be able to recover one third (which was granted at 100%, along with 25% of the remainder of the balance), resulting in an interim payment of £1,846,466GBP. Clearly, as concerns the interim payment, the judge relied on a more precise calculation of the relevant items in a final trial concerning the quantification.

In *Aquatron*, the losses were calculated on the basis of income generated by the contract, broken up into annual amounts, plus additional income on the basis of extra work. The figures were deduced by costs (i.e. labor costs, adjusted by overheads, multiplied by actual hours of service).

The lost chance quantification

It must be pointed out, regarding the percentages of the final damage amount, that the judges’ estimate is rather rough. Specifically the reduction in the amount of damages for risk and hazards inherent to a sector by 35% is a significant part of the ultimate damages award.

On the lost chance, the judge estimated:

⁴⁶⁰ *Harmon*, para 294.

⁴⁶¹ Provisional sums, variations, claims and currency. This sum excluded (para 296 of *Harmon*) running costs, overheads and contingencies such as payments to OMC.

320. On the other hand it remains important to distinguish between the evaluation of the loss of chance of "success" i.e. being awarded the contract, and the probability that the whole of the likely profit might be recovered. In my judgment Mr. Fernyhough's approach both recognised this distinction and was sensible and practical. He submitted that all that was here required was to make an assessment of the probability of the profit being earned. He suggested that it might be reduced by 50% to illustrate the risks and hazards inherent in construction work. In my view this is realistic and conservative and I agree with it since it is in my view a reasonable assessment, entirely consistent with experience of the incidence of risk on work of this kind. I therefore answer this issue: 35%.

The judge ruled that the lost chance was to be established by reference to a proportion of the lost profit or gross margin, in this case 35%. This assessment was based on rather rough assessments of the kinds of risks inherent to the specific sector. The issue was therefore subject to a significant degree of court discretion. Applied to the base figure of £4.5 million, this yielded an amount of £1.7 million, of which a reasonable proportion was to be accorded in the amount of 75%; so the final figure was £1.3 million. However this amount was alternative to the others (bid cost and lost chance) and therefore to Harmon's first claim – the loss of gross margin.

In *Aquatron*, the court did not consider the assessment of the lost chance, as it found in a comparative evaluation of the tenders that the plaintiff ought to have been awarded the contract. The court stated that even with greater discretion regarding quality and technical merit, based on a comparative evaluation between its tender and the competitor's tender (a third party was excluded due to insufficient certification), the plaintiff would have stood at least an even chance of acceptance. The judge stated in an *obiter dictum* that he would then have assessed the loss at half the contract value.⁴⁶²

Sums awarded

To give an illustration of the large sums that public tenders and the associated losses can run up to, consider that in an (unsuccessful) action the claimant had threatened action "(...) to claim damages for loss of opportunity on future profits (circa £90m NPV) and wasted bid costs (circa £2.5m)."⁴⁶³

⁴⁶² *Aquatron Marine (t/a Quatron Breathing Air Systems) v Stratchyde Fire Board* [2007] ScotCS CSOH 185, para 103.

⁴⁶³ *Sita UK Ltd v Greater Manchester Waste Disposal Authority (Rev 1)* [2010] EWHC 680 (Ch), para 94.

The *Harmon* case had left main quantification issues open. It was followed by the *Harmon II* case, which was the application for an interim payment. Although the ultimate decision on damages would be taken at a later full trial stage, as the judge noted, the parties saw the interim application as a first opportunity to test the quantification value of Harmon's claim. The issue was complex as Harmon had gone into liquidation in the meantime. Clearly, main evidence as concerning the financial value of Harmon's claim was still lacking. The judge, as it concerned an application for an interim payment, based himself on a conservative estimate of the claim base, excluding several factors which would have positively influenced the amount claimable by Harmon and deducted an additional 35% margin for risk. The amount was estimated by the court and the judge ordered an interim order of 75% of £1,848,456 GBP. The amount of £1.3 million was alternative to the others (bid cost and lost chance) and therefore to Harmon's first claim – the loss of gross margin.

One rare recent successful case is the Scottish *Aquatron Marine* case.⁴⁶⁴ The court awarded £122,149.20 GBP in damages for lost profit. This figure was made up of a total loss over the three years of £109,555.20, plus interest of £12,594 at 4% per annum. The estimate is based on the contract works of £222,300, less the cost of those works. The costs were based on the previous contract carried out for the defendant. The annual contract value of £74,100 minus the estimated work costs of £37,581.60 left an annual loss of £36,518.40 GBP.

9.5 CONCLUSIONS

In theory, the evaluation of the UK system of damages ought to be quite favorable as, demonstrably, several causes of action can give rise to successful damages claims. It is argued that, in the UK context, one might speak of an "altered (...) balance of power between tenderers and public sector purchasers".⁴⁶⁵ However, the UK situation is perplexing in some ways, because despite the seemingly very numerous possibilities in terms of causes

⁴⁶⁴ *Aquatron Marine (t/a Quatron Breathing Air Systems) v Stratchyde Fire Board* [2007] ScotCS CSOH 185.

⁴⁶⁵ M. BOWSER & P. MOSER, 'Damages for breach of the EC public procurement rules in the UK', (2006) *Public Procurement Law Review*, 195, 195.

of action that promise damages to aggrieved tenderers, the number of cases does not correspond. One might strongly suspect that willingness to bring challenges in general extends more to large projects, in which significant costs have already been incurred, especially at the stage of tendering.

10 INTERIM FINDINGS

10.1 SUMMARY OF FINDINGS

In this part, the jurisdictions covered are individually assessed before proceeding to a horizontal, transjurisdictional comparison. The analysis consists of a brief summary of the systems, an evaluation of the effectiveness of each of the systems based on doctrinal and empirical assessments, and a discussion of nationally discussed suggestions for change and revision. Indicators of the ‘effectiveness’ of a damages system are, for example, the certainty of doctrine, the empirical assessment of practitioners or business participants (perception studies), the kinds of claimable losses, onerous conditions precluding successful claims on a regular basis, and a comparison of the successful cases available (related to the potential number of breaches).

10.1.1 The German legal system of claiming damages

Theoretical availability

The German landscape of damages claims for breaches of public procurement rules is characterized by a number of parallel actions which allow the secondary protection of the aggrieved bidders’ rights. The multitude of available causes of action combines a statutory public procurement action that implements the damages article in the EU Directives with possible claims developed under *culpa in contrahendo* duties, and those based in one way or the other on the liability of the State.

Assessment of damages regime

In terms of effectiveness, the specific public procurement provision §126 GWB receives mixed acclaim. On one hand, the article provides for alleviation of the burden of proof or causality⁴⁶⁶ and thereby facilitates damages claims, while on the other hand it limits the recoverable heads of damage to the bid preparation costs only.

⁴⁶⁶ Depending how one chooses to conceptualise the “serious chance” requirement.

Attaining the positive interest or lost profits is possible only by means of other actions, and it is widely assessed that *culpa in contrahendo* remains the far more important action for damages - provided its conditions are met. The parallel causes of action create an overlap and discrepancies between the constitutive criteria of §126 GWB (no-fault required) and *culpa in contrahenda*, which requires fault. This mixes with the divergence of available heads of damages: §126 GWB granting (not even full) negative interest; *culpa in contrahendo* granting negative and potentially positive interest, but subject to more stringent constitutive criteria.

Dissatisfaction with the varied and often unclear distribution of claims procedures in Germany is pervasive. Most commentators criticize the damages claims as they currently stand for reasons of legal uncertainty – specifically regarding what constitutes a genuine chance. Further the overall amount of damages is perceived as inadequate, since the general §126 GWB provision limits the amount of recoverable damages to the bid preparation costs. It is regarded as of minor importance for legal practice.⁴⁶⁷ Further reaching claims for lost profit are extremely rare.⁴⁶⁸

Proposals for reform

One aspect of reform calls for a clarification of the constitutive criteria that give rise to a claim for damages, which would alleviate the current legal uncertainty caused by some of the jurisprudence rendered. In terms of substance, the following revisions to the constitutive criteria are proposed in order to make damages claims easier: first, a specification of the heads of damages to be claimed, or, reaching further, a (legislative⁴⁶⁹) clarification of an extension to positive interest where an aggrieved tender would have obtained the award in case of a correct procedure, so that reliance on the *culpa in contrahendo* doctrine would become futile. Secondly, giving up the fault requirement is generally proposed, and also

⁴⁶⁷ C. ALEXANDER, 'Vergaberechtlicher Schadensersatz gemäss §126 GWB', (2009) *Wettbewerb in Recht und Praxis*, 28 29.

⁴⁶⁸ H.-J. PRIEB & F. J. HÖLZL, 'Id quod interest! Schadensersatz im Vergaberecht nach der neuesten Rechtsprechung des EuGH und BGH', in Oliver Remien (ed), *Schadensersatz im europäischen Privat- und Wirtschaftsrecht* (Mohr Siebeck, 2012), .

⁴⁶⁹ W. IRMER, *Sekundärrechtsschutz und Schadensersatz im Vergaberecht* (Peter Lang, 2004) 313.

required by the CJEU for claims deriving from EU law.⁴⁷⁰ However, it is widely acknowledged that in most public procurement situations, the fault of the contracting authority is a given.⁴⁷¹ Improving legal certainty around the loss of chance is often advocated, potentially through a legislative clarification of the “loss of a chance” doctrine,⁴⁷² since the current narrow interpretation gives rise to concerns over whether it is in conformity with the EU law requirement of effectiveness.⁴⁷³

In procedural law, on the other hand, shifts in the burden of proof and the degree of proof would constitute valid mechanisms to facilitate the effectuation of damages claims. An aggrieved bidder will almost never be able to prove that he would have obtained a contract. A reversal of the burden of proof is suggested, following the example of German product liability – in addition, the notion that European law could regulate evidentiary rules is not novel.⁴⁷⁴

Péguret proposes the introduction of material law-based information rights, as well as amendments of a procedural nature, in order to make the realization of damages claims less unrealistic for tenderers.⁴⁷⁵ Informational (material) rights would alleviate the problems on two levels. First, at the level of the conditions giving rise for a valid claim of damages, and secondly in the form of a modified and weakened requirement of causality. However, these modifications will only alleviate the problems of realizing rights to damages in specific circumstances and case constellations.

⁴⁷⁰H.-J. PRIEB & F. J. HÖLZL, 'Drei Worte des EuGH: Schadensersatz ohne Verschulden! - Zur gemeinschaftsrechtskonformen Auslegung des §126 S. 1 GWB', (2011) 1 *Neue Zeitschrift für Baurecht und Vergaberecht*, 21

⁴⁷¹ M. DREHER, 'Die Kontrolle der Anwendung des Vergaberechts in Europa - Perspektiven und Leitlinien der Sicherstellung des Vergabebinnenmarkts', (1998) *EuZW*, 197, 200; Y. SCHNORBUS, 'Der Schadensersatzanspruch des Bieters bei der fehlerhaften Vergabe öffentlicher Aufträge', (1999), 77

⁴⁷² W. IRMER, *Sekundärrechtsschutz und Schadensersatz im Vergaberecht* (Peter Lang, 2004) 313.

⁴⁷³ H.-J. PRIEB & F. J. HÖLZL, 'Drei Worte des EuGH: Schadensersatz ohne Verschulden! - Zur gemeinschaftsrechtskonformen Auslegung des §126 S. 1 GWB', (2011) 1 *Neue Zeitschrift für Baurecht und Vergaberecht*, 21

⁴⁷⁴ M. DREHER, 'Die Kontrolle der Anwendung des Vergaberechts in Europa - Perspektiven und Leitlinien der Sicherstellung des Vergabebinnenmarkts', (1998) *EuZW*, 197 199 referring to Articles 4 and 7 of the Product liability directive or Article 2(7) of the Sectoral remedies directive.

⁴⁷⁵ K. PÉGURET, *Schadensersatzansprüche übergangener Bieter im Vergaberecht* (Jenaer Wissenschaftliche Verlagsgesellschaft, 2010).

Overall, judicial protection – as experienced by practicing lawyers – is perceived to be in need of a redesign in order to make it more efficient.⁴⁷⁶ Successful damages claims against contracting authorities were assessed as ‘rare’ by practitioners.⁴⁷⁷

10.1.2 Summary Netherlands

Theoretical availability

The Dutch legal system has a two-tier structure in which public procurement disputes may fall under either civil or administrative jurisdiction, the civil leg of which again offers two tracks for bringing procedures, the summary or the general procedure. The available action for damages is the general tort law provision.

Assessment of damages regime

The Dutch system for recognizing claims to damages, in a government commissioned report on judicial protection in public procurement in 2006, “may be candidly assumed” to be in conformity with European requirements.⁴⁷⁸ This is also the point of view of the legislator, which in its implementation of Directive 2007/66 not in the slightest questioned the general system of judicial protection in public procurement. The exception was the issue of arbitration, which became quite heavily discussed in both the parliamentary preparations as well as doctrine. We have argued above that the way in which arbitration is implemented may not conform with EU law.

Empirical data

The statistics partially show the very low degrees of compliance with public procurement rules, for example, at the level of local government and regarding services, it can be as low as 33%.⁴⁷⁹ Pervasive non-compliance means numerous breaches of EU procurement law are

⁴⁷⁶ H.-J. PRIEB & F. J. HÖLZL, 'Drei Worte des EuGH: Schadensersatz ohne Verschulden! - Zur gemeinschaftsrechtskonformen Auslegung des §126 S. 1 GWB', (2011) 1 *Neue Zeitschrift für Baurecht und Vergaberecht*, 21, 23. Not so Y. SCHNORBUS, 'Der Schadensersatzanspruch des Bieters bei der fehlerhaften Vergabe öffentlicher Aufträge', (1999), 77, 106.

⁴⁷⁷ For example H.-J. PRIEB & F. J. HÖLZL, 'Id quod interest! Schadensersatz im Vergaberecht nach der neuesten Rechtsprechung des EuGH und BGH', in Oliver Remien (ed), *Schadensersatz im europäischen Privat- und Wirtschaftsrecht* (Mohr Siebeck, 2012), although the opinion of Prieß is that also aggrieved bidders are not interested in damages claims.

⁴⁷⁸ J. M. HEBLY, E. T. DE BOER & F. G. WILMAN, *Rechtsbescherming bij aanbesteding* (Uitgeverij Paris, 2007).

⁴⁷⁹ HAUTE CONSULTING, *Groei in rechtmatigheid, Onderzoek rechtmatigheid gemeenten 2006*, (Zwanenburg, 2008).

occurring, indicating an equally high number of potential damages claims to be filed. Yet, it is estimated that only approximately 3% of tenderers have ever brought a dispute to court.⁴⁸⁰

Among jurists, it is widely recognized that there is a reluctance to litigate on the merits of damages.⁴⁸¹ This may be partially explained by the intimate business climate of a small jurisdiction that -in relations characterized by a high number of repeat players- eschews litigation in general. At the same time, interim proceedings abound. This may be due to firms having greater appreciation for the rapidity and cost-efficiency of the available interim procedures. Based on practitioners' experience, one cultural explanation may be that firms see litigation on the merits as more harmful than rapid litigation in interim procedures.⁴⁸² The behavioral predisposition of firms to litigate is greatly marked by the extent of "legalization" of business relations.⁴⁸³ At the same time, culture and law are also constitutive of each other. A predisposition to litigate is to a significant extent also determined by the onerous burden of proof, which diminishes the chances of success and the fact that the amount of damages granted are not commensurate to the risk involved in litigating.

Proposals for reform

The authors do observe a remarkably low number of aggrieved tenderers making use of that option – from a legal structural point of view they identify two important hinges, namely fixing the amount of damages and facilitating the burden of proof.⁴⁸⁴ The authors discuss the possibility of fixing damages at -for example- 1% of the value of a tender. The main criticism focused on encroaching into the capacities and discretion of judges, a pertinent argument for Dutch judges, who have the discretion make damages estimates. However, there are

⁴⁸⁰ *Memorie van Toelichting aanbestedingswet*, TK 2005-2006, 30 501, nr. 3 p. 24.

⁴⁸¹ J. M. HEBLY & F. G. WILMAN, 'Damages for Breach of Public Procurement Law. The Dutch Situation', in Duncan Fairgrieve & Francois Lichère (eds), *Public Procurement Law. Damages as an Effective Remedy*. (Hart Publishing, 2011), 87.

⁴⁸² J. M. HEBLY & F. G. WILMAN, 'Damages for Breach of Public Procurement Law. The Dutch Situation', in Duncan Fairgrieve & Francois Lichère (eds), *Public Procurement Law. Damages as an Effective Remedy*. (Hart Publishing, 2011), 88.

⁴⁸³ This opinion is noted in J. M. HEBLY & F. G. WILMAN, 'Damages for Breach of Public Procurement Law. The Dutch Situation', in Duncan Fairgrieve & Francois Lichère (eds), *Public Procurement Law. Damages as an Effective Remedy*. (Hart Publishing, 2011), 88, who foresee further legalization of public procurement litigation in the future.

⁴⁸⁴ J. M. HEBLY, E. T. DE BOER & F. G. WILMAN, *Rechtsbescherming bij aanbesteding* (Uitgeverij Paris, 2007).

other aspects of damages in which the Dutch judges' discretion in determining the extent of damages is already limited, such as, for example, Article 6:119 BW.⁴⁸⁵ Additionally, it was feared that this would set a precedent for other fields of law. The arguments as they were made relate to apprehension that EU law might encroach on procedural competences at the national level.

Overall, the Dutch context is marked by a high level of recognition that, empirically speaking, damages claims are not a regular course of action pursued by aggrieved tenderers. Despite the general recognition, the national legislator has not addressed this issue specifically.

10.1.3 French system summary

Theoretical availability

Under French law, the conditions giving rise to liability are i) fault, which however is established by illegality alone; ii) harm; and iii) causality, that is, a direct link between fault and harm. The doctrine of the lost chance is applied by the administrative courts, in variations of case law rendered in other areas of law (especially medical law) and the civil jurisdiction. A discussion of which variation of the doctrine is deployed is still ongoing, yet with the more recent case law one may conclude that the lost chance is not taken as an autonomous head of damage leading to true proportional liability. The determination of whether and which damages are awarded happens through a two step evaluation of the chances that an aggrieved tenderer had of actually obtaining a contract. This two step process involves, first of all, establishing whether an aggrieved bidder was deprived of all chances of being awarded a contract – usually where he would not have qualified at all for being awarded a contract. Secondly, the chance is qualitatively evaluated in relation to whether it was serious or not, which is assessed based on the circumstances of the case and the objective hypothetical prognosis of the individual scenario; an assessment which the judge is required to motivate.

⁴⁸⁵ J. M. HEBLY, E. T. DE BOER & F. G. WILMAN, *Rechtsbescherming bij aanbesteding* (Uitgeverij Paris, 2007) accepting the argument within the Dutch context.

As heads of damages, an aggrieved tenderer without any chance will receive no compensation; where he can prove he has not been deprived of any chance, the bid costs are rather easily granted by French courts in the wake of the illegality committed by the public authority alone. A serious chance usually leads to the award of lost profits. As to the types of losses that are claimable – while the judge has a large margin of discretion, the Conseil d’Etat has recently pronounced judgments providing guidance on the quantification of damages in public procurement. The margin of maneuver for judges narrowed, based on a two step calculation of first, the estimation of turnover, and second, the applicable profit rate.

Assessment of damages regime

The hurdles for claiming damages in France do not appear to be set very high, and easily grant an aggrieved bidder damages amounting to the net profit – a profit that accrues without the latter having to actually execute the contract with all the attached risks of the regular conduct of business. Whether or not this solution meets a standard of fairness is determined by the view one takes on whether the lost chance doctrine should be admissible in the law of (public) responsibility.

10.1.4 UK System Summary

Theoretical availability

The *theoretical* availability of damages in the UK is vast. *Harmon* established as main different causes of action: breach of statutory duty, implied contract and public misfeasance. Since *Harmon* is a rare but strong authority, what can be inferred from that particular case is that causation is handled in a rather mild way, allowing expressions of the lost chance where complete certainty in favor of the claimant cannot be established. In addition all, bid costs, lost profits, and legal fees were granted to the claimant. Despite *Harmon*, the literature is ambiguous concerning the question whether bid costs can be regularly claimed.⁴⁸⁶

⁴⁸⁶ M. TRYBUS, 'An overview of the United Kingdom Public Procurement Review and Remedies System with an Emphasis on England and Wales', in Steen Treumer & François Lichère (eds), *Enforcement of the EU public procurement rules* (DJØF Publishing, 2011), , 229; S. ARROWSMITH, *The Law of Public and Utilities Procurement* (Sweet & Maxwell, 2005), 1381 argues for a tort approach under which the tender is put in a position as though the tort had not occurred, which in many cases will preclude bid cost claims as they would have been made anyways.

Assessment of damages regime

Doctrinally, the case was welcomed, although it is argued that the implications of the judgment remain unclear considering that the quantification of damages was left open to a subsequent trial.⁴⁸⁷ Proposals for reforming the damages regime are not commonly voiced given that *Harmon* in theory opens many possibilities. That being said, it is also true that *Harmon* was judged some time ago and the conducted research showed that there have been only few damages actions successfully brought since. It has been remarked by some practitioners that even if this is not reflected in the number of actions brought, the strong stance taken by the court in delivering a clear and authoritative judgment in favor of the aggrieved tenderer has had a significant deterrent impact on contracting authorities, and has strengthened the tenderers' position.⁴⁸⁸

The present research did find that there is a steady rise in what was an initially low number of procurement actions being brought.⁴⁸⁹ One of the most prominent recent actions was the attempt of Alstöm to claim damages⁴⁹⁰, although ultimately unsuccessful as it was not deemed to constitute a utilities of the purposes of EU procurement law. Nevertheless the case can be interpreted as a sign that, increasingly, big players are willing to enter into litigation disputes for damages.

10.1.5 Moving the internal point of view to an abstract level

The answer to the global question of whether damages claims are available in the Member States will most likely be "yes, but...". At face value, damages claims are possible within the national legal orders. However, looking at the country studies, this is an unsatisfactory

⁴⁸⁷ D. PACHNOU, *The effectiveness of bidder remedies for enforcing the EC public procurement rules: a case study of the public works sector in the United Kingdom and Greece* (University of Nottingham, 2003), section 2.9.

⁴⁸⁸ As discussed among participants of the British Institute for International and Comparative Law conference 'Celebrating 20 Years of Francovich in the EU' held 17 November 2011.

⁴⁸⁹ On litigation, Craig and Trybus report a change in the litigation attitude, attributing increasing awareness of the availability of procurement remedies as one of the reasons. P. CRAIG & M. TRYBUS, 'Angleterre et Pays de Galles/England and Wales', in Rozen Noguellou, et al. (eds), *Droit comparé des contrats publics* (Bruylant, 2010), 358.

⁴⁹⁰ *Alstom Transport v Eurostar International & Siemens* [2011] EWHC 1828 .

description of the findings. A latent view exists in the national literature that something is awry about damages claims, which finds confirmation in the low number of national cases in which aggrieved bidders were successful in their damages claims. However, this finding is difficult to motivate, because in all jurisdictions damages claims are theoretically possible. Looking closer, the faultlines much depend on the frayed nature of damages claims. For example in the Netherlands, bid costs are not regularly claimable. Yet, since lost profits are available, it is difficult to assess the effectiveness of the damages regime in a simple question as to whether 'damages' are available. Similarly, in Germany only the statutory provision for bid costs does not have a fault criterion. Although 'damages' are available without fault, these are limited to bid costs only. Does this mean that the German implementation complies with the 'no fault' requirements under *Strabag*?

One of the prime findings of the country studies is that damages claims are not a concept capable of unitary definition. Instead, several 'issues' define the overall availability of damages at the same time.

Semantic theory discusses the relevance of relativity of terms, i.e. that the meaning of concepts derives from a relational understanding of their connected components.⁴⁹¹ This approach can be equally applied to legal concepts. The initial research conducted in the country studies builds the network of issues which, on an abstract level, make up the structure of 'damages'. It is almost meaningless to see rules in isolation, for example to consider whether lost profits are available, without considering the wider modalities for such claims. It is, in reality, impossible to understand damages as 'unitary' constructs, as the horizontal overview makes clear. The thesis therefore proposes to see them as a bundle of rules and to study their constitutive and quantificative criteria.

In the following, we unbundle the different sites of damages claims topically grouped together in three chapters. Chapter 11 covers systemic, institutional and constitutive

⁴⁹¹ E. F. KITTAY, 'Metaphor its cognitive force and linguistic structure', in, Clarendon library of logic and philosophy. (Clarendon, 1987) This is a highly simplified use of the approach of semantic theory, which as a field is much advanced. Overall, I think that important insights could be drawn for comparative law from this line of research, for example as concerns the notion of culture. Semantics could yield a better understanding of legal concepts, e.g. differences debated in notions of semantic field and frame.

criteria; Chapter 12 focuses on the quantification aspects of damages; while Chapter 13 discusses the lost chance in its multifaceted version, addressing at times causality, burden of proof and claimable losses.

Damages claims are structurally defined by systemic, institutional and constitutive factors. Very broadly, they are embedded in the national policy environment. Despite a 'unitary' policy-making body at EU level, the national level disposes of its very own policy sphere, which is often driven by independent factors. The damages legal process is further channeled through assigned fora, which also partially determine which (procedural) law is applicable. An issue which rarely receives attention at the national level is the issue of international private law, which determines the applicable law. The relevant national laws on the other hand allow for different actions through which damages may be claimed for violations of EU procurement rules. Causes of action greatly impact on the legal process and show significant divergence across jurisdictions. Next to tort-based claims, precontractual and statutory causes of action have been pertinent, next to more peripheral actions of the public misfeasance kind. Damages claims are fitted into very different types of claims, corresponding to different constitutive criteria for their success. In addition, procurement claims are conditioned by justiciability factors, such as standing and time limits. Lastly, fault requirements are discussed.

The last group covers issues relating to the quantification of damages. The quantification aspects of damages in particular have received little overall attention (which is starting to change, as the Oxera study on quantification in Competition law demonstrates, and most recently the damages proposal in the field of Competition law that was put forward by the European Commission). In public procurement, the knowledge of this part of the field is particularly sparse. Under quantification, first of all the different heads of damages or claimable losses are discussed. Different causes of action may attach to different claimable heads of damages. While the losses may be described in more or less fixed categories, the valuation methods thereof are very volatile. This goes hand in hand with the role of the judge to whom the responsibility for the ultimate estimation of damages may be assigned. Due to the highly particular and isolated nature of procurement law suits that succeed in claiming damages, the quantification aspects are highly unpredictable.

On a constitutive level, the prime factor determining the success of a damages action is how a legal system deals with the hypothetical nature of an aggrieved tenderer's possibility of winning a procurement procedure. A survey on a theoretical level brings out the notion that the lost chance operates equivocally as causality, burden of proof and head of damage requirement. At the same time, the lost chance appears to be a doctrine which is capable of providing a particularly suitable doctrinal solution for the factual situations which breaches of procurement law and the loss combination typically give rise to.

In the following part, the issues and depth of coverage were necessarily restricted by selection at the discretion of the author, keeping in balance relevance and resources. Overall, a problemistic approach was followed, guiding the inquiry to instances where internal uncertainty prevailed, differences between jurisdictions were pronounced, or tension with regards to EU law was foreseeable. Also examined is the extent to which EU law has developed requirements on the relevant items in order to indicate the degree to which specific sub-issues are determined at EU level, or open to national discretion.

The purpose of the horizontal issue based analysis is additionally a conceptual endeavor. It aims to provide an abstract and *a priori* understanding of the elements which frame damages. The abstraction is carried out by the use of case studies, overviews of EU requirements, and theory. In several instances the results of the comparative law overview are given by presenting one national jurisdiction in greater detail. These case studies are used variably, as examples or illustrations (for example, the discussion of the German *Schutznormtheorie*), or in order to enhance general statements through specificity (for example, the composition of arbitration awards in the Netherlands). Also, this section is written with the European point of view in mind. Sometimes a mere statement of the law for some jurisdictions was rationalized, if the discussion of one legal system in detail was suitable in order to discover the underlying qualitative issues of a given rule from the point of view of EU law. It is often the case that a particular rule has given rise to contention in one particular legal order but has gone relatively undisputed in other jurisdictions (as is the case for the award of interest). Lastly, and where possible, legal solutions have been combined with a theoretical perspective to enable a deeper understanding and as a reference point to allow the classification of differences.

11 PUBLIC PROCUREMENT DAMAGES ISSUE BASED ANALYSIS

Chapter 11 depicts the different factors which shape damages claims at the national level. It analyzes damages by considering the national policy making sphere, the institutional framework, the determination of the applicable law, various causes of action and the justiciability of public procurement norms (material conditions, standing, and prescription).

11.1 NATIONAL PUBLIC PROCUREMENT POLICY SPACE

EU policy making takes place in a multi-level policy making framework which means that European procurement policy coexists with the national legal policy sphere. Common EU policy is supplemented by the specificities of individual countries and by how the policy area (public procurement) and precise issue (damages) are perceived in the given national policy contexts.

11.1.1 Public agenda

To take a prominent example, Dutch procurement policy was incisively marked by a construction sector scandal (see box below). The discovery of systemic fraud in the sector prompted a national outcry denouncing pervasive corruption practices that put compliance with public procurement rules in the spotlight. Empirical compliance studies were commissioned, which entailed a study on judicial protection in public procurement bringing forward a rather devastating assessment on juridical availability, but also the dearth thereof in praxis, for damages claims in the Netherlands.⁴⁹²

Policy context of legal relevance: The Dutch construction sector scandal

The lack of attention for public procurement in the Netherlands was evident, and after passing the implementation acts in 1992, as an area of law it had been lying fallow. It was the construction sector scandal which brought the topic to the attention of the public. The public found itself facing systemic corruption, shadow accounting, tax evasion and fraud, and of course persistent and systemic violations of public procurement and competition law rules. The first step was the commission of the “Enquete Bouwnijverheid” which examined the nature of the beast,

⁴⁹² J. M. HEBLY, E. T. DE BOER & F. G. WILMAN, *Rechtsbescherming bij aanbesteding* (Uitgeverij Paris, 2007).

identified weaknesses and proposed solutions. Additional compliance studies were being drawn up on a biannual basis in the “*Nalevingsreport*” for 2002 – 2008 so far.⁴⁹³ In addition, under the initiative “*Rechtmatigheid Gemeenten*”, several categories of contracting authorities are subject to annual accountants’ declarations which also have to assess the legality of accounts, among others with public procurement rules. Under this initiative, some statistical data is available on the compliance of municipalities, as well as provinces, with *waterschappen* to come under the same duty by 2009.

Clearly, the fact that public procurement started to be higher on the public agenda influenced the policy making process to a significant extent. Compliance studies for the first time provided an estimate of the extent to which contracting authorities across the Netherlands followed public procurement rules. In addition, several legislative initiatives were taken which relate to the reporting and auditing duties of public authorities. Such general policy measures can act as an additional deterrent, and encourage compliance.

11.1.2 Structural implementation

Another important aspect of national policy making is the way in which a Member State chooses to implement EU law. The procurement directive is a very good illustration of the highly divergent ways in which the systemic legal interface between national and EU law can be designed. One of the most striking differences in the jurisdictions surveyed concerned the means of implementing actions for damages: ‘structural coupling’, i.e. the way to assure transposition of EU rules into the domestic systems, exhibited strong variations. Germany passed a specific provision to deal with public procurement damages. The Netherlands, on the other hand, ‘implemented’ through non-implementation - in the sense that the very general tort law scheme which covers Member State liability equally governs public procurement damages claims. In France, the situation at face value is similar, namely the resort to a general liability scheme without express implementation efforts. However, the area-specific regimes have been worked out to great detail and with variation by the judiciary. This judge-made law, then, is more closely related to the common law approach. The law of damages in England is at the moment authoritatively stated in the *Harmon* case. The cases have the value of precedent, while the wording of the regulations which have been passed does not go beyond the wording of the directives.

⁴⁹³ SIGNIFICANT B.V., *Nalevingsmeting Europees aanbesteden* for various years, available at <http://www.rijksoverheid.nl>.

One may wonder what EU implementation requirements amount to in relation to procurement damages. Arguably, national damages provisions must satisfy requirements of legal ascertainability and certainty. Regarding the quality of the implementing law, the implementation process requires provisions to guarantee the ascertainability of rights granted. Requirements of legal certainty must also be met, understood as “*unquestionable binding force, or with the specificity, precision and clarity required in order to satisfy the requirement of legal certainty*”.⁴⁹⁴

There is an enormous discrepancy between the highly detailed nature of EU public procurement law, leaving almost no margin of discretion in terms of implementing substantive rules; a detailed remedies regime which required legislative action in all Member States to comply; and the merely vague damages obligation, the precise content of which is unascertainable. One of the main elements of the ineffectiveness of damages claims is the uncertainty surrounding their claimability, but also the extent to which there is an EU obligation to provide for damages at national level. This uncertainty is aggravated because the vague requirement of damages is part of an otherwise highly regulated field of law. This seems to cause Member States to feel a certain ‘irresponsibility’ towards the obligation of damages. Where, in other areas of law, the legislature or the courts would turn to national general principles to determine and potentially raise the adequate level of judicial protection, the fact that Member States feel to formally comply with a vague damages EU law requirement seems to obstruct the development of further reaching secondary protection.

National enforcement policy is dependent on the extent to which public procurement is on the public agenda. In addition, the structural implementation by Member States of remedial provisions in public procurement as a field that is highly regulated at EU level is contingent on the strength of the specific obligation. Implementations of the damages article vary between specific legislative implementation, case law developed procurement liability actions and applicability of general tort law clauses. This sustains the conclusion that

⁴⁹⁴ Case C-354/98 *Commission v France* [1999] ECR I-04927, operative part.

the vagueness of the damages provision at EU level leads to an equally vague implementation at Member State level. Only Germany has implemented the damages article by means of a statutory instrument, which is based on the implementation of the more specific damages article in the Utilities Remedies Directive. The legislator should consider to clarify the meaning of the lost chance in the Utilities Remedies Directive and as a minimum align the general and the utilities' directives by including the lost chance provision for both regimes.

11.2 INSTITUTIONAL FRAMEWORK

Another structural factor which influences damages claims in public procurement is the institutional structures in which claims are handled. The forums which are designed vary between the Member States. Broadly speaking, one can distinguish between arbitration as an extra-judicial forum, special review bodies which are characterized by a special degree of technical expertise in the field of procurement, and the general administrative and civil courts.

The Member States' public procurement remedies systems exhibit crucial differences in their institutional structure and the nature of the claim can determine the institution that is competent. For example in Germany, special procurement senates are competent for public procurement disputes in general, but damages claims as a post-contractual remedy are adjudicated by general civil courts.

Instance	Special Review Body	Administrative Court	Ordinary Court
1st instance	Austria, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Latvia, Malta, Poland, Romania, Slovakia, Slovenia	Belgium, Estonia, France (public), Luxembourg (public), Sweden	Denmark, France (private utility), Ireland, Lithuania, Luxembourg (utility), Netherlands, United Kingdom
2nd instance		Austria, Bulgaria, Czech Republic, Estonia, Finland, France (public), Latvia, Luxembourg (public), Portugal, Sweden	Cyprus, Denmark, France (private utility), Germany, Hungary, Ireland, Lithuania, Luxembourg (utility), Netherlands, Poland, Romania, Slovakia, United Kingdom
3rd instance		Latvia, Portugal, Sweden	Estonia, France (private utility), Hungary, Lithuania, Netherlands, Slovakia, United Kingdom

Instances of Review of Procurement Decisions prior to the Award of the Contract ⁴⁹⁵

	Specialised Review Body	Civil or Ordinary Court	Administrative Court
Prior to conclusion of the contract	Austria, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Latvia, Malta, Poland, Romania, Slovakia, Slovenia	Belgium (utility), Denmark, France (private utility), Ireland, Lithuania, Luxembourg (utility), Netherlands, United Kingdom	Belgium (public), Estonia, France (public), Luxembourg (public), Portugal, Sweden
After conclusion of the contract (damages)	Denmark	Belgium (utility), Cyprus, Czech Republic, Denmark, Estonia, Finland, France (private utility), Germany, Hungary, Ireland, Latvia, Lithuania, Luxembourg (utility), Malta, Netherlands, Poland, Slovakia, Slovenia, Sweden, United Kingdom	Belgium (public), France (public), Luxembourg (public), Portugal, Romania

First-Instance Review before and after the Conclusion of the Contract⁴⁹⁶

The institutions having jurisdiction for procurement litigation inside the judicial system are special review bodies, administrative courts and ordinary courts. In addition, 'extra-judicial'

⁴⁹⁵ Table as published in SIGMA, Central Public Procurement Structures and Capacity in Member States of the European Union. Sigma Paper No 40 (OECD 2007), 20.

⁴⁹⁶ Table as published in SIGMA, Central Public Procurement Structures and Capacity in Member States of the European Union. Sigma Paper No 40 (OECD 2007), 18.

processes in the form of arbitration procedures are sanctioned in some Member States as competent to hear procurement disputes.

11.2.1 EU law requirements on review bodies

In the Remedies Directive, the requirements on the non-judicial bodies reviewing contracting authorities' decisions are the following:

Article 2(9): Where 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 measure 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 authority and the review body.

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.

As to the legality of those independent bodies under the Directive, Article 2(9) sets requirements for non-judicial bodies regarding: the qualification of their members; the possibility of appeal to a court or tribunal with a prospect of making a preliminary reference to the CJEU; the procedural guarantee such as that both sides must be heard; rendering a decision that is legally binding; and a decision that is based on written reasons. These are quite far-reaching stipulations on the composition of procurement bodies, and quite deeply define the nature of the judicial organization of the Member States for the purposes of public procurement.

Is there a place for arbitration in the system of judicial protection?

Arbitration is a generally critical issue from the point of view of EU law. The independence of tribunals, bias towards specific interest groups and the role of arbitration in enforcing the 'proper' application of EU law has been repeatedly criticized. The questionable nature of arbitration within the EU legal order is aggravated by the explicit and stricter requirements set in the Remedies Directive. Specifically, the potential for appeal to a judicial organ within the meaning of Article 267 TFEU and the specific details on the composition of such a body are requirements which arbitration tribunals may come short of fulfilling.

First, Arbitration tribunals themselves do not usually qualify as courts or tribunals entitled to make preliminary references under Article 234 EC. At the same time, the nature of arbitration brings with it the fact that arbitration tribunals never operate in pure isolation from the judiciary, but as a pre-stage. Regular public courts can always be a fallback jurisdiction in the form of award annulment or enforcement proceedings. However, their scrutiny of cases is limited to public policy and hence theirs is a lower standard of review on substance.

The independence and composition of arbitration tribunals can also be a critical issue. Regarding the qualification of members of arbitration tribunals, it is often asserted that arbitration provides better technical expertise, which in a specialized field such as procurement is highly valuable in order to adjudicate on the merits of a case. That being said, arbitration panels risk being insufficiently independent. The reason is that, precisely due to their technical specialization, the circles between claimants and arbitration panelists may be biased in favor of interest groups. For example, in the case of the Dutch RvA arbitration tribunal, the nomination of the members has been accused of bias.⁴⁹⁷ The Netherlands is a jurisdiction which made a lot of use of arbitration in cases of procurement disputes. In the box below, the Dutch experience is illustrated in greater detail in order to understand the possible pitfalls of arbitration.

Arbitration tribunals in the Netherlands

In the Netherlands, arbitration used to be common in the field of public procurement. The Dutch legal system had highly institutionalized the use of arbitration tribunals. This was due to the fact that several regulations such as the UAR-EG 1991 or the UAR 1986 (now UAR 2001) contained arbitration clauses, through which disputes were submitted to the *Raad van Arbitrage voor de Bouwnijverheid* ('RvA'). After the corruption scandal in the construction sector, the RvA was identified as one of the systemic weaknesses in Dutch judicial protection by a government report, due to which the regulations were amended so that arbitration was no longer agreed upon by default clauses. Due to the automatic arbitration in the construction sector through the RvA, arbitration in the Netherlands was an important dispute settlement mechanism. Although the importance of arbitration has declined significantly because the public procurement regulations for construction no longer provide for arbitration by default, there are still a large number of disputes submitted to the RvA. This has

⁴⁹⁷ See also kamerstuk 28244 nr. 11 p 68.

been one of the key issues in the implementation process for Directive 2007/66, with the Wira explicitly addressing the matter.⁴⁹⁸

The RvA, composition and characterization as independent body

Taking the example of the Dutch procurement arbitration tribunal, the RvA was created in 1907 by the *Koninklijk Instituut van Ingenieurs* (KIVI), the *Koninklijke Maatschappij tot bevordering der Bouwkunst, Bond van Nederlandse Architecten* (BNA) and the *Vereniging Algemeen Verbond Bouwbedrijf* (AVBB). Changing the statutes of the RvA requires the approval of the Minister for Traffic, Public Works and Water Management, as provided by the Statutes themselves. The body is made up of the president, up to 100 members nominated by KIVI, BNA and AVBB, and up to 30 extraordinary members nominated by the governing board of the RvA itself. All members must be approved by Minister for Traffic, Public Works and Water Management. Although the RvA has these special ties to the government, it falls undisputed to say that most arbitration panels exhibiting similar structures to the RvA do not qualify as part of the judiciary. The reason is that the RvA is not a court or tribunal which is entitled to make a preliminary reference under Article 267 TFEU⁴⁹⁹, but as an independent body.⁵⁰⁰

Interests represented in arbitration panels

Since the KIVA, KNB, BNA and VAAB - which undertake the nominations - are major groups of interest representation for tenderers, one might regard the RvA⁵⁰¹ as a one-sided organ in which contracting authorities are not represented.⁵⁰² In a dispute against one of those tender groups, an arbitration panel could be called to make an award against an organization through which its members are nominated. For contracting authorities or enterprises not part of the organizations, there might be the impression of bias.

Can and to what extent can arbitration awards be appealed in the Dutch legal system?

Taking the Dutch legal order as an illustration: in order to enforce an arbitration award, the leave to execute needs to be granted by the judiciary, that is the president of the court (Article 1062 Rv). Apart from several formal grounds, permission can be denied in cases where the arbitration award is against the *ordre public* or *contra bonos mores* (Article 1063 Rv). In addition, a request for annulment of an arbitration award can be filed (Article 1064 Rv), again to be granted next to formal reasons on the grounds of being against the *ordre public* or *contra bonos mores* (Article 1065 Rv). These reasons must be interpreted in conformity with the Directives,⁵⁰³ hence one way of arguing that Article 1064 Rv constitutes an effective appeal is by defending the position that a breach of the European public procurement rules always counts as a reason for public policy and in every case therefore results in an inquiry into the award on the merits. Granted that when assessing the validity of a legal act the Dutch Supreme Court in *Uneto/deVliert*⁵⁰⁴ held that a breach of public procurement rules is not

⁴⁹⁸ Not only was criticism on arbitration voiced from a national perspective, especially in relation to the construction sector scandal, but the conformity with European law also became increasingly questioned. Kamerstuk 2005/2006 30 502, nr 4, p 4-5.

⁴⁹⁹ Characteristics taken into account in order to judge whether a body qualifies as a part of the judiciary are the legal basis of the organ, its permanent character, the bindingness of its jurisdiction, the principle of being heard, the independence of the organ and so on.

⁵⁰⁰ This is also the conclusion reached in the “Enquete Bouwverrijheid” report, see kamerstuk 28 244 nr 11 p. 66.

⁵⁰¹ Kamerstuk 30501 Nr. 3 p 26.

⁵⁰² In the context of the Dutch construction scandal, the RvA was named as one of the structural characteristics which was responsible for the limited sanction of irregularities, see the “Enquete Bouwverrijheid” kamerstuk 28244 nrs 5-6 p 57 stating that, contrary to regular arbitration, the RvA has no representative of contracting authorities, kamerstuk 28 244, nr. 24 p 13, proposing a reformulation of the role of the RvA.

⁵⁰³ For this comment see Nota naar aanleiding van het verslag kamerstuk 32027 C, p 2.

⁵⁰⁴ HR 22 January 1999, NJ 2000,305 (*Uneto/De Vliert*)

necessarily to be regarded as a violation of public policy, this argumentation does not hold in Dutch praxis.⁵⁰⁵

Regarding the first issue, much of the uncertainty relating to the conformity of arbitration such as that of the RvA under the Directive serves as a specific illustration of the general uneasy accommodation of arbitration in European law. The issue most clearly arose with respect to *Eco Swiss*⁵⁰⁶ in Competition law, from where it spilled into Consumer law, an area in which numerous references to the topic illustrate the legal uncertainty surrounding arbitration. But since the developments are increasingly critical towards arbitration, especially in Consumer law, the legality of arbitration under European law can very easily be challenged in public procurement too.

One may argue that a national judge faced with arbitration award challenges would be required to interpret public policy provisions differently as a result of EU law requirements in combination with the conform interpretation duty. Accordingly, the breach of a public procurement directive, as a rule that ranks among rules of public policy in a legal system, would justify the review of a case on public policy grounds.⁵⁰⁷ In the Dutch context, this argument is used in order to defend the position that the arbitration system includes a mechanism of appeal (Article 1064 Rv grants powers to the Dutch judge to annul awards

⁵⁰⁵ Article 20 b Wira provides that, in case of arbitration, “an appeal has to be possible in front of the civil judge”. This was one of the more hotly contended provisions in the legislative process because its formulation is not conclusive as to which procedure of recourse against arbitration awards Article 20 b Wira was alluding to – full review, the annulment procedure for arbitration awards under Article 1064 Rv, or simply arbitral appeal.

⁵⁰⁶ Case C-126/97 *Eco Swiss* [1999] ECR I-3055.

⁵⁰⁷ This is the reasoning endorsed, for example, in 28 244, nr. 11 p. 31. This requires a chain of argumentation: First, a reading of *Eco Swiss* to the effect that an arbitration award in violation of ex-Article 81 EC must be annulled. Secondly, the reasoning to be applied to the public procurement directives, as implying that a breach of the public procurement directives constitutes (like a breach of ex-Article 81 EC) a breach of public order. For secondary legislation, the case law has developed this position in *Asturcom* to the effect that under the principle of equivalence, a provision in consumer law had to be treated as such a fundamental provision that it would count in the equivalence test as a provision of public policy. There, the ECJ held “[a]ccordingly, in view of the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers, Article 6 of the directive must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy” (para 52). Whether the public procurement directives can be considered as equally fundamental for the European legal order as consumers (who merit a mention in the Social Charter, for example) must be judicially determined, which confines us to the realms of speculation.

contrary to public policy).⁵⁰⁸ This in my view cannot be said to constitute an appeal under the Remedies Directives, because procurement would not usually classify as public policy.⁵⁰⁹

One standard argument is that arbitration should be agreed upon freely, by both sides, but arbitration clauses in public procurement are unilaterally imposed. The nature of the procurement process lays precisely in the uniformity of the conditions in an offer of tender – which the tenderer has to accept by filing a bid. These kinds of clauses can generally not be seen as an exercise of a tenderer’s party autonomy to renounce his rights. A different case is the scenario where *ex-post*, that is after a dispute has arisen, the parties – tender and contracting authority –agree on arbitration and the limitations of appeal therein.

In order to be able to sustain the contention that arbitration bodies are bodies suitable for public procurement dispute resolution, arbitration awards must systematically be made open to full review under the public policy exception for annulment of arbitration awards. As a whole, the legal certainty and finality brought about by arbitration awards is therefore significantly lowered – and thus realistically for the future we can only project a further decrease in the importance of arbitration in the procurement landscape.

The EU Perspective

From the perspective of EU law, the issue of arbitration raises an institutional problem concerning access to Justice, by which disputes relating to EU rights become distanced from the reach of the legal process under which a preliminary reference can be made to the ECJ. The judicial link to an EU law interpretative authority breaks. This raises challenges as to

⁵⁰⁸ Hordijk et al also argue that one “can” defend the position that the annulment of an arbitration award (such as the Dutch ex Article 1064 Rv) counts as a review along the Directives. E. H. PIJNACKER HORDIJK, W. H. VAN BOOM & J. F. VAN NOUHUYS, *Aanbestedingsrecht. Handboek van het Europese en het Nederlandse Aanbestedingsrecht* (Sdu Uitgevers, 2009) They refer, for example, to the general fact that arbitration proceedings are clearly not excluded, and are even implicitly endorsed through the provision on independent bodies, under the Directive. On that they are right – if one were to require full scrutiny by a civil judge, arbitration loses its advantages of being less time and cost intensive. Further, it is argued, the European Directives do not exclude the parties’ option to voluntarily renounce their right to review. This may be true, and we can refer at this point to the general tension between the exigencies of European law vis-à-vis arbitration.

⁵⁰⁹ Critical views are also expressed in kamerstuk 28244 nr 11 p 68.

whether these bodies are required to apply EU law, and if they are doing so, whether a uniform interpretation is guaranteed.

The public procurement directives specifically address the composition of the forum dealing with disputes and put forward the possibility in a framework of a forum that can make preliminary references. This is a choice which demonstrates the public nature of the procurement rules. Arbitration is essentially private dispute settlement, from which mandatory rules are excluded. By requiring at least the possibility of appeal, the institutional connection to EU law is always guaranteed. Public procurement law, due to its explicit requirements, can be said to constitute a *lex specialis* to the general EU law approach on arbitration.

11.2.2 Summary proceedings versus procedures on merit

In several jurisdictions, the kinds of proceedings available for public procurement disputes vary. Summary procedures are common, and these usually exhibit only limited testing of the merits. Due to the need for swift and rapid mechanisms in public procurement, for general litigation these short litigation procedures are preferable to the claimants. In terms of procedural justice, they strike a different balance between the costs of cases, for example in terms of time and money, and the value that is attributed to the accuracy of the outcome itself. This is reflected in the fact that less importance is given to procedural steps such as the evaluation of evidence and that more discretion is allowed to the judge and his or her estimate. The box below contains the example of the Netherlands, which illustrates in greater detail how the rules for the two types of procedure typically differ from each other.

Procedural differences between summary and regular proceedings

The *kort geding*⁵¹⁰ is a summary procedure, which allows adjudication by an interim judge under Article 254(1) Rv for all urgent matters, which - taking into consideration the interests of parties - require immediate interim relief to grant these.

Furthermore, compared to the regular procedure, its procedural rules are much more flexible: for example, legal representation is not binding, the pleadings are generally not exchanged in writing, time periods for submission of documents are different and the legal rules of evidence are not applicable, which leaves the evaluation of evidence at the discretion of the interim

⁵¹⁰ The *kort geding* summary procedure is regulated by Articles 254 – 260 Rv, see also W. HUGENHOLTZ & W. H. HEEMSKERK, *Hoofdlijnen van Nederlands Burgerlijk Procesrecht* (Elsevier, 2006). References to case law in this section derive from their account.

judge.⁵¹¹ Apart from in very special circumstances, a case is decided after one hearing only. Also, the legal exigencies in relation to the judgment's motivations are lower. It must be based on a balancing of parties' interest when granting interim measures,⁵¹² a task that is to be undertaken by the judge *ex-officio*.⁵¹³ This does not translate into a duty to evaluate the parties' chances of success in a regular procedure. On the other hand, the interim judge remains - of course - limited by general principles of procedure, such as the prohibition of arbitrariness. An interim procedure does not have *erga omnes* effect but remains limited to the parties of the procedure without third party effect and without definitely establishing legal relationships (Article 257 Rv). Without going into all procedural details, it is sufficient here to state that overall, the interim judge has a considerably greater margin of discretion in the interim injunction procedure. The procedure is thus characterized by informality and aims for rapidity of decision. Although the regular procedure is the standard procedure in civil litigation generally, public procurement disputes are mostly resolved by means of interim procedures. Such public procurement disputes typically seek an order to stop an ongoing procurement procedure, to reprocore, to allow the claimant party to the inscription process a prohibition of awarding a contract, the duty to reopen the tender procedures anew with a view to preventing the conclusion of a contract and the potential performance thereof.⁵¹⁴

The *bodemprocedure*, on the other hand, being the regular court procedure in the Netherlands, is subject to the general body of civil procedural law. The drawback in the greater level of detail and formality lies in the fact that such a procedure is more intensive in terms of resources – it is more formal in that it has greater formalization in the way parties make their views known, and is subject to greater scrutiny (for example, in the hearing of experts). The regular procedure takes substantially more time, which also renders it more costly. Yet the regular procedure is the procedure which is mainly used in public procurement for damage claims, as the time factor does not weigh so heavily, but substantive scrutiny is necessary.⁵¹⁵

Differently than under Dutch administrative law, the interim procedure is not contingent upon the existence of a regular court procedure– there is no requirement of connectivity. Even though also the effect of the regular procedure is limited as between the parties, it can be used to establish definite legal relationships and render declaratory rulings. It is therefore up to an aggrieved tenderer to decide which track he wishes to take, although the interim judge retains the possibility of holding that a dispute is not suitable for settlement through an interim procedure.⁵¹⁶ The judge in a regular procedure is not bound by the judgment given in an interim procedure. However, because the procedures can also run in parallel, the structure of the Dutch system gives rise to the risk of conflicting judgments.

The use of the interim injunction procedure has been subject to considerable debate in the Netherlands for this inherent risk of contradictory judgments, but also on other grounds.⁵¹⁷ Additionally, the capacity of the interim judge to pass judgment in a technical area such as public procurement is questioned, which is sometimes coupled with the argument that interim judges are too restrictive in their approach in granting interim measures. This is contrasted with the regular procedure in which the judge is qualified to deal with technical issues, but which lasts

⁵¹¹ HR 31 January 1975, NJ 1976, 146.

⁵¹² See Article 257 Rv.

⁵¹³ HR 2 February 1968, NJ 1968, 62.

⁵¹⁴ By way of example, see kamerstuk 2008/2009 32 027, Nr 3, 3. Also J. M. HEBLY, E. T. DE BOER & F. G. WILMAN, *Rechtsbescherming bij aanbesteding* (Uitgeverij Paris, 2007).

⁵¹⁵ J. M. HEBLY, E. T. DE BOER & F. G. WILMAN, *Rechtsbescherming bij aanbesteding* (Uitgeverij Paris, 2007)51.

⁵¹⁶ See Article 256, 257 Rv.

⁵¹⁷ See also comment in kamerstuk 30501 Nr. 3 p 25.

much longer. These discussions relate to the opposing pulls deriving from the desire for efficient and rapid procedures on one hand (procedural economy), yet on the other hand the will to ensure the quality of litigation; these concerns are aggravated by the fact that both tracks are open, with the potential to yield diverging judgments.

It is quite obvious that the two kinds of procedures greatly impact upon procurement litigation. The underlying criticism, however, concerns the required level of technical expertise which a body adjudicating on public procurement damages ought to have. Arguably, this is one of the rationales involved in having arbitration as well as institutional structures with specific technical bodies (such as the German public procurement senates) that are characterized by a specialized knowledge base in order to adjudicate.

The relevance for damages claims varies, as damages are often separable from these summary proceedings, and claimed in a different procedure which goes into the merits. From the EU point of view, so far the question of summary judgments has not come under the full scrutiny of the ECJ. The issue was raised incidentally in *Combinatie Spijker*,⁵¹⁸ but the Court did not pick up on this specific point. However, these procedures on the merits are much longer in terms of duration, and ultimately, more weighty in terms of costs. What all of these special procedures have in common is that the degree of accurate application of law is compromised to some extent through the rationalization of process economy. The question is, at what stage does the degree of just ‘approximating’ ‘the truth’ or the correct application of EU law become insufficient to satisfy the effectiveness postulate of EU law?

11.3 THE APPLICABLE LAW

11.3.1 The applicable law

Public procurement disputes are often perceived as exclusively national disputes. However, they can include important cross-border connecting factors, so that issues of international private law remain relevant. Before entering into the conditions for damages and the consequences thereof within one legal system, a precursory question concerns the

⁵¹⁸ Case C-568/08 *Combinatie Spijker Infrabouw* [2010] ECR I-12655.

applicable law. The applicable law depends on which type of action a claim is classified as, since the cause of action is the primary connecting factor in determining the applicable law.

The private international law regime applicable to damages claims is harmonized.⁵¹⁹ Uniformity is therefore a given, unless one argues that the EU Regulation is not applicable due to an exception contained therein. At the same time, procurement damages are kinds of claims that ‘incidentally’ seem to fall within the scope of application of the Regulation, and they are rarely examined in the light of international private law.

The international private law characterization of public procurement depends on how one sees the contracting authority and its actions. What defines the procurement situation? Is it the fact that a State body is involved in a transaction, so must all its acts be qualified as acts of State authority (*auctor regit actum* principle)? Similarly, a procurement process can be qualified as an administrative act, potentially of only a procedural nature. In adopting a diverging perspective, it is possible to define the procurement transaction as a relationship between a tenderer and a State entity that is defined by the (widely recognized) private nature of the purchasing process. Casting the relationship between tenderer and contracting authority as bilateral leaves the aggrieved tenderer as a potential connecting factor, and furthermore the contract as an instrument which, by agreement, could provide an additional alternative to the applicable law. The choice of connecting factors among these alternatives results in divergent views on the law applicable to procurement obligations.

The broadest distinction is based on a ‘unitary’ or ‘separability’ view of the law applicable to the public contract on one hand, and the applicable public procurement law on the other. A unitary approach would commit to the view that either the law governing the contract follows that of the applicable public procurement law or, on the contrary, that the law applicable to the contract determines the applicable public procurement law. The separability argument makes two different laws applicable. For damages claims arising out of the breach of public procurement law, a large part of this argument is irrelevant due to the absence of a public contract actually having been concluded with the damages claimant.

⁵¹⁹ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

The purely contractual side of the contract performance is therefore neglected in the following.

11.3.2 Applicability of the Rome II Regulation

The Rome II Regulation⁵²⁰ governs the conflict of laws concerning the law applicable to non-contractual obligations. One can either see damages claims as determined by the regular provisions of the Rome II Regulation, or argue that public procurement damages claims fall outside of the scope of the Rome II Regulation, and form part of a special determination of the applicable law.

A specific exclusion on the applicability of the Rome II Regulation is provided for in Article 1(1) “to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)”. An argument to the effect that government procurement acts constitute the exercise of State authority could be made; however, by their very nature, government purchases seem to qualify by definition as commercial matters, and hence as *acta iure gestionis*. More strongly, in many legal orders, it is precisely the defining characteristic of public procurement regulation for the State to be qualified as acting in a private capacity – therefore not rendering the exception applicable to damages claims arising from breaches of public procurement law. If we allow an analogy from within EU law, the CJEU has interpreted acts of official authority narrowly. For example, regarding the tasks of notaries, the CJEU has taken a restrictive interpretation of activities constituting assistance or support to the operation of official authority under Article 45 EC.⁵²¹ Although highly specific public procurement transactions such as defense spending might be characterized by State authority, regular purchases would be classified as *acta iure gestionis* – resulting in the applicability of the Regulation.

⁵²⁰ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

⁵²¹ Access to the notary profession, see Opinion of A-G Cruz Villalón in Cases C-47/08, C-50/08, C-51/08, C-53/08, C-54/08, C-61/08 and C-52/08 delivered on 14 September 2010.

Public procurement law could be characterized as having overriding mandatory provisions, thus creating a special connection and resulting in the exclusive application of national law. Such a view had been endorsed by German courts, for example, relying on the old Article 34 EGBGB (now repealed).⁵²² This allowed recourse to German public procurement law in instances where German law “imperatively” governed a situational context;⁵²³ although the contract itself could have been governed by foreign law.⁵²⁴ This view commits to a separability between public procurement law and the law of the contract. Article 34 EGBGB (repealed) is now expressed in Article 9 of the Rome I Regulation for contractual obligations, and Article 16 of Rome II for non-contractual obligations – the mandatory provisions exceptions. In order for these exceptions to apply, one would have to conceive of the whole body of public procurement law as constituting mandatory provisions. They are defined as:

*“provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.”*⁵²⁵

Again, taking the German example with the diverse actions for claims of damages, accepting this argument would raise the question of whether one has to distinguish between the public procurement specific statutory damages basis contained in §126 GWB and other causes of actions. All other claims form part of the general, for example contractual, liability scheme, and hardly qualify as mandatory provisions.

In relation to the exceptions, damages are mentioned in Recital 32 of the Rome II Regulation, which states:

⁵²² Article 34 Einführungsgesetz zum Bürgerlichen Gesetzbuche (EGBGB): “Dieser Unterabschnitt berührt nicht die Anwendung der Bestimmungen des deutschen Rechts, die ohne Rücksicht auf das auf den Vertrag anzuwendende Recht den Sachverhalt zwingend regeln.”

⁵²³ G. S. HÖK, 'Zum Vergabeverfahren im Lichte des Internationalen Privatrechts', (2010) *ZfBR*, 440 442 , OLG Düsseldorf 14.05.2008 – Verg 27/08, VergabeR 2008, 661, 663.

⁵²⁴ G. S. HÖK, 'Zum Vergabeverfahren im Lichte des Internationalen Privatrechts', (2010) *ZfBR*, 440 442 , OLG Düsseldorf 14.05.2008 – Verg 27/08, VergabeR 2008, 661, 663. This might result in a splitting of the law applicable to a procurement situation – however, it seems that within our treatment of cases of damages claims that aspect can be neglected.

⁵²⁵ Article 9(1) Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

“Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing noncompensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (ordre public) of the forum.”

Within the system of the Rome II Regulation, damages may fall within the public policy exception of Article 26 where they are perceived as excessive. Given the close connection between the mandatory provisions, and refusal of public policy grounds in the Rome I Regulation, one might make an argument to the effect that because the damages regime of another country is perceived to be excessive, the legal damages regime of the forum should be applicable. At the same time, in intra-EU cases, punitive damages for public procurement violations could only be awarded very rarely (for example, on the basis of abuse of power in the UK), so that recourse to this provision in the context of procurement claims is highly unusual.

Probably the most serious challenge to the applicability of the Rome II Regulation to damages claims for breaches of public procurement law in some jurisdictions lies in the limitation of the scope to civil and commercial matters, and thus the exclusion of administrative measures under Article 1(1). For civil law-regulated damages claims, however, this reasoning is not pertinent.

However, EU public procurement does not constitute a purely budgetary - and hence internally, administratively shaped - field of law, but to a large extent is seen to belong to competition law in a broad sense.⁵²⁶ Arguably therefore, public procurement law, at least for those contracts above the thresholds of the EU Directives lack administrative character. Similarly, if one were to qualify the procurement purchasing process as merely procedural, the result would -under the ordinary substance/procedure division- lie in the application of the law of the seat of the contracting authority. The result of this connection in applying the State entity's seat's law may be justified under the *auctor regit actum* principle as well,⁵²⁷

⁵²⁶ A. S. GRAELLS, *Public procurement and the EU competition rules* (Hart, 2011).

⁵²⁷ G. S. HÖK, 'Zum Vergabeverfahren im Lichte des Internationalen Privatrechts', (2010) *ZfBR*, 440 442.

but formally, this move relies on the qualification of public procurement law as entirely procedural.

None of the exceptions seem convincingly applicable. I would therefore argue that the Rome II Regulation is pertinent in determining the applicable law for damages claims, although this still leaves several possible qualifications.

11.3.3 Application of the Rome II Regulation

The non-contractual obligations governed by the general provision contained in Article 4(1) are a basic rule, designating the law of the country “*in which the damages occurs*”. Before the general rule is applicable, however, it has to be considered whether a special provision might preclude the application of Article 4(1). In several countries, this might vary with different causes of actions:

Accepting a dimension of competition law would lead to the additional applicability of Article 6(3)(a): “*The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.*” For example in Germany, damages actions under §126 GWB are part of competition law legislation. Public procurement damages could arguably be qualified as guaranteeing competition between tenders, an interpretation strongly supported by the move from budgetary to competition legal instrument; the applicable law could therefore be determined under Article 6.⁵²⁸

Actions based on the *culpa in contrahendo* doctrine on the other hand are governed by the provisions of Article 12,⁵²⁹ which reads, in Article 12(1):

“The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into.”

⁵²⁸ G. S. HÖK, 'Zum Vergabeverfahren im Lichte des Internationalen Privatrechts', (2010) *ZfBR*, 440 448.

⁵²⁹ G. S. HÖK, 'Neues europäisches Internationales Baurecht', (2008) *ZfBR*, 741 747.

One can turn this reasoning around and ask what seems to be a “fitting” solution for the connecting factor. The applicability of the general rule contained in Article 4 leaves too many potentially applicable laws, especially considering that multiple bidders having sustained damage would lead to one situation being governed by different laws. As a matter of simplicity, it seems that since public procurement situations on the side of the contracting authority are marked by a very structural and highly consistent connection to a case, there are good arguments for making the law of the seat of the contracting authority the law applicable to the determination of damages. Faced with an exercise of party autonomy, this result might be different, i.e., there is an argument to be made in respect of the choice of the parties, or the inclusion of a choice of law contained in the invitation for tender. Departing from a strictly positivistic analysis of the international private law regime, when one thinks about the circumstances giving rise to damages claims, the situation is such that a contracting authority is often an entity of a given State. The aggrieved tenderer was willing to engage with that contracting authority. By their very nature, public purchases are connected to the legal order of one country; the factual circumstances in any public procurement situation are such that recourse to the law of the contracting authority usually constitutes the closest connection. A connecting factor based on the seat of the contracting authority seems a just solution. Such a construction could be construed on the basis of Article 4(3):

“Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.”

None of the options above are convincing to a conclusive degree, and it will ultimately be up to the judgment of the CJEU in this matter. The international private law qualification may lead to different results in different countries, based on the nature of the underlying causes of action at issue.

11.4 CAUSES OF ACTION

As argued above, the qualification as tortious or contractual and pluralities of causes of action can make a difference with regard to the law applicable under private international law. The EU procurement directives do not prescribe the cause of action which the national law must provide for – by their nature, directives impose only an obligation of result.

The public procurement damages regime differs greatly between the selected countries. In Germany, a specific statutory provision for liability of public procurement damages co-exists with other causes of action. This is different in both the Netherlands and France, which largely govern public procurement damages liability by means of tort law. The Netherlands deploys a provision on the constitutive criteria of torts, whereas the quantification is governed by a single article for both contractual and tortious liability. France also relies on tort law in order to govern liability claims, but it has consequently been developed through the courts. It was observed that the case law on liability has been developed in a divergent manner for different areas of law. The English common law system, on the other hand, relies heavily on the *Harmon* case, the main precedent and accepted authority for damages claims, which gave flesh to the general damages provision of the Regulations and beyond. At the same time, the comparison of liability of damages in public procurement confirms that each legal system has developed strong strands of case law that are public procurement specific, and molds pre-existing general principles to the specific needs of the sector.

The German system has introduced a statutory liability regime (special in terms of the constitutive criteria), yet which only leads to bid costs as heads of damages. Further reaching damages such as lost profit can only be achieved through another cause of action, most prominently through pre-contractual liability.

The French system, on the other hand, delegates claims for damages to the general principles of Tort law which, being extraordinarily broad, have been developed in case law. In addition to this, there is a schism between the tort case law regarding administrative and civil jurisdictions – these came to the fore for example in public procurement, which is an area in which French case law has developed particular conditions and interpretations. The

French claims of damages discussion is largely determined by first assessing the doctrine of the loss of chance, and second, the lost chance itself.

The problems in the absence of a specific mechanism are reflected in the Dutch legal system's switch from arbitration (specific) to damages claims under the general tort cause of action. At the same time, in the absence of specific public procurement provisions, the general system of tort law has to come to terms with the specific issues of public procurement, and visibly struggles to do so – in terms of, for example, references to the ECJ for guidance, that is, drawing on other sources in order to fill the gaps in the originating national legal system; and also the divergence of outcomes in the case law, leaving immense discretion to judges, who adjudicate the disputes arising based on individual, case-by-case assessments. The result is legal uncertainty, as also observed strongly in doctrine, translated in practice into a reluctance to litigate in order to receive damages against unlawfully acting authorities, and on a judicial level into great indeterminacy of outcome, through the -not to say subjective, but- at least indeterminate margin of assessment within which the judge's assessment is bound.

In the UK, the *Harmon* case as the authoritative but exclusive source of law on the issue discussed four possible causes of action for the claimant. These were breach of EU law, statutory breach, implied contract, and public misfeasance. Regarding the statutory breach, however, the court found: *“As a matter of general approach I consider that where compensation is sought by a tenderer for being deprived of an opportunity to be awarded the contract, the approach should be to award damages on a ‘contractual’ basis rather than on a ‘tortious’ basis, although the remedy is a statutory remedy and usually the assessment of damages for breach of statutory duty is akin to those for a comparable tort.”*⁵³⁰ While for the heads of damages, the difference is probably without distinction (if one accepts that the contractual ‘positive interest’ is used), the difference in claims is not devoid of practical significance. In particular, characterization as tort or contract can impact on limitation periods, and perhaps on “the appropriateness of applying the “loss of a chance test””.⁵³¹

⁵³⁰ *Harmon* at 259.

⁵³¹ M. BOWSER & P. MOSER, 'Damages for breach of the EC public procurement rules in the United Kingdom', (2006) *Public Procurement Law Review*, 195, 203.

11.4.1 Member State liability as a cause of action

In some jurisdictions, however, the damages article is implemented (sometimes partially) by means of Member State liability as a cause of action.

For example, the Netherlands uses an identical cause of action for public procurement and Member State liability. In other jurisdictions, the available causes of actions are multifaceted and do not correspond. France in this respect formally governs both forms of damages through the same provision in the code civil, yet under different conditions as fleshed out in case law. Germany has explicitly distinct causes of actions and doctrine mainly as regards national State liability as the cause of action through which Member State liability manifests in the national court.⁵³² In England on the other hand, *Francovich* liability is a self-standing, autonomous cause of action.

While viewed from the EU perspective, Member State liability is developed as though it were a self-standing remedy, this is not the sole view in the national jurisdictions: some authors defend the view that national law alone is pertinent and that *Francovich* liability materializes only through a recognized national course of action, while others maintain that *Francovich* liability is self-standing. Inversely, an implementation of the damages provision by Member States through just a reference to Member State liability might not constitute a sufficient implementation measure either.⁵³³ In a case against Germany, the Court rejected the German government's argument based on the direct effect of directives against the State in cases of non-implementation:

This minimum guarantee, arising from the binding nature of the obligation imposed on the Member States by the effect of the directives under the third paragraph of Article 189, cannot

⁵³² In Germany, the literature holds different views on the relationship of *Francovich* liability and the German State liability regime of §839 BGB combined with Article 34 Basic Law. A pragmatic solution combines both aspects, providing for damages via the German liability course of action, which - if necessary - may be reinterpreted through the EU law-derived constitutive criteria as trumping national, more restrictive, ones. In order to claim damages in public procurement, the national State liability provision is generally not viewed as a pertinent or effective cause of action.

⁵³³ V. EIRÓ & E. MEALHA, 'Damages under Public Procurement: The Portuguese Case', in Duncan Fairgrieve & François Lichère (eds), *Public procurement law: damages as an effective remedy* (Hart, 2011).

justify a Member State's absolving itself from taking in due time implementing measures sufficient to meet the purpose of each directive.⁵³⁴

A reference to Member State liability as implementation simply may not be sufficient.⁵³⁵ A Member State liability reading of the Remedies Directives' damages article is problematic when viewed through the national lens of the available causes of action. Thinking about Member State liability in terms of causes of action is misleading, because it follows an *ibi remedium, ubi ius* approach that prescribes a result. Member State liability is compensation limited to pecuniary damages and has constitutive conditions which can be more onerous to meet. I discuss the problematic nature of the conflation between damages in procurement law and Member State liability damages further in Chapter 14.

11.4.2 Relevance of having different causes of action

On a formal level, implementation 'styles' differ with regard to whether countries undertake implementation through legislation, and whether the legislation deals with damages in a detailed manner or sticks to the vagueness of the remedies directives. In addition, the number of causes of actions which are generally regarded as useful for a tender varies considerably, as does their relative relation to each other. Qualitatively, the biggest difference can be found between tort based approaches and systems which (in addition) recognize pre-contractual causes of actions. The implementation of damages for public procurement in all jurisdictions has not been limited to tortuous liability, but may contain contractual causes as well. Next to this, Member State liability lingers as a cause of action. While the denomination itself is perhaps only relevant for international private law purposes, it is only through filling the causes of action with the relevant constitutive criteria that the first differences emerge. The nature, the essence of a claim as being based in tort or contract, however, carries great weight, as we will see with regards to the claimable heads of damages and the way losses are quantified.

From a legal process point of view, the notion of a damages claim appears more and more disintegrated, consisting of many different causes of actions which present the

⁵³⁴ Case C-433/93 *Commission v Germany* [1995] ECR I-2303, para 24.

⁵³⁵ V. EIRÓ & E. MEALHA, 'Damages under Public Procurement: The Portuguese Case', in Duncan Fairgrieve & François Lichère (eds), *Public procurement law: damages as an effective remedy* (Hart, 2011), .

aggrieved tenderer with various constitutive requirements and possible heads of damages. Overall, these findings challenge the unitary way in which the CJEU seems to deal with what it terms “damages claims” at the national level.

11.5 JUSTICIABILITY IN TERMS OF NORMTYPE (MATERIAL), PERSON (STANDING) AND TIME (PRESCRIPTION)

The laws implementing EU public procurement create different effects in terms of the invocability that damages claims enjoy.

In the first instance, norms can be classified as holding different degrees of justiciability and limit the ways in which they can be relied on in courts by individuals. For example, public procurement administrative regulations that were strictly internally directed in Germany precluded the creation of rights that can be relied on in courts. Similarly, several doctrines restrict the capacity to invoke to cover only provisions intended to confer subjective rights; that is, the protective scope of a norm must have been geared towards a specific group of individuals. A variation on such a limitation is found in standing rules which require a person to enjoy a protected interest to be relied upon. For example, the individual must possess specific characteristics, such as that it must be capable of being singled out in a sufficiently specific manner. In terms of procurement damages claims, the requirement for a claimant to have submitted a bid in order to enjoy standing for a damages action is an example. Furthermore, invocability may be limited in time through prescription periods which bar an action from being brought in the courts. Justiciability, subjective rights requirements, requirements of protected interests and time limits are all rules which in one way or another contain a formal limitation of the scope of a given rule, which is why they are here grouped together under the heading of ‘justiciability’.

11.5.1 Invocability

In countries in which public procurement was conceived of as administrative law, the position of the tenderer has typically undergone some strengthening over time, owing to the EU derived reconceptualization of the purpose of public procurement regulation. Government purchasing was perceived as merely enabling the internal working of the

administration in the proverbial “pencil purchase”.⁵³⁶ As internal regulations, procurement norms lacked external effect, leaving tenderers in a vulnerable position. Individuals were unable to rely on these norms in the courts as they were non-justiciable norms. The underlying public procurement rationale, therefore, was highly crucial for the position of the tenderer. For example in Germany, public procurement underwent a shift from budgetary to competition law under the influence of EU law. The organization of the sources of law and the fact that aggrieved tenderers lacked subjective rights became subject to European law through the Directives. In addition, a challenge was targeted at the German legal system in the form of a Commission action for infringement of the EC Treaty in which the ECJ ended up condemning the German ‘administrative solution’ to public procurement law.⁵³⁷ This judgment (discussed in greater detail in the box below) was decisive in enabling damages claims for aggrieved tenderers in the first place.

Case Study: German Law under European Influence

The Commission⁵³⁸ alleged that Germany had failed to adopt the necessary measures to comply with the provisions of the old substantive Public works and public supply Directives.⁵³⁹ The temporal aspect of this judgment is relevant; at the European level the facts were situated in time before Directive 89/665 was applicable, and at the national level, Germany had not yet implemented the changes through the ‘budgetary solution’.

The Commission put forward the following arguments: (i) the VOL/A and VOB/A were to be regarded as purely private bodies of rules and therefore not binding on contract awarding authorities; (ii) the pure requirement pursuant to internal administrative circulars did not create any right for individuals to rely on those rules;⁵⁴⁰ and (iii) purely administrative practices that could be altered on a whim were inadequate.⁵⁴¹ The position of the Commission was that a correct transposition required individuals to be able to ascertain the full extent of their rights, as the Public works and Public supplies directives were designed to make individual suppliers and undertakers rely on those rights as against public awarding authorities. This was precluded by the formal way in which Germany had chosen to transpose the provisions of the public procurement directives, namely through the internal administrative circulars, which lacked external effect upon which aggrieved tenderers could

⁵³⁶ M. BURGI, 'Zukunft des Vergaberechts', (2009) *NZBau*, 609, 612.

⁵³⁷ Case C-433/93 *Commission v Germany* [1995] ECR I-2303.

⁵³⁸ Following the usual infringement procedure, involving a formal letter from the Commission on 27 February 1992 and reasoned opinions given on 3 December 1992, on 3 November 1993 the Commission sought a declaration that the Federal Republic of Germany had failed to fulfill its obligations under the Treaty.

⁵³⁹ Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts and with Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC.

⁵⁴⁰ Opinion of A-G Elmer delivered 11 May 1995, C-433/93 ECR I-2305, para 4.

⁵⁴¹ Case C-433/93 *Commission v Germany* [1995] ECR I-2303, para 5.

rely. Additionally, the Commission relied on C-361/88 *Commission v Germany*,⁵⁴² in which the ECJ had, similarly, dealt with a general administrative circular (in that case “Technical instructions concerning air purity”) and condemned the lack of binding character thereof vis-à-vis third parties.

Germany did not deny the lack of individual rights of tenderers under the administrative circular solution, but advanced that (i) it was only with the adoption of Directive 89/665 that rules were established regarding breaches of Directives 88/295 and 89/440. (ii) Germany tried to rely on the direct effect of the Directives as opening a way for individuals to rely on the Directives against public authorities having infringed those rules.⁵⁴³

The ECJ agreed with the arguments put forward by the Commission regarding the non-mandatory nature of the legal rules in question. Although it stressed the possibility that “*a general legal context may, depending on the content of the directive, [would] be adequate*” for transposing directives, but that this is only so where “*the full application of the directive [has taken place] 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*”⁵⁴⁴.

In addition, the Court clearly rejected both of Germany’s pleas. The first by relying on the first and second recital of Directive 89/665 which state that the introduction of the directive has only the purpose of reinforcing existing arrangements for ensuring “*effective application of Community directives*”. It is, however, without bearing on the obligation to transpose the Public works and public supplies Directives themselves.⁵⁴⁵ The Court equally rejected the direct effect argument.

“whereas the Court has in specific circumstances (...) recognized the right of persons affected thereby to rely in law on a directive as against a defaulting Member State. This minimum guarantee, arising from the binding nature of the obligation imposed on the Member States by the effect of the directives under the third paragraph of Article 189, cannot justify a Member State’s absolving itself from taking in due time implementing measures sufficient to meet the purpose of each directive (see in particular, the judgment in Case 102/79 Commission v Belgium [1980] ECR 1473, para 12)”.⁵⁴⁶

In the meantime, what happened was a rather technical legal reshuffling of public procurement regulation. The German legislator tried to implement the European Directives by changing the *Haushaltsgrundsatzgesetz* (HGrG, Framework Law on the Budget).⁵⁴⁷ Thereby, on the basis of §57 HGrG, the *Vergabeverordnung* (VgV, Ordinance on the Award of Public Contracts) of 1994 was

⁵⁴² C-361/88 *Commission v Germany* concerned Germany’s implementation of Directive 80/779 on Air pollution and fixing of limit values applicable to concentrations of sulphur dioxide. Regarding the mandatory nature of the administrative circular, the ECJ found the existence of an administrative circular to constitute an absence of a general mandatory rule: “*It must be stated that, in the particular case of the technical circular “air”, the Federal Republic of Germany has not pointed to any national judicial decision explicitly recognizing that that circular, apart from being binding on the administration, has direct effect vis-à-vis third parties. It cannot be claimed, therefore, that individuals are in a position to know with certainty the full extent of their rights in order to rely on them, where appropriate, before the national courts or that those whose activities are liable to give rise to nuisances are adequately informed of the extent of their obligations. 21 It follows from the foregoing considerations that it is not established that Article 2(1) of the directive has been implemented with unquestionable binding force, or with the specificity, precision and clarity required by the case-law of the Court in order to satisfy the requirement of legal certainty.*”

⁵⁴³ Case C-433/93 *Commission v Germany* [1995] ECR I-2303, para 21.

⁵⁴⁴ Case C-433/93 *Commission v Germany* [1995] ECR I-2303, para 18.

⁵⁴⁵ Case C-433/93 *Commission v Germany* [1995] ECR I-2303, para 23.

⁵⁴⁶ Case C-433/93 *Commission v Germany* [1995] ECR I-2303, para 24.

⁵⁴⁷ 26. November 1993 (BGBl. I S. 1928) das Haushaltsgrundsatzgesetz, HGrG, Statute on the Principles on the Spending of Public Funds.

issued, as well as the *Nachprüfungsverordnung* (NpV, Ordinance on the Review Procedures for the Award of Public Contracts). In 1997, final changes required for Procurement regulation for the award of independent contractor services (VOF) and an amendment to VOL/A were effected. The sector specific provisions were taken out of the Procurement Regulations, into the *Sektorenverordnung*. This 'budgetary solution' was explicitly not geared towards the creation of subjective rights, however, the Procurement Regulations for Public Works (VOB/A) and Public Supplies and Services (VOL/A) which had been deemed to be only of internal administrative effect, were finally given statutory character for contracts above the European thresholds.

Yet again, the ECJ held this system to be in breach of the public procurement directives. Only under the influence of European regulation through the public procurement directives did subjective rights for tenderers become constructed. This resulted in a third and last reorganization of public procurement law, which became part of Competition law, the 'Competition law solution' if we so choose. Finally, for contracts falling within the scope of the European public procurement directives, the budget oriented approach was abandoned with a comprehensive revision and the incorporation of the material law into part 4 of the German Act against the Restraints of Competition, the *Neufassung des Gesetzes gegen Wettbewerbsbeschränkungen (GWB)* of 29.05.1998, §97 GWB and following.

The Schutznormtheorie and theories of protected interest

The legal construction that norms only offer legal protection if they are protecting specifiable interests is important in the German legal system, and referred to as the *Schutznormtheorie*.⁵⁴⁸ It is widely recognized that the doctrine is problematic in relation to EU law. This has led to calls for modification of several variants, and even abolition thereof, but a reconciled understanding is still lacking. The discussion of the subjective right and the Schutznorm are highly controversial in Germany; in France it is mirrored in a weaker version, the protected interest theory. In the Netherlands also, general tort law provisions require a condition of 'relativity' (6:163 BW). Relativity tests the objective and purpose of a statutory norm regarding both the protected person/entity and protected losses.

From a national perspective, one way to see the issue of the invocability of EU law provisions of directives is this: they are only indirectly applicable, and hence require a two-levelled process of application – first, examining whether a provision is directly applicable (for reasons of being sufficiently clear etc... i.e. the CJEU derived test). Following this view, it would be for the *national legal order* to determine whether subjective rights can be claimed. To take the national interpretation of the protective scope of European norms would result in diverging interpretations and seem to violate the European legislator's intention to create uniform rules.

⁵⁴⁸ In order to indicate the fact that the legal instrument is at the heart of this definitional matter, the term "theory of protective provision" seems more accurate.

Many authors argue that the *Schutznormtheorie* is not pertinent for claims deriving from EU procurement law.⁵⁴⁹ A moderate view requires an invocable provision to at least be intended to protect the interests of undertakings in competition. This version still requires the specific protective purpose of a provision, but the purpose is more widely phrased and will, in the case of public procurement, be met in most instances. Another view suggests a differentiation on the basis of the direct applicability of a directive – mainly following the ECJ’s rulings which held that individual rights are not based on a potential purpose of a directive.⁵⁵⁰ A variation of protected interest is based on conditions for individual concern comparable to those elaborated under 230 EC. Overall, oriented along the lines of the ECJ interpretation, the ECJ has easily assumed a legally protected interest, based on various different protected requirements – thus not following any version of a protected interest theory strictly, yet always requiring (weaker) legal protection of some sort, making a complete abandoning of the protected interest theory impossible.⁵⁵¹

11.5.2 Time limits

A further limitation of damages claims comes in the temporal form of prescription periods, that is, the amount of time after which a claim ‘expires’. The time period can be calculated in various ways, for example, it can start to run from either the commission of the illegal act or after the claimant has acquired knowledge thereof. The durations of prescription periods are most often laid down in legislative instruments, while the application in concrete cases may require an assessment of, for example, when exactly the claimant became aware of his or her claim; this is mainly developed by the courts. In some instances, derogations from statutory limits can be undertaken by contract, in the case of public procurement in tender notices or the applicability of standardized tender conditions. However, even these will usually be subject to possible scrutiny by the courts regarding their fairness.

⁵⁴⁹ See K. PÉGURET, *Schadensersatzansprüche übergangener Bieter im Vergaberecht* (Jenaer Wissenschaftliche Verlagsgesellschaft, 2010), 74.

⁵⁵⁰ K. PÉGURET, *Schadensersatzansprüche übergangener Bieter im Vergaberecht* (Jenaer Wissenschaftliche Verlagsgesellschaft, 2010), 78.

⁵⁵¹ K. PÉGURET, *Schadensersatzansprüche übergangener Bieter im Vergaberecht* (Jenaer Wissenschaftliche Verlagsgesellschaft, 2010), 81.

In France, the prescription period is governed by the *prescription quadriennale*, under the law of 31 December 1968. The time limit starts to run from the first day of January following the claimant's becoming aware of the violation. In Germany, the applicable regular prescription period is 3 years, according to §195 BGB. Following §199 BGB it starts to run at the end of the year in which the claim arose, or in which the claimant ought to have had knowledge of those circumstances. In the Netherlands the standard applicable period for damages claims is laid down in Article 3:310 BW and the regular period is 5 years. The period starts to run on the day following the claimant's learning of the damages and the person to be held liable. However, it seems possible to contractually agree on shorter time periods (often around 90 days) as is the case, for example, in the standard tendering regulations.⁵⁵² In England, the prescription period has been subject to litigation in front of the CJEU, and consequently the rules have been changed to 30 days.

EU law requirements

Time limits have been the subject of much critical scrutiny by the CJEU, as they are so closely connected to the enjoyment of a right, and are usually qualified as material in nature rather than procedural – although from an EU law perspective they have come under the doctrine of procedural autonomy. Specifically, the ECJ has held that time limits in the field of public procurement can only start to run “from the date of the infringement of those rules or from the date on which the claimant knew, or ought to have known, of that infringement.”⁵⁵³ EU law in public procurement precludes the time period for prescription from running from the date of infringement, but requires the claimant's knowledge.

The Court further held that the fact that a tenderer has been rejected is not sufficient in order to presume that he had knowledge of, or sufficient information to establish, the illegality.

⁵⁵² J. M. HEBLY & F. G. WILMAN, 'Damages for Breach of Public Procurement Law. The Dutch Situation', in Duncan Fairgrieve & Francois Lichère (eds), *Public Procurement Law. Damages as an Effective Remedy*. (Hart Publishing, 2011), 85.

⁵⁵³ ECJ 28 January 2010, Case C-406/08 *Uniplex (UK)* [2010] ECR I-00817, para 35.

“It is only once a concerned candidate or tenderer has been informed of the reasons for its elimination from the public procurement procedure that it may come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings.”⁵⁵⁴

While the ECJ scrutinized the conditions for the starting of the time period, it did not consider the question of whether three months is a sufficient time period in absolute terms. The English rule used to be that proceedings must *“be brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose, unless the Court considers that there is good reason for extending the period”*. It does address issues of rapidity:

“To that end, Member States have an obligation to establish a system of limitation periods that is sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations.”⁵⁵⁵

The case turned on the discretion of the judge and the resulting legal uncertainty, which in this case failed the effectiveness principle:

Directive 89/665 precludes a national provision, such as that at issue in the main proceedings, which allows a national court to dismiss, as being out of time, proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules on the basis of the criterion, appraised in a discretionary manner, that such proceedings must be brought promptly.⁵⁵⁶

However, although the Court has not delimited the time limits more closely, it has drawn attention to the fact that due to the rapidity sought for purposes of the Remedies Directive, time limits in absolute terms could be relatively short, as long as they were reasonable.⁵⁵⁷

The growing amount of case law on time limits is another indication that there is a law of damages in creation and, in institutional terms, the interpretation at the discretion of the judge shifts the burden of implementation of EU law to the legislatures. Especially in the field of civil procedure, where the judge enjoys a wider margin of discretionary

⁵⁵⁴ ECJ 28 January 2010, Case C-406/08 *Uniplex (UK)* [2010] ECR I-00817, para 31.

⁵⁵⁵ ECJ 28 January 2010, Case C-406/08 *Uniplex (UK)* [2010] ECR I-00817, para 39..

⁵⁵⁶ ECJ 28 January 2010, Case C-406/08 *Uniplex (UK)* [2010] ECR I-00817, para 43.

⁵⁵⁷ Case C-314/09 *Strabag and others* [2010] ECR I-8769, para 37. Among others referring to Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paras 74 to 78 and ECJ 28 January 2010, Case C-406/08 *Uniplex (UK)* [2010] ECR I-00817, para 38 as authority.

responsibility, one can expect a shift towards legislative codification, as exemplified by the *Uniplex* case in the UK.

11.6 FAULT REQUIREMENTS

11.6.1 EU case law

Fault is one of the constitutive criteria in which the CJEU has not been reluctant to intervene. Although we can observe differences between the countries and different actions, it is useful to first survey the position of EU law before comparing the national positions. The national jurisdictions are required to comply with the interpretations as rendered by the ECJ in this respect. It is a strict no-fault requirement and diverging regimes would be in violation of EU law.

The Portuguese case line on the fault requirement

The Commission opened proceedings against Member States for failures of implementation, wherein the CJEU scrutinized whether national laws constituted sufficient or valid implementation of the Remedies Directive. One case law thread⁵⁵⁸ which generated little resonance or discussion at EU level⁵⁵⁹ in the field of public procurement was the Commission's infringement procedure against Portugal. The infringement targeted a national law making the award of damages to persons harmed by a breach of Community law relating to public contracts, or the national laws implementing it, conditional on proof of fault or fraud.⁵⁶⁰ In its observations, the Commission underlined that such proof is tremendously difficult to provide, given the fact that the individual responsible for the faulty or fraudulent act is extremely difficult to discern. The requirement of proof therefore did not satisfy the effective and rapid review mechanisms called for in the directive. Portugal most interestingly put forward that the liability scheme as imposed by the directive is not objective. Secondly it referred to the fact that proof of serious fault or intention is required

⁵⁵⁸ See fn 150 for details on the 'Portuguese saga'.

⁵⁵⁹ Two annotations are listed on the ECJs website, only one -an admittedly brief case note- in English: M. DISCHENDORFER, 'The conditions Member States may impose for the award of damages under the Public Remedies Directive: Case C-275/03 Commission v Portugal', (2005) *Public Procurement Law Review*, 19.

⁵⁶⁰ Case C-275/03 *Commission v Portugal* [2004] unpublished .

only in the internal liability between the individual responsible and agent or their joint liability. Lastly, it put forward that administrative practice differs from the rules. Without entering into a discussion on the intricacies of the Portuguese national law, the ECJ found it to be in violation of Article 1(1) and 2(1)c in so far as proof is required for the “faute ou d’un dol commis par les agents d’une entité administrative déterminée”⁵⁶¹. This part of the judgment is more specific in the way that it links the burden of proof as against an individual (agent). For the remainder, the formulation on proof is more sweeping, as in the interpretation that any need to prove fault breaches the respective Article of the public procurement Remedies Directive. This more sweeping formulation disregards the identity of the tortfeasor. Several remarks can be made on the judgment: primarily, the judgment concerns the question of the burden of proof. Nevertheless, one may wonder - since the Court ruled that the burden of proof cannot rest on the individual relying on the public procurement review mechanism – to what extent fault and intention are valid criteria at all in a claim for damages based on the public procurement rules. The Portuguese government referred to this as problematic in its submission that the Directive does not establish a system of objective liability. The judgment therefore links back to the discussion of seriousness and the requirements thereof as regards the type of liability scheme intended by the Directive. The Court did not explicitly come back to the submission. However, the way in which the notion of fault is to be interpreted is open, most importantly in relation to whether it includes notions of negligence or not, as in some Member States this still seems to be a substantive condition for a successful claim for damages.⁵⁶²

Strabag

Strabag addressed the doubts that remained due to the oscillating formulations in the Portuguese judgments. These concerned namely the question of whether all fault requirements were prohibited or if this was only in instances where the burden of proof was imposed on the tenderer. The Court stated:

⁵⁶¹ Case C-275/03 *Commission v Portugal* [2004] unpublished para 31, 32, judgment only available in French.

⁵⁶² It seems that several Member States made, or possibly still make, claims for damages subject to a condition of negligence. See D. PACHNOU, *The effectiveness of bidder remedies for enforcing the EC public procurement rules: a case study of the public works sector in the United Kingdom and Greece* (University of Nottingham, 2003) Section 2.8.2.

“In that regard, it should first be noted that the wording of Article 1(1), Article 2(1), (5) and (6), and the sixth recital in the preamble to Directive 89/665 in no way indicates that the infringement of the public procurement legislation liable to give rise to a right to damages in favour of the person harmed should have specific features, such as being connected to fault – proved or presumed – on the part of the contracting authority, or not being covered by any ground for exemption from liability.

That assessment is supported by the general context and aim of the judicial remedy of damages, as provided for in Directive 89/665.”⁵⁶³

In *Strabag* in 2010 it held that a fault requirement would contravene Directive 89/665/EC.⁵⁶⁴

“must be interpreted as precluding national legislation which makes the right to damages for an infringement of public procurement law by a contracting authority conditional on that infringement being culpable, including where the application of that legislation rests on a presumption that the contracting authority is at fault and on the fact that the latter cannot rely on a lack of individual abilities, hence on the defence that it cannot be held accountable for the alleged infringement.”⁵⁶⁵

For EU law claims, the fault criterion is therefore dispensed with. The justification for the no-fault requirement is drawn first of all largely from the specifics of the case, although it is quite clear that the finding of the ruling will be of general application. Secondly, the discussion does not focus on the question of whether materially, a fault criterion as a constitutive criterion for damages claims would be warranted. The reasoning depends, on one hand, on the rapidity and length of proceedings that *proving* culpability would require. Also, a reversal of the burden of proof through a presumption of fault on behalf of the contracting authority is not permitted. The ECJ cited the possibility that through the application of a specific rule, namely under the doctrine of the ‘excusable error’, the Austrian contracting authority would have an escape clause in order to rebut culpability.

While the ECJ is clear in the prohibition of fault, it is less clear as to *why* this is the case. It is inherently true that a fault criterion would preclude the liability of contracting authorities in certain cases. None of this reasoning addresses the underlying question of whether or not a fault criterion in damages claims is perhaps justifiable under specific factual situations. As others have pointed out, these limitations from a policy aspect might serve a

⁵⁶³ Case C-314/09 *Strabag and others* [2010] ECR I-8769, paras 35-36.

⁵⁶⁴ Case C-314/09 *Strabag and others* [2010] ECR I-8769.

⁵⁶⁵ Case C-314/09 *Strabag and others* [2010] ECR I-8769.

legitimate purpose.⁵⁶⁶ The resulting liability might be disproportionate, the prime example being a simple error of law.

11.6.2 Fault at national level

In principle, fault requirements are therefore not permissible for damages claims at the national level. While this issue is settled, it is open as to how far no-fault requirements are valid for all parallel causes of action. In Germany, for example, there is more than one action for damages. And while it is now accepted that for the specific statutory causes of action, the fault criterion is not permissible, the question remains open for the *culpa in contrahendo* doctrine. According to common opinion it is still based on fault. For the purposes of EU law, is it sufficient if one of the causes of action available to an aggrieved tenderer is open, without a fault requirement? In particular, in Germany the no-fault cause of action is limited to claims for bid costs –lost profits are available only under the pre-contractual liability doctrine.

Again, the ‘holistic’ view of damages claims taken by the CJEU is translated back into the national legal systems with difficulty, due to the frayed nature of damages claims at that level.

⁵⁶⁶ See discussion by C. ALEXANDER, 'Vergaberechtlicher Schadensersatz gemäss §126 GWB', (2009) *Wettbewerb in Recht und Praxis*, 28, 36.

12 QUANTIFICATION OF CLAIMABLE LOSSES

The quantification of damages is the last step in the transformation of legal norms into real outcomes in a legal procedure. In the process of applying legal rules to specific cases and facts, the quantification of damages is situated at grass roots level. Nevertheless, the damages quantification step can impact upon the monetary amount, and therefore the ultimate outcome of a case, to a significant degree.

With regard to their general significance for the overall result of a legal case, the study of quantification rules has been neglected in comparison with the constitutive criteria.

In the following, I first show some theoretical divergence in the identification of losses, and how this impacts on what is meant by lost profit and actual damage. These terms having identical meaning in the national legal orders is thus not a given. Section 12.2 discusses the most pertinent heads of damages in public procurement, namely bid costs, lost profits and interest. Section 12.3 deals with the relevance of the burden of proof and evidentiary rules, and addresses institutional and structural rules in relation to judges' discretion. The Chapter closes with a consideration of valuation methods in Section 12.4. Overall, these are the definitional elements which I have identified that most strongly impact on the notion of damages and the quantification thereof on a conceptual level.

These are discussions in the abstract, again with the intention to transcend isolated national understandings by providing a conceptual and functional analysis as a backdrop against which the individual jurisdiction's rules can be contextualized and better understood.

12.1 QUANTIFICATION OF DAMAGES

The kinds of losses which are to be quantified depend on the underlying understanding of what counts as legally recognized damage. In particular, one can distinguish *between a natural and a normative understanding of damage*. A natural definition of harm refers to the non-legal understanding of damage as any detriment caused. It may thus seem too broad.

Normative damage, in contrast, requires some kind of a legal recognition of the interest that the *laedens* holds in relation to the initial state of affairs. The term ‘normative damage’ thus implies the fact that a loss is legally protected. For example emotional pain and suffering are certainly natural forms of harm, but the extent to which legal recognition is granted to such harm in legal systems differs. This is the distinction that can be expressed in French between ‘*dommage*’ and ‘*préjudice*’;⁵⁶⁷ damage/harm and loss, *damnum* and *injuria*.⁵⁶⁸

Next, on the definition of the losses which can be subject to a damages claim, quantification relies on different types of comparisons in order to assess the extent of a given loss. One may commonly distinguish between an *objective* and a *subjective assessment* of losses incurred. In a subjective assessment, one takes account of the specific losses that a certain wrongful act inflicts on a particular victim. The concrete method takes into account and bases the damage on all individual circumstances of the case. This is the regular method for calculation of damage. The objective method departs from more abstract, i.e. general and universal criteria by comparing the damage that all *laedens* would have sustained in a similar position. Under the objective conception of damage, losses are independent of the victim and of the victim’s particular situation. The setting of criteria for quantification by the legislature constitutes a move towards more abstract quantification of damages.

Under the *Differenzhypothese*,⁵⁶⁹ two states of patrimonies are compared under a ‘hypothesis of difference’. This is the comparison between the state which is and the state which would have existed had an injurious act not taken place. Mommsen called this the ‘interest’. From this differential operation stem the distinctions between *lucrum cessans* and *damnum emergens*.

*“da das Interesse die Differenz zwischen dem wirklichen Betrage eines Vermögens und demjenigen Betrage desselben ist, wie er ohne die Dazwischenkunft des beschädigenden Ereignisses gewesen wäre, so kann das Interesse nur aus solchen Gegenständen bestehen, welche zu Vermögensobjecten sich eignen“.*⁵⁷⁰

⁵⁶⁷ M. SOUSSE, *La notion de réparation de dommages en droit administratif français* (L.D.G.J, 1994).

⁵⁶⁸ Throughout the thesis, the terms damage and loss have been used interchangeably since it is not committed to the understanding thereof in a particular legal system.

⁵⁶⁹ Developed by F. MOMMSEN, *Zur Lehre vom dem Interesse* (Schwetschke, 1855).

⁵⁷⁰ F. MOMMSEN, *Zur Lehre vom dem Interesse* (Schwetschke, 1855), 11.

The hypothesis of difference refers to the overall comparison of patrimonies before and after a detrimental event. Apart from the hypothetical operation, a slight difference emerges if the method of quantification relies on the overall patrimony as opposed to individual items of loss. This is different to a subjective-objective approach because the point of reference is not the individual value of lost items. There are several theories which lie between overall patrimony and specific individual damages. An *abstract normative approach* to damages has been accepted by several courts and entails that, next to the thesis of difference comparison of overall patrimonies, the protective scope of legal norms is taken into consideration and the recoverable losses are replaced or adjusted accordingly. For example, from the point of view of insurance, only a particular part of the overall patrimony is compared, namely that part which is specifically protected by the legal norm guaranteeing the interest. This is less than the overall patrimony, yet neither is it an individualized account of protected losses.⁵⁷¹

Compensation is a relational concept that compares two states of the world, an imaginary and a real one. The hypothetical nature of the comparison fundamentally differs between actions for liability under non-performance of contract and torts. Let us imagine that a course of events unfolds, marked by a tortuous act. From this string of events, the real scenario leads from the tortuous act to the world we live in. But which state of the world should be the comparator? To assess the hypothetical comparator state, it is possible to merely eliminate the tortuous wrongful act, or else to replace it with the rightful one in order to project the hypothetical image of the world.⁵⁷²

Under breach of contract, the present situation is compared with a perfect world in which the contract was faithfully executed. The head of damage arising therefrom is called

⁵⁷¹ H. MÖLLER, *Summen- und Einzelschaden. Beiträge zur Erneuerung der Schadenslehr vom Wirtschaftsrecht aus* (de Gruyter, 1937).

⁵⁷² T. HONORÉ, *Responsibility and Fault* (Hart Publishing, 1999). The opinion of Honoré of replacing an act with rightful conduct rather than the mere elimination thereof is especially pertinent in the context of this thesis in which we are dealing with breaches of statutory duties. This means that the content of the rightful act can at times be positively asserted through the content of the statutes. This implies that in certain cases the 'rightful act' we can project to the future is none other than not acting, which is then identical to the mere elimination of the tortuous act from the hypothetical course of events. It seems the most difficult state posed for the replacement approach is one in which the rightful act is indeterminate yet not an omission, or where there are alternative rightful acts.

the positive (contractual) interest. By contrast, in the case of defective legal acts underlying a contract, the hypothetical situation, the perfect world, is precisely one in which the contract was not executed. This is then termed negative (contractual) interest. Because they refer to mutually exclusive either/or comparisons, they cannot be simultaneously claimed.⁵⁷³

Positive and negative forms of contractual interest are therefore not congruent with those of lost profits and costs sustained. Lost profits and costs do not refer to the comparator situation, but the heads of damages, which can be both claimed in a single comparison. Lost profits (*lucrum cessans*) are the gains not realized due to an incident; actual or positive costs (*damnum emergens*) either mean a decrease in assets or an increase in liabilities. In public procurement, the distinction is pertinent. Given that some of the selected jurisdictions conceive of procurement damages in tort, and others resort to (pre)contractual considerations, the causes of action are factors that can potentially influence the available compensation.

Simply put, establishing losses requires a comparison. Different kinds of comparisons use quite different units of comparison, for example overall patrimony, as opposed to individual loss items. Also, the hypothetical situation can be one in which the wrongful act is eliminated, or replaced with the rightful act. Again, terminology sometimes obscures the finer distinctions between these operations.

12.2 HEADS OF DAMAGES: BID PREPARATION, LOST PROFIT AND INTEREST RATES

The ECJ judgments in *Courage*⁵⁷⁴ and *Manfredi*⁵⁷⁵ can be read, in a highly simplified account, to require that for violations of EU law, *damnum emergens*, *lucrum cessans*, and interest must all be claimable. The ECJ uses the terminology of actual loss in an identical sense to *damnum emergens*, and loss of profit in an identical sense to *lucrum cessans*. A brief survey

⁵⁷³ J. SPIER, T. HARTLIEF, G. E. VAN MAANEN & R. D. VRIESENDORP, *Verbintenissen uit de wet en Schadevergoeding* (Kluwer, 2006); M. H. WISSINK & W. H. VAN BOOM, 'The Netherlands. Damages under Dutch Law', in U. Magnus (ed), *Unification of Tort Law: Damages* (Kluwer, 1996), 146.

⁵⁷⁴ Case C-453/99 *Courage v Crehan* [2001] ECR I-6297.

⁵⁷⁵ See for example Joined Cases C-295/04 to C-298/04 *Manfredi and others* [2006] ECR I-06619, para 94.

of each of these heads of damages for the field of public procurement demonstrates how the concepts translate into quite diverse content on theoretical and national levels.

All jurisdictions claim to adhere to the general principle of full compensation.⁵⁷⁶ Yet systems vary in whether and to what extent they regard losses as either normative or factual concepts. Under a normative system, losses are enumerated in *numerus clausus* type closed categories of those losses that are regarded as legally relevant. Where losses are more of a factual question, the recognition of losses requires the demonstration that losses were incurred through sufficient evidence and in combination with the necessary connection to the injurious act.

12.2.1 Preparation of bid costs

The costs of preparation of a bid in their broadest definition are costs relating to the preparation of a tender. Examples of preparation of bid cost items are costs relating to: the obtaining of tender documents; obtaining the required certificates and documentation; analysis of the tender; the development of bid solution and possibly models; price calculations and possibly variants; negotiations, both pre- and post-tender.⁵⁷⁷ In public procurement, the preparation of bid costs can add up to substantial amounts of money. To illustrate, Versatel allegedly invested €1.5 million in the preparation of a bid for UMTS technology.⁵⁷⁸

Beyond this simple formulation, there are varying definitions of this type of loss. Preparation of bid costs are *costs which a tenderer incurs* when placing a bid. Defined in the negative, they are those *costs which would not have existed*, had a tender not participated in the public procurement procedure. It is clear that the kind of costs incurred varies with the type of procedure chosen by the contracting authority, as well as the type of contract proposed.

⁵⁷⁶ J.-T. OSKIERSKI, *Schadensersatz im Europäischen Recht : Eine vergleichende Untersuchung des Acquis Communautaire und der EMRK* (Nomos, 2010).

⁵⁷⁷ C. E. C. JANSEN, 'Aanbesteding en offertekostenvergoeding', in Bert van Roermund, et al. (eds), *Aanbesteding en aansprakelijkheid. Preventie, vergoeding en afwikkeling van schade bij aanbestedingsgeschillen*. (Schoordijk Instituut Centrum voor Aansprakelijkheidsrecht, 2001), 71.

⁵⁷⁸ J. M. J. VAN RIJN VAN ALKEMADE, 'Overheidsaansprakelijkheid voor onrechtmatige verdeling van schaarse publieke rechten', (2011) *Overheid en Aansprakelijkheid*, 69, fn 36.

Conceptual distinctions can also be based on the *purpose of the costs* (preparation costs versus contract performance costs) or the question of *enrichment*. They distinguish between the pure *costs of the preparation* of the bidding procedure and acquisition of the tender and, on the other hand, those *costs which relate directly to the performance of the contract* itself. An example of pure acquisitory costs are costs for filing the documentation required in the bidding procedure. On the other hand, in an architectural design contest, the costs for designing a model are directly linked and form part of the performance of a contract. The concepts are not identical to the splitting of bids based on *who is enriched* from the incurred costs - that is, whether costs incurred by the tenderer in the preparation stage confer an advantage on the contracting authority. The distinction is similar in that a cost conferring an advantage onto the contracting authority will normally also fit into the category of cost meant for performance of the bid itself. However this will not always be the case *vice versa*, since costs can be incurred with the object of performing, which the contracting authority does not benefit from later on.⁵⁷⁹

Economic as opposed to legal reasoning on preparation of bids

Essentially, the answer to the question of whether or not to award damages for the preparation of bids depends on the question as to who is held liable for incurring those costs in the first place. The issue is one of initial cost allocation on either the contracting authority or tenderer. However, if the contracting authority is liable, in the end the public pays.⁵⁸⁰ In the alternative, namely the tenderer being liable for the costs, the tenderer is forced to include the costs within his general costs. Effectively such costs are transferred to other bids which are ultimately successful. Two positions may be held in that regard, either that the costs are lost or that the costs need to be covered by whoever causes them. In any event, the economic reality is that considerable bidding costs may be involved in a tender, such as functionally designed bids intended to stimulate creative bidding.

⁵⁷⁹ To illustrate, take the example of a design study, which is a cost incurred in relation to the performance. A contracting authority might award the contract to another tender, yet still rely in parts on the design study, in which case it has received an advantage. If it does not, the two categories would not overlap.

⁵⁸⁰ C. E. C. JANSEN, 'Aanbesteding en offertekostenvergoeding', in Bert van Roermund, et al. (eds), *Aanbesteding en aansprakelijkheid. Preventie, vergoeding en afwikkeling van schade bij aanbestedingsgeschillen*. (Schoordijk Instituut Centrum voor Aansprakelijkheidsrecht, 2001), p. 75 et seq, is in favor of introducing compensation for the preparation of bids in public procurement procedures in general, rather than examining the question as one arising out of a breach of statute of a contracting authority.

The general considerations on the allocation of the burden of costs for the preparation of bids are the basis for any debate on the inclusion of bid preparation as a head of damages. Two scenarios in between can be imagined: in one, a legal system, or a particular clause in the tender documents holds the contracting authority (economically) responsible for the preparation of a bid. In the other scenario, a tenderer is expected to cover the preparation costs, in the event of a successful bid, from the proceeds of that bid. In the first scenario, the contracting authority would be expected to cover the preparation costs. In this case, those general (economic) considerations would be enough to ground a claim. In a system whereby the initial allocation of costs does not rest with the public authority, in order to make the case for preparation bid reimbursements, additional arguments need to be advanced (which tend to be of a legal nature).

From a welfare economics point of view, the costs of unsuccessful bids must be counted as part of the total transaction cost of a public procurement procedure.⁵⁸¹ Accordingly, under an incentive theory, the most efficient cost allocation can be achieved by assigning costs to whoever is most suitable to control the costs. Jansen notes the distinction between the economic and the legal approach to preparation of bids. Whereas the economic efficient transaction approach departs from a macro level efficiency debate, the legal argumentation focuses on the micro level as between parties. In his words, “the fact that Party A incurs costs which benefit Party B is reason enough for a lawyer to go and look for a legal basis upon which Party B has a duty to compensate in relation to A.”⁵⁸² Whereas one view (economic) tends to consider the overall welfare, the other (legal) point of view departs from the party relationship.⁵⁸³

⁵⁸¹ C. E. C. JANSEN, 'Aanbesteding en offertekostenvergoeding', in Bert van Roermund, et al. (eds), *Aanbesteding en aansprakelijkheid. Preventie, vergoeding en afwikkeling van schade bij aanbestedingsgeschillen*. (Schoordijk Instituut Centrum voor Aansprakelijkheidsrecht, 2001), p. 77.

⁵⁸² C. E. C. JANSEN, 'Aanbesteding en offertekostenvergoeding', in Bert van Roermund, et al. (eds), *Aanbesteding en aansprakelijkheid. Preventie, vergoeding en afwikkeling van schade bij aanbestedingsgeschillen*. (Schoordijk Instituut Centrum voor Aansprakelijkheidsrecht, 2001), 82, translation by author.

⁵⁸³ At the end of the day, both disciplines have the capacity to adopt more nuanced points of view. Law, for example, takes 'welfare' into account by means of public policy arguments. In the end, the disagreements are about assumptions pertaining to recognized interests in either economic models or doctrines of law and hence are identical for both law and economics.

Accepting the logic that the contracting authority precluded a tenderer from having a fair chance of winning the procurement procedure, one must theoretically also accept that this holds true for all those that submitted a bid. Assume that contracting authority A invited bids, but was already determined to award to B. All other tenders (Cn) have been precluded from successfully participating. Based on this reason alone, A would be liable for all costs in Cn's preparations for bids. In order to limit the effect of the duty to pay damages for the preparation of bids, another element of liability would have to be included again, such as (the most basic one) the eligibility of the bids, or alternatively, the likelihood of succeeding in the absence of other factors. For example, Jansen takes the view that costs should be compensated only where three conditions are met: a) the price of the bid must have been valid, b) the bid must have been serious, that is it must have been adequate, and c) the costs must have been incurred in good faith.⁵⁸⁴ Formulated for his general approach, the concerns addressed through the conditions also remain validly addressed in relation to bid preparation as a head of damage.

One could make a better case for bid preparation damages as a residuary head of damage in relation to situations in which the claim of lost profits is precluded. This could arise out of the difficulty of proving the causality or difficulty in proving the loss itself. In both these cases, the preparation of a bid could serve as a minimum threshold for damages.⁵⁸⁵

For bid costs, one of the main issues concerns the items of loss which are legally covered by the notion. As such, bid costs do not necessarily correspond to *damnum emergens*. In addition, to claim bid costs and lost profits in parallel, or *damnum emergens* and *lucrum cessans*, must result in an appropriate method of evaluation in order to avoid

⁵⁸⁴ C. E. C. JANSEN, 'Aanbesteding en offertekostenvergoeding', in Bert van Roermund, et al. (eds), *Aanbesteding en aansprakelijkheid. Preventie, vergoeding en afwikkeling van schade bij aanbestedingsgeschillen*. (Schoordijk Instituut Centrum voor Aansprakelijkheidsrecht, 2001), 87. He assumes a duty to compensate for the following items: deciding whether or not to tender, development of bid solution, price calculations. However, the other costs he rejects on rather factual grounds, for example, due to the fact that obtaining documents or pre-qualification do not usually create costs for an undertaking.

⁵⁸⁵ The residual nature of the bid profits can be explained by several rationales, namely double counting, in the case that an aggrieved tenderer claims both bid costs and lost profits. Then, lost profits can lead to overcompensation, for example, due to the lengthy nature of the contract or the high level of risk inherent to actually carrying out the work. In addition, there may only be weak evidence in order to assess the extent of damages.

double counting. There are valid arguments for either solution, but the underlying concerns ought to be addressed by any court.

12.2.2 Lost profits

Availability of heads of damages

Lost profits are theoretically available across the jurisdictions, yet are rarely successfully claimed. In the Netherlands they are available, however they are subject to a high burden of proof, in that the aggrieved bidder has to prove that he would have been awarded a contract. In the UK, in *Harmon*, the claimant was awarded both its tender costs and its lost profits, but successful follow-up cases are very rare. In France, subject to the tender having had a serious chance, lost profits are available and are regularly awarded. In Germany, lost profits are available under *culpa in contrahenda*, but the statutory article of §126 GWB is limited to claiming bid costs. Again, successful claims for lost profits are rare. Therefore, while lost profits are available in all jurisdictions, the rate of incidence of successful awards varies greatly. In Germany and the UK only a very small number of cases are known, as is the case in the Netherlands. Only in France do courts regularly award lost profits. In addition, the Netherlands and France are reluctant to award lost profit and bid costs at the same time, while in the UK it is ambiguous whether whether bid costs can be regularly claimed.⁵⁸⁶

In practice, there is therefore a difference between the terms ‘bid preparation’/‘costs of participation’ and ‘negative interest’. For example in Germany, the court found a discrepancy between the losses covered in §126 and the *cic* – the difference is based on causality. Under §126 GWB, legal fees may arguably be claimed. While §126 GWB allows for bid preparation cost and costs of participation, the *culpa in contrahendo* doctrine covers losses on the basis of negative and positive interest, but these are dependent on a stricter reading of causality in determining the losses caused. The causality required in the

⁵⁸⁶ M. TRYBUS, 'An overview of the United Kingdom Public Procurement Review and Remedies System with an Emphasis on England and Wales', in Steen Treumer & François Lichère (eds), *Enforcement of the EU public procurement rules* (DJØF Publishing, 2011), , 229; S. ARROWSMITH, *The Law of Public and Utilities Procurement* (Sweet & Maxwell, 2005), 1381 argues for a tort approach under which the tender is put in a position as though the tort had not occurred, which in many cases will preclude bid cost claims as they would have been made anyways.

framework of the *cic* was stricter, and excluded legal fees, as they would have been incurred with or without the tortious conduct.⁵⁸⁷

The relationship between lost profit and bid preparation

The initial starting point for a legal system on the allocation of costs for bid preparations also influences a head of damage for the preparation of bids in relation to other heads of damages, in particular in claiming lost profits. Specifically when it comes to party agreements concerning cost allocation, whether a claim for bid preparation is based in obligation or tort makes a difference.

One issue regarding the parallel claim of lost profits and bid preparation is that of double counting. Depending on to whom a legal system initially allocates costs, bid preparations are economic risks which ought to be borne by the bidder and hence discounted from the expected profits. In order to avoid double counting, either the two heads of damages are not available in parallel, or the quantification method used for this evaluation must account for this cost allocation.⁵⁸⁸

A more fundamental difficulty arises regarding the chosen hypotheticals. It is the difference mostly reflected through tort or contract as the cause of action. From a contractual point of view, compensation implies that the plaintiff is put in a position either as though the contract had never been performed (negative interest), or as though the contract had been performed (positive interest). The hypothetical in this case is exclusive, and based on this reasoning, the parallelism of both heads of damages is logically flawed.

Appreciation

⁵⁸⁷ LG Magdeburg, 02.06.2010, 36 O 25/10 (007), 36 O 25/10.

⁵⁸⁸ See the recognition of this problem in the divergent practice of investment arbitration tribunals. For example, J. GOTANDA, 'Recovering Lost Profits in International Disputes', (2005) 2 *Transnational Dispute Management*, quotes the following arbitral award: "[The plaintiff should be] put ... in the same pecuniary position as they would have been in if the contract had been performed. But the repayment of the expenses incurred in concluding the contract would tend to put them in the position they would be in if the contract had never been concluded (negative damages)... Undoubtedly, the plaintiff was justified in hoping to recover the expenses of making the contract out of the profit which they were expecting. But this is an element included in the compensation for loss of profit. Adding positive and negative damages together is a contradiction, and cannot be allowed. *Sapphire Int'l Petroleum Ltd. v. Nat'l Iranian Oil Co.*, Arbitral Award (Mar. 15, 1963), reprinted in 35 I.L.R. 136, 186-87 (1967)."

We have seen in the country studies that the extent to which lost profit claims are available varies significantly between the countries. In the United States, lost profits are generally not awarded at all in public procurement proceedings.⁵⁸⁹ The reason for this doctrine lies in the fact that the respondent is the State, and any damages cashed out are ultimately paid for by the taxpayer. Damage claims are therefore limited due to the mainly public nature of the defendants. The question of awarding (or not) lost profit damages in public procurement proceedings then becomes a question of State immunity. However, the doctrine as expressed in the United States is hardly ever put forward in EU countries. The non-availability of lost profits in the EU is not motivated by the identity of the State. Drawing on the experience of investment arbitration, which is also directed against States, this rationale is also not accepted in other fields of law and overall lost profits are regularly awarded. The reason is simple; if damages are compensation damages, then the award must approach the natural pecuniary damage to some degree.

For the judicial development of the damages doctrine, in any case, the principle of full compensation would provide the starting point. The availability of specific heads would then be assessed according to the actual situation. Mainly, the breach itself impacts on which hypothetical scenario is chosen for the comparison, and whether this results in lost profit and preparation bids being claimable at the same time. Based on these choices, the evaluation method used to decide lost profit surfaces as the main determinant of the extent of lost profits.

12.2.3 Interest rates

The award of interest at the national level is often marked by the broad discretion enjoyed by the courts with regards to the applicable interest rates. The most salient issues arising usually concern which cases courts award interest in, what the applicable rate and method (simple or compound interest) are, and what time period is covered. The box below provides the example of England in greater detail in order to illustrate that, even at the national level and therefore from an internal point of view, the question of damages tends to be foreseen with important question marks. The judges' practice of awarding interest was noted to be

⁵⁸⁹ D. GORDON & M. GOLDEN, 'Money Damages in the Context of Bid Protests in the United States', in Duncan Fairgrieve & François Lichère (eds), *Public procurement law: damages as an effective remedy* (Hart, 2011), .

highly variable, and in some instances the high percentage of interest awarded almost seemed to amount to a punitive element.

The issue of interest awards in England

The Law Commission in England has addressed the issue with a study in 2004, stating the availability of interest.⁵⁹⁰ Overall, the Law Commission found a wide disparity in the calculation of interest and the methodologies used, in addition to which, interest rates should be clarified as containing no punishing element as regards the defendant.

Historically, apart from two sections of the Civil Procedural Act 1833, interest would not be awarded by the courts at common law. Later on, interest became recoverable through the statutory provision thereof in the Law Reform (Miscellaneous Provisions) Act 1934. Doctrine only later developed in such a way that interest came to be seen as special damages as opposed to general damages. In cases of claims based in equity and admiralty courts, interest was also available.

Details on the award of interest are set out in section 35A of the Supreme Court Act 1981, and section 69 of the County Courts Act 1984. There is wide discretion left to the courts as to how interest rates are set. However, statutory interest is simple and not compound. Again, in equity and admiralty courts, the position on compound interest differed. The 1996 Arbitration Act on the other hand provides the powers to award compound and simple interest to arbitration tribunals.

What is the applicable rate and method of interest computation?

Section 17 of the Judgments Act 1838 currently provides for an 8% rate, which could, depending on the current base rates, be considerably higher than usual rates. (The recent base rates of interest have been at around 0.5%, making the applicable statutory interest rate a good 7.5% above the base rate.) Deviation from this statutory rate can be made in a commercial transaction, for which it has been acknowledged that "interest should reflect the commercial value of money".⁵⁹¹ With variations over time, established rates usually seem to be somewhere between 1% and 4% above the base rate.⁵⁹² *McGregor on Damages* notes fluctuations over time, but estimates a current norm of around 1% above bank rate, adjustable to the actual borrowing situation of the defendant.⁵⁹³ The Law Commission recommended a standard (though variable) interest rate of the base rate plus 1%.

Taking these changes into account, it remains true that simple interest prevails in common law. Compound interest is still not regularly awarded, and only in cases where this reflects trade practice and custom, as well as in equity and the admiralty courts. However, the prevailing

⁵⁹⁰ As a result of these developments, pre-judgment interest may now be awarded in one of seven ways: (1) under a contract or trade usage (when it may be simple or compound according to the agreement or usage); (2) as special damages (simple or compound); (3) under the equitable or Admiralty jurisdictions (simple or compound); (4) where proceedings have been commenced, under section 35A of the Supreme Court Act 1981 or its county court equivalent (which is limited to simple interest only); (5) as of right under certain other statutes (simple only); (6) by arbitrators, exercising their discretion under the Arbitration Act 1996 (which may be simple or compound); or (7) after trial, where the defendant has been held liable for more than a refused claimant's offer, under Part 36 of the Civil Procedure Rules (simple only). LAW COMMISSION, *Pre-Judgment Interest on Debts and Damages*, LAW COM no 287 available at <http://lawcommission.justice.gov.uk/publications/prejudgement-interests-on-debts-and-damages.htm>, p 10. The following paragraphs are based on the Law Commission's report.

⁵⁹¹ D. A. THOMAS & H. MCGREGOR, *McGregor on Damages* (Sweet & Maxwell, 2009), 657.

⁵⁹² Note by J. GUN CUNINGHAME, *Calculating Claims of Interest* (at http://www.goughsq.co.uk/documents/calculating_claims_of_interest.pdf).

⁵⁹³ D. A. THOMAS & H. MCGREGOR, *McGregor on Damages* (Sweet & Maxwell, 2009), 660.

position may change with increased recognition of the fact that simple interest does not fully compensate an injured party.⁵⁹⁴

What time period is covered?

It is acknowledged as the general rule that loss will start to run from the time of accrual of the loss. However, it has been stated that “there is certainly no rule that interest will invariably run from the date of loss.”⁵⁹⁵ In addition, undue delay in bringing the lawsuit may result in deprivation of (parts of) the interest.

The relationship between taxation and damage, and taxation and interest

An additional factor to which we can but briefly refer is the matter of taxation. In this respect, it has been held that while for damages themselves taxation may be irrelevant, for interest calculation the matter of taxation certainly matters in order to adjust the interest due.

“Damages are awarded to compensate for the loss of money or its equivalent. Interest is awarded to compensate for the loss of use of money. In accounting terms damages compensate for the effect of wrongdoing on profit and loss, interest compensates for the effect of wrongdoing on cashflow. If in year one loss is caused which is shared between the plaintiff and Inland Revenue and in year five damages fall to be awarded which will be shared between the plaintiff and the Inland Revenue, it can be logical to disregard the effect of taxation when assessing the damages. But it does not follow that the plaintiff should receive an award of interest which compensates not only for his loss of use of money but in addition for the loss of use of the share which should have been received by the Inland Revenue.”⁵⁹⁶

In the specific case, Phillips J. awarded interest on only 75% of the damages due to taxation matters.

As the above findings make clear, there is great variation in how the matter of interest is very much decided. As a result, the Law Commission in its report on pre-judgment interest has criticized the current award of interest as being uncertain, arbitrary, and often too high.⁵⁹⁷

In the UK, CPR rule 16.4(1)(b) and (2) requires the claimant to state that s/he is seeking interest, and on what basis it is required, for what periods and at which rate. In the *Harmon* litigation, for example, the question of the applicability of interest was raised by both

⁵⁹⁴ J. GUN CUNINGHAME, *Calculating Claims of Interest* (at http://www.goughsq.co.uk/documents/calculating_claims_of_interest.pdf), 11 referring to *Man Nutzfahrzeuge AG v Freightliner Ltd* [2005] EWHC 2347 (Comm). However, again this concerns a case in the commercial jurisdiction. The following paragraphs and case citations are based on his text.

⁵⁹⁵ B.P. Exploration Co (Libya) Ltd v Hunt (No 2) [1979] 1 WLR 783, Robert Goff J.

⁵⁹⁶ Deeny v Gooda Walker (No.3) [1996] L.R.L.R. 168 at 173 in D. A. THOMAS & H. MCGREGOR, *McGregor on Damages* (Sweet & Maxwell, 2009), p 674.

⁵⁹⁷ LAW COMMISSION, *Pre-Judgment Interest on Debts and Damages* available at <http://lawcommission.justice.gov.uk/publications/prejudgement-interests-on-debts-and-damages.htm>. The overall recommendations are the following: “The report makes recommendations for reforming the current system for awarding interest before judgment in claims for damages. The main changes would be: (i) the courts should normally award interest at a specified rate, set each year at 1% above the Bank of England base rate (the courts would have discretion to depart from the rate where there was good reason); (ii) the courts should have a power to award compound interest in appropriate circumstances; (iii) the courts should make available a computer programme and tables to make interest calculations as simple and straight-forward as possible.”

parties, although the issue was excluded. The applicants applied for an 8% statutory margin, while for example, in respect of tender costs, the defendant had offered Harmon an interim payment that was based on a rate 2.5% above the base rate from 1 July 1995.⁵⁹⁸

Interest as a head of damage? Interest as a procedural or substantive matter?

From the EU law perspective, the conceptualization of interest is relevant for example if it is accepted that EU law should define the claimable heads of damages for a violation of the law. Historically, interest has been conceived of on one hand *as* damage, namely damage to compensate for the late payment and the plaintiff's inability to use that money. On the other hand, interest could hold a special position within a specific item of damages. In England, both points of view were historically enshrined in the law.⁵⁹⁹ In the context of arbitration, awarding interest is regarded as a procedural issue, thus allowing an appeal, while in other jurisdictions (e.g. Japan and Russia) it is a substantive matter, and is only challengeable under the arguably higher threshold of being contrary to public policy.⁶⁰⁰ In line with my observation in previous parts, although interest is often treated as a head of damage, it is factually also subsumed under the procedural autonomy considerations. For example, in *Metallgesellschaft*⁶⁰¹ the Court held: "*While, in the absence of Community rules, it is for the domestic legal system of the Member State concerned to lay down the detailed procedural rules governing such actions, including ancillary questions such as the payment of interest, those rules must not render practically impossible or excessively difficult the exercise of rights conferred by Community law.*"⁶⁰² In this particular case the procedural autonomy considerations did not lead the Court not to intervene. From the formulation of the case, however, we can deduce that the court is willing to treat the interest question in a differentiated way depending on the right at stake.

⁵⁹⁸ Which was at 6.75%, which with the 2.5% amounted to a 9.25% rate of interest.

⁵⁹⁹ I. YOSHIDA, 'Comparison of Awarding Interest on Damages in Scotland, England, Japan and Russia', (2000) *Journal of International Arbitration*, 41, 52-53 citing the Civil Procedure Act 1833 as an example for interest as damage, and the Law Reform (Miscellaneous Provisions) Act 1934 regarding the special position.

⁶⁰⁰ I. YOSHIDA, 'Comparison of Awarding Interest on Damages in Scotland, England, Japan and Russia', (2000) *Journal of International Arbitration*, 41, 71.

⁶⁰¹ With regards to interest discussed by R. CARANTA, 'Damages: Causation and Recoverable Losses', in Duncan Fairgrieve & François Lichère (eds), *Public procurement law : damages as an effective remedy* (Hart, 2011), 175; Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and others* [2001] ECR I-1727, para 94.

⁶⁰² Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and others* [2001] ECR I-1727, para 95.

Under EU law, interest tends to be mentioned in the same breath as actual damage and loss of profit. The availability of interest is a requirement of EU law, and the context indicates that the ECJ regards interest as a head of damage.⁶⁰³

12.3 PROVISIONS REGULATING THE QUANTIFICATION OF DAMAGES

There are several structural elements which constrain and shape the way quantification is undertaken within the legal process. The degree of formal and doctrinal separation between the categories of constitutional and quantification criteria varies significantly between jurisdictions. In addition, quantification can occur in the same legal procedure as the ascertaining of liability, or as in some jurisdictions, there can be a separate quantification legal procedure in which the amount of damages is established. These factors also shape the discretion accorded to the judge, which can be quite significant with regards to the ultimate damage award.

12.3.1 The separation between constitutive and quantificative criteria

The degree of separation between constitutive and quantificative criteria of damages claims depends on the design of the legal system in question. In France there is hardly any, and after constituting liability, a court will usually proceed to make an award in the course of the same legal procedure. Formal separation is stronger in other regimes, for example the Netherlands. Quantification and constitution are regulated in the Civil Code under two different provisions. The quantification provision is identical for both tort and contract. In the legal process, the finding of liability can be a legally entirely separate procedure of the later quantification judgment. In Germany, the legal regime also distinguishes rather strongly between ‘Haftungsbegründung’ and ‘Haftungsausfüllung’. The UK also has a stronger degree of separability.

The separation of a finding of liability from the ultimate quantification of an award impacts on how intensely quantification aspects are pleaded, and also on whether settlements are sought. Where quantification is embedded in the ‘material’ part of the

⁶⁰³ Joined Cases C-295/04 to C-298/04 *Manfredi and others* [2006] ECR I-06619.

procedure on the constitutive terms, a claimant may be primarily concerned with proving the constitutive elements of a claim. Consequently, quantification pleading receives less attention. When constitution and quantification are separate, it is also more likely that the judge would have less discretion in estimating the amount of awarded damages. If an entirely new procedure is started to deal with the issues of quantification, those issues tend to become 'legalized'. Also, where the moments of constitution and quantification of damages are separate from one another, the likelihood of settlement proceedings increases. Usually, the outcome of a finding on the constitutive legal question will facilitate an out-of-court finding on the amount of compensation, as opposed to a unilateral legal one imposed by the courts. Empirical data on these effects is unfortunately not available in the form of systematic studies, but these observations are affirmed by most practitioners. But it is clear that once there is a positive finding of liability, process economies will strongly encourage the responsible party to seek a settlement. Settling a dispute out of court, at least partially, moves the dispute away from the formalized trial structure and hence moves disputes, in terms of result, away from the trial and the reach of EU law, and into the private sphere.

12.3.2 Discretion of the judge

The 'discretion of the judge' component is related to legal determination. The quantification of damages in the legal systems can be better understood by looking at whether a legal system openly addresses and creates a formal doctrine of damage quantification methods. Indeterminacy relates to the method itself, the choice of method, or an open delegation to the judge's individual (not to say personal) assessment. In most legal systems, the quantification of damages is a neglected topic. Quantification thus becomes a technical if not arbitrary exercise, rather than one that is diligently dealt with in legal doctrinal discussions. Paradoxically, this vacuum of common understanding and guidance puts the judge in a position whereby, in the absence of legal determination, he has to exercise discretion.

Where the judge is in a position to adjudicate, but without guidance from the legislative, s/he disposes of greater discretion. The question of whether an issue has been legislated on is not the only factor in determining this discretion. In addition, the judge, as seems to be the case in France and also in the UK, may to a certain degree be bound by

previous case law, from which guidance can be expected. In the Netherlands on the other hand, damages are 'implemented' by means of a general tort law scheme, but the case law on tort is very divergent (for example, with respect to the availability of lost chances as damages). In this case, the judge has discretion in the sense that he is faced with doctrinal uncertainty.

Indeterminacy, general regimes, and legislative provisions on quantification

In the Netherlands, a reversal of the burden of proof is possible for risk liability, however, for public procurement it is rejected. The burden of proof is thus incumbent on the claimant. Judges quantify damage by means of 6:97 BW. The most suitable method is chosen according to the nature of the loss. The judge therefore has discretion in determining the method chosen. On the 'material' side, as opposed to factual evidentiary, the judge does have the possibility of reducing the amount of damages for limitation and mitigation. Where damages seem to be incalculable, the judge makes an estimate *ex aequo et bono*, implying that the duty to plead and substantiate are not applicable. In this respect, the Dutch system is again characterized by informal means which allow the judge a lot of discretion. Also in the Netherlands, the duty to plead extends only to claiming damage; further specification of losses at the outset of a case is not necessary. As such, the legal system is more lenient than some of the others surveyed.

From what one can tell in relation to the estimation of damages in the English *Harmon* case, the judge enjoyed wide discretion. For example, there was a reduction in the amount of damages for risk and hazards inherent to a sector by 35% which did not seem to be reasoned based on any specific data (although one does not know how this issue played out in the hearing).

In France, judges' discretion is already broad in their assessment of the extent of the damage. From the jurisdictions that have been scrutinized so far, France, through its acceptance of the lost chance, holds the closest intrinsic connection between constitution and quantification of damage. This is different in the Netherlands and Germany, legal systems which follow a two-tiered model that strives for conceptual distinction between the two steps.

The German legal system discards heads of damages -as well as losses- rather swiftly where they are found not to be sustained. The interaction of the material and the procedural conditions surrounding damages claims in the provisions on recoverable losses can only be understood in the additional context of §287 ZPO, which grants extensive discretion to the judge in the determination of damage. Excepted from this discretion, however, is the determination of the reason for liability (*Haftungsgrund* or constitutive causality), establishing a damages claim.

Overall one can remark that the estimation of damages often lacks a more sound quantification method, and can incorporate rationales of reduction which come very close to comprising a material criterion. This material connection in terms of result often delivers 'proportional' liability due to the damage reductions undertaken.

12.4 VALUATION METHODS FOR DAMAGES

To arrive at a monetary amount depends on the valuation of the losses. The previous section pointed out that the valuation exercise can depend to a great extent on the discretion of judges, and sometimes allows for their simple estimation. Thus, the extent to which a judge follows a specific evaluation method can vary even within particular jurisdictions and certainly according to different fields of law. This exercise can be undertaken through methods drawn from accounting and economic valuations. The problem with this remains the same: valuation is in the hand of judges who are not specifically trained in these methodologies. For example, the double counting mistake regarding the valuation of actual damage and lost profits can be encountered in several investment awards.⁶⁰⁴

Even if a judge decides to follow a formal evaluation method, the choice of method remains and they abound. The European Commission recognized this problem for the field of Competition law and commissioned a systematic study of valuation methods,

⁶⁰⁴ S. RIPINSKY & K. WILLIAMS, *Damages in international investment law* (British Institute of International and Comparative Law, 2008).

“Quantifying antitrust damages. Towards non-binding guidance for courts”⁶⁰⁵. The two guiding principles of the study are, on one hand, full compensation, understood as the aim to determine the “real damage value”⁶⁰⁶ as closely as possible. There is also a slightly pervasive normative assumption that private enforcement claims should be facilitated. Regarding the methodology, two stages are distinguished. The first stage is a determination of the counterfactual scenario, the second the valuation of the “final value”.⁶⁰⁷ The antitrust study clearly bases its counterfactual situation on a ‘but-for’ scenario.⁶⁰⁸ Regarding valuation methods, the study distinguishes three broad groups: comparator based;⁶⁰⁹ financial performance based;⁶¹⁰ and market structure based.⁶¹¹ Rather than advocating one or other

⁶⁰⁵ 'Quantifying antitrust damages. Towards non-binding guidance for courts. Study prepared for the European Commission.', in (Oxera Consulting Ltd, 2010). This study systematizes and brings in the methodologies of two previous documents on the quantification of damages in national competition law regimes. Study on the conditions of claims for damages in case of infringement of EC competition rules (August 2004) and in the study on making antitrust damages actions more effective in the EU (December 2007), both available at <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>.

⁶⁰⁶ 'Quantifying antitrust damages. Towards non-binding guidance for courts. Study prepared for the European Commission.', in (Oxera Consulting Ltd, 2010), 3.

⁶⁰⁷ 'Quantifying antitrust damages. Towards non-binding guidance for courts. Study prepared for the European Commission.', in (Oxera Consulting Ltd, 2010) ii.

⁶⁰⁸ 'Quantifying antitrust damages. Towards non-binding guidance for courts. Study prepared for the European Commission.', in (Oxera Consulting Ltd, 2010) ii.

⁶⁰⁹ As defined in the study: “These use data from sources that are external to the infringement to estimate the counterfactual. Broadly, this can be done in three different ways: by cross-sectional comparisons (comparing different geographic or product markets, also referred to as the yardstick or benchmark approach); time-series comparisons (analysing prices before, during, and/or after an infringement); and combining the above two in ‘difference-in-differences’ models (e.g., analysing the change in price for a cartelised market over time, and comparing that against the change in price in a non-cartelised market over the same time period).”

'Quantifying antitrust damages. Towards non-binding guidance for courts. Study prepared for the European Commission.', in (Oxera Consulting Ltd, 2010), 44.

⁶¹⁰ These are defined in the study as follows: “These models have been developed in finance theory and practice. They use financial information on comparator firms and industries, benchmarks for rates of return, and cost information on defendants and claimants to estimate the counterfactual. There are two types of approach that use this information. First are those that examine financial performance. These include assessing the profitability of defendants and/or claimants and comparing this against a benchmark; event studies of how stock markets react to information; and bottom-up costing of products to estimate a counterfactual price for them. The second type is a group of more general financial tools, such as discounting (a concept that is introduced in section 2.5), multiples (which is another approach to undertaking discounting and valuation), and methods that can be used alongside the other categories of methods and models.” 'Quantifying antitrust damages. Towards non-binding guidance for courts. Study prepared for the European Commission.', in (Oxera Consulting Ltd, 2010), 44.

method of valuation in theory, a pragmatic approach is followed, which relies on an evaluation of whether sufficient data exists to populate one of the models. Valuation is then based on one method, or pooling the results of different methods in order to come to an averaged solution for the final value.⁶¹²

The basic conclusion from this brief overview is that the amount of damages received will naturally vary with the kind of computation chosen. However, the declared aim is to approximate and model the actual losses as closely as possible. In addition, the judicial context is one which is often reigned over by a scarcity of data. The pragmatic approach of choosing the valuation methodology according to the available data is well accepted.

Valuation in public procurement

Why would a common approach to the quantification methods be needed? The Commission, from the point of EU Competition law, cites reasons of “clarity and transparency, completeness, and replicability of results”.⁶¹³ For the same reasons, in the United States the Daubert doctrine on scientific evidence, including “economic and financial evidence on antitrust damages”⁶¹⁴ is applied.

In public procurement, disputes suffer from their relative rarity, which impacts first of all on the routine with which judges come to terms with assessing damages and also foregoes the search for replicability, as every damages award remains ‘unique’. Secondly,

⁶¹¹ These are defined as being “[...] based on industrial organisation (IO) theory and use a combination of theoretical models, assumptions and empirical estimation (rather than comparisons across markets or over time) to arrive at an assessment of the counterfactual situation. This approach involves identifying models of IO theory that best fit the relevant market, and using them to provide insight into how competition works in the market concerned and to estimate the counterfactual price (or volumes). The models can be calibrated (i.e., populated with data) using the econometrics techniques described under the comparator-based approaches. Such models can either be used individually, and be calibrated to represent the counterfactual, or can be used in ‘pairs’, with one model representing the factual and the other the counterfactual.” ‘Quantifying antitrust damages. Towards non-binding guidance for courts. Study prepared for the European Commission.’, in (Oxera Consulting Ltd, 2010), 44.

⁶¹² ‘Quantifying antitrust damages. Towards non-binding guidance for courts. Study prepared for the European Commission.’, in (Oxera Consulting Ltd, 2010), iiv.

⁶¹³ ‘Quantifying antitrust damages. Towards non-binding guidance for courts. Study prepared for the European Commission.’, in (Oxera Consulting Ltd, 2010), 9.

⁶¹⁴ ‘Quantifying antitrust damages. Towards non-binding guidance for courts. Study prepared for the European Commission.’, in (Oxera Consulting Ltd, 2010), 10.

since damages awards by courts are unpredictable factors, the disputes tend to phase out into the private sphere, and the parties come to settlements as regards the final amount of damages to be claimed. Overall, the discretion of the judge is broad, and from the damages awards we have seen, the judgments themselves are mainly devoid of discussions of the methodology for valuation.

In public procurement, there is no pattern of how lost profits are measured, neither across jurisdictions, nor even within jurisdictions where lost profit claims are common, such as France. Even at national level, beyond the enumeration of coverable losses, methods of quantification remain obscure.

This is especially so if compared to the growing sophistication of competition law on the matter. Although, as pointed out, not all of the findings in Competition law are directly applicable to public procurement, basic differences in computation are often ignored. A case in point being for example the quantification of lost profit as denoting either of the two methods of calculation: (counterfactual revenues - actual revenues = lost revenues) or (lost revenues - avoided costs = lost profit).⁶¹⁵ Methodologically, there is clearly much room for refinement in the valuation of damages.

12.5 CONCLUSIONS

Due to the low number of cases and rare explicit treatment of quantification, the country studies' conclusions are hardly generalizable. The findings are therefore situated at conceptual level. Especially in public procurement, there is much room and need for theoretical and methodological refinement regarding the quantification of damages overall. Particularly problematic is the mix of terminology for heads of damages given that the CJEU's standard formulation on recoverable loss refers to the categories of *damnum emergens* and *lucrum cessans*. Conceptually, these terms are too ambiguous in order to be well received in Member States' legal systems.

⁶¹⁵ 'Quantifying antitrust damages. Towards non-binding guidance for courts. Study prepared for the European Commission.', in (Oxera Consulting Ltd, 2010), 145.

The degree of formal and doctrinal separation between the categories of constitutional and quantification criteria varies significantly between jurisdictions. Quantification can occur in the same or in separate legal procedures as the finding of liability. These factors shape the discretion accorded to the judge, who often enjoys explicit powers of estimating damages – resulting in a rather rough appreciation of the value of an award. Available heads of damages and quantification methods can significantly determine the outcome of legal procedure in monetary terms and are therefore not negligible when it comes to assessing the effectiveness of damages.

13 The Iridescence of the Lost Chance Doctrine

In the previous part, we identified and discussed underlying issues that treated damages claims ‘horizontally’ across jurisdictions in the field of public procurement – regarding both the constitutive and the quantification side of damages. This conceptual undertaking pursued the aim of better describing liability in damages, specifically in how definitional elements of damages relate to each other in the jurisdictions. In moving to the theoretical and conceptual plane, one can transcend the national understanding to a certain degree. The description of damages moves towards a ‘Europeanized’ perspective on the national award of damages claims.

In the country studies we identified the following pervasive obstacles for public procurement damages claims: the problem of causality, and the question of whether a tenderer could prove his or her chance of obtaining an award. This can also be cast within proving the damage, in the shape of onerous evidentiary rules and a heavy burden of proof. The second feature is the determination of the heads of damages which may be claimed, i.e. the negative or positive interest, preparation of the bid, and lost profits.

As such, any determination of heads of damages must be intrinsically linked to causality. In the abstract, the requirement of a specific head of damage tells us nothing at all. Only through the factual constellations which are able to fulfill -or not- the constitutive requirements does the statement begin to acquire legal meaning.

The hypothetical nature of a tender’s potential chances of having obtained a contract, be it phrased as a question on the burden of proof, causality or the claimable head of damage, is *the* central difficulty standing in the way of a successful damages award. In all selected jurisdictions, causality emerges as one of the prime doctrinal issues for successful damages claims after a violation of EU public procurement rules.

In the face of these notorious difficulties, the doctrine of the ‘lost chance’ is increasingly discussed as a potential solution. Without a doubt, this has partially been triggered by the fact that the terminology of “lost chance” is used in the Utilities Remedies

Directive and some General Court case law on Institutional Liability regarding public procurement (See Chapter 3 'EU public procurement law').

Significantly, the acceptance and practice of a lost chance theory is greatly linked to the heads of damages that are claimable. We can conclude that damages claims in public procurement are most successful where there is an acceptance of the lost chance doctrine, independent of the type of lost chance doctrine followed.

Conceptually, however, the lost chance is a chameleon. It appears sometimes as a head of damage, sometimes as an alleviation of the burden of proof and sometimes as akin to proportional liability. The following section surveys different understandings of the lost chance theory. It examines the general stance of the selected legal systems on the lost chance and then explores the field of public procurement particularly. The conclusions investigate the potential for a fruitful application of the lost chance doctrine in the EU public procurement context.

On the constitutive side of damages, the main challenge to claiming damages was found to lie in the situation that typically characterizes breaches of EU public procurement rules. While a breach can be readily proven, it is difficult to ascertain how the breach affected the position of an aggrieved bidder.

The hypothetical nature of the future position of the aggrieved tender is thus almost subject to speculation. All legal systems have dealt with this issue, but in different ways. Clearly, the lost chance emerged as one of the main theories for addressing the issue. The availability of losses is best in the jurisdictions which make use of the lost chance doctrine. The lost chance could provide a *solution* from a *functional* point of view.

The main issue on which the success of a claim in procurement law hinges is the evaluation of the 'chance' of a tenderer receiving a tender. This, in its details, is judge-made law. It is therefore not sufficient to confine the "test" of whether EU law effectiveness is met to national legislation. Public procurement, in addition, is an area which in the legal systems was subject to *particularization*, meaning that specific solutions were found for case

typologies which characterize the procurement context and which did not follow other areas of law, such as medical law or general theories of causation.

From here, the functional point of view, the lost chance emerged as a solution.⁶¹⁶ Its potential lies in the fact that the lost chance is a compromise between the continuity of law and the liability allocation based views. In practical terms, it is an instrument that mediates between the interests of the aggrieved bidders in the protection of their rights, and the public interest in not having to pay too many damages suits. The lost chance is a compromise precisely because in a way it moves away from the full compensation principle which is enshrined in many legal orders.⁶¹⁷

The lost chance is sometimes seen as *the* lost chance, while, in reality, it is a highly iridescent legal doctrine. When surveying the notion, it is apparent that there are three types thereof and that differences exist in the way the lost chance is applied.

13.1 THE DIFFERENT UNDERSTANDINGS OF THE LOST CHANCE THEORY

The concept of 'lost chance' takes theoretically different forms. The diverging views on the meaning and validity of the doctrine between - but also within - legal systems are demonstrated in the country studies. Broadly speaking, there are three ways of thinking about the lost chance: (1) the lost chance as an *autonomous type of loss*; (2) *proportional or relational liability*, in which the probability of the chance determines the lost chance as a proportion of the "final" or potential loss sustained; and (3) the lost chance as a relaxation of *the burden of proof* for establishing full compensation.

A strong version of the lost chance theory requires a particular redefinition of the loss of a chance itself as a compensable damage. Based on a "subjective-relational theory of

⁶¹⁶ See most recently A. REICH & O. SHABAT, *The Remedy of Damages in Public Procurement in Israel and the EU: A Proposal for Reform* SSRN eLibrary (2013) at <http://ssrn.com/abstract=2244909>, but also various authors on national level.

⁶¹⁷ J.-T. OSKIERSKI, *Schadenersatz im Europäischen Recht : Eine vergleichende Untersuchung des Acquis Communautaire und der EMRK* (Nomos, 2010).

value”,⁶¹⁸ patrimony is a positive relationship between an individual and something of value in the individual’s life/world. Damage to one’s patrimony does negative harm to this relationship. A positive relationship can include mere potentialities. For example, the fact that I bought a lottery ticket gives rise to a positive relationship between me and the lottery prize. The damage to a positive relationship, even where the materialization of the value has not occurred, is damage to a “becoming patrimony”.⁶¹⁹ On these theoretical grounds, the lost opportunity, the damage done to the ‘becoming patrimony’, is an autonomous type of loss.⁶²⁰

The lost chance gives rise to doubt under accepted general principles of liability in that they challenge accepted notions of either full compensation or full causality. Below, the legal systems and the type of loss of chance arguments that are accepted are broadly described.

13.2 COUNTRY OVERVIEW IN GENERAL

Before looking at the specific field of public procurement, the general stance on the lost chance theory in the legal systems covered is summarized and classified. Based on these findings, we are able to indicate through the EU comparative law approach whether there is a general tradition of Member States with regards to this doctrine.

13.2.1 France

In France, the loss of chance theory (*la perte d’une chance*) has a long standing tradition, the *Cour de cassation* having permitted damages both for the loss of a chance and for future harm in 1932. The first traces of the prerequisite lines of argumentation appeared as early as

⁶¹⁸ For example W. MÜLLER-STOY, *Schadensersatz für verlorene Chancen - Eine rechtsvergleichende Untersuchung* (Albert-Ludwigs-Universität zu Freiburg, 1973), p 124, relying on Möller.

⁶¹⁹ H. MÖLLER, *Summen- und Einzelschaden. Beiträge zur Erneuerung der Schadenslehre vom Wirtschaftsrecht aus* (de Gruyter, 1937), p 124.

⁶²⁰ Möller distinguishes these ‘becoming patrimonies’ as “*Anwartschaftsbeziehungen*” and sharply differentiates them from mere chances. This distinction is based on degree, as *Anwartschaften* are likely, and chances are merely possible. In W. MÜLLER-STOY, *Schadensersatz für verlorene Chancen - Eine rechtsvergleichende Untersuchung* (Albert-Ludwigs-Universität zu Freiburg, 1973), p 124.

1896,⁶²¹ and were manifested in an 1889 judgment on chances to win a process.⁶²² In specific fields of law, the doctrine is widely recognized – most pronounced in medical law since the 1960s. While it has been accepted since the end of the nineteenth century, France is a good example of how the understanding and the meaning accorded to the lost chance doctrine can oscillate. All variants of chance can be encountered.⁶²³

Clustering occurs, most commonly around separate fields of law and related typologies of case law. In addition, there is a difference between the case law of civil and administrative branches. The area of medical law is particularly interesting for the comparison of civil and administrative jurisdictions. Similar cases reached different jurisdictions depending on whether injuries were sustained in public or private hospitals. These jurisdictions deployed different concepts of the lost chance. The nature of the lost chance changed in the 1960s, when the Conseil d'Etat, the administrative jurisdiction, “borrowed” the doctrine. Administrative courts were for a long time regarded as handling the notion of lost chance based on an alleviation of causality. Only since a judgment of the Conseil d'Etat of 5 January 2000 has the lost chance also come to be seen as an autonomous head of damage in the administrative branch of the judiciary.⁶²⁴ The loss of a chance is not identical to the final loss, the *préjudice final*, as the French Cour de Cassation has also stressed on several occasions.⁶²⁵

The theory of lost chances in France is also subject to different conceptualizations – as one author noted in 1973: “*Das Chancenproblem ist in Frankreich offenbar auf dieser fließenden Grenze anzusiedeln, weil die Zerstörung einer Chance zwar sicher (“actuel et*

⁶²¹ I. VACARIE, 'La perte d'une chance', (1987) *RRJ*, 903 I. VACARIE, 'La perte d'une chance', (1987) *RRJ*, 903, 905, and fn 6.

⁶²² P. JOURDAIN, J. GHESTIN & M. BILLAU, *Traité de droit civil / T.II Les obligations 4e Partie Les conditions de la responsabilité* (Librairie Générale de Droit et de Jurisprudence, 1998), 74, citing 17 July 1889 Cour de cassation.

⁶²³ As observed, for example, by V. TACCHINI-LAFOREST, 'Reflexions à propos de la perte de chances.', (1999) 19 juillet 1999 *Petites Affiches*, 7, 7: « La position de la jurisprudence et d'une partie de la doctrine à l'égard de la perte d'une chance n'est pas exempte de paradoxe » B.2.b.

⁶²⁴ For greater detail on this distinction between administrative and civil jurisdictions, see: J. BOUCHER & B. BOURGEOUIS-MACHUREAU, 'Indemnisation de la perte de chances : le Conseil d'Etat poursuit sa conversion au probabilisme', (2008) *AJDA*, 135.

⁶²⁵ V. TACCHINI-LAFOREST, 'Reflexions à propos de la perte de chances.', (1999) 19 juillet 1999 *Petites Affiches*, 7 at A.1., citing for example Cass. Civ. 1re, 8 juillet 1997, J.C.P. 1997, II, 22921.

certain”), ihre Realisierung aber zweifelhaft (“éventuel et hypothétique”) ist. Demgemäß wird “la perte d’une chance” durchweg im Abschnitt über die “Certitude du dommage” behandelt”.⁶²⁶ In judging chances, the French general principles are: the chance must be direct and certain in character and it must be real and serious, not merely hypothetical or eventual. Regarding the discretion of the judge, the Cour de Cassation held that the judge must lay down why a lost chance was certain, and held direct relation to the tortious act. The lost chance does not form part of the loss sustained, it is instead the value of the lost chance that is being compensated.

Characterized in this way, the lost chance forms part of a doctrine of possible losses and the evaluation of damages; but over time “elle s’est métamorphosée en se dédoublant”⁶²⁷ – doubled because of it weakening the causality requirement. In the assessment of this loss, the judge must estimate the probability of a favorable chance materializing. The Cour de Cassation has repeatedly quashed judgments in which the lower courts granted compensation for the full damage without the required certainty that without the fault, the positive event would have materialized. The lost chance is necessarily “une fraction de la perte subie”.⁶²⁸

13.2.2 The Netherlands

The Dutch Supreme Court applies different approaches to the loss of chance in specific circumstances.⁶²⁹ In addition, specific fields of law have also received better receptions in lower instances, especially in medical malpractice law.⁶³⁰ The loss of chance is often quantified by means of judge’s estimation (*ex aqua et bono*), for example by simply fixing a

⁶²⁶ [Footnote with doctrinal references omitted] W. MÜLLER-STOY, *Schadensersatz für verlorene Chancen - Eine rechtsvergleichende Untersuchung* (Albert-Ludwigs-Universität zu Freiburg, 1973), 7.

⁶²⁷ JURISCLASSEUR, *Civil Code 14 juin 1999, 'Art. 1382 à 1386 > Fasc. 202-1-3 : RÉGIME DE LA RÉPARATION'* (LexisNexis 28 October 2010).

⁶²⁸ JURISCLASSEUR, *Civil Code 14 juin 1999, 'Art. 1382 à 1386 > Fasc. 202-1-3 : RÉGIME DE LA RÉPARATION'* (LexisNexis 28 October 2010), listing relevant case law.

⁶²⁹ HR 24 October 1997, NJ 1998, 257 (PAS) (Baijings/Mr. H.).

⁶³⁰ J. SPIER, T. HARTLIEF, G. E. VAN MAANEN & R. D. VRIESENDORP, *Verbintenissen uit de wet en Schadevergoeding* (Kluwer, 2006), 217, with references to case law.

percentage of the amount claimed.⁶³¹ As a head of damage it forms part of the larger conception of proportional liability. It has been applied by the Dutch Supreme Court in the *Nefalit/Karamus* case, in the framework of 7:658 BW, a special provision on employers' liability for asbestos. In this case, the chance that the cancer was a result of exposure to asbestos was estimated at 55%, from which the court reached the conclusion that 55% of the claim was granted.⁶³²

In the Dutch system, the default rule applied by the courts in determining damage is the all-or-nothing approach.⁶³³ Recognition of loss of chance as a head of damage in the Dutch system would amount to recognizing a new category of patrimonial loss covered under 6:95 BW.⁶³⁴ The chance is thus quite controversial, not least as it is difficult to fit within a rigid conception of the tort system in the Netherlands. With the first applications by the courts, and several voices in the literature calling for the lost chance to be considered in Dutch law, one may assume that the lost chance theory is on the rise. Note, however, that as in the other legal systems, the relevance of the lost chance is strongly connected with the specific typology of cases at issue and the kind of uncertainty (scientific, or hypothetical) that one is dealing with.⁶³⁵

13.2.3 Germany

⁶³¹ J. SPIER, T. HARTLIEF, G. E. VAN MAANEN & R. D. VRIESENDORP, *Verbintenissen uit de wet en Schadevergoeding* (Kluwer, 2006), 218. One of the most famous examples is the Baby Ruth case, in which a late diagnosis negatively impaired chances of healing. Hof Amsterdam 4 January 1996, NJ 1997, 213.

⁶³² J. SPIER, T. HARTLIEF, G. E. VAN MAANEN & R. D. VRIESENDORP, *Verbintenissen uit de wet en Schadevergoeding* (Kluwer, 2006), 219, HR 31 March 2006, RvdW 2006, 328.

⁶³³ A. J. AKKERMANS, *Proportionele aansprakelijkheid bij onzeker causaal verband. Een rechtsvergelijkend onderzoek naar wenselijkheid, grondslagen en afgrenzing van aansprakelijkheid naar rato van veroorzakingswaarschijnlijkheid* (Katholieke Universiteit Brabant, 1997), 116.

⁶³⁴ A. J. AKKERMANS, *Proportionele aansprakelijkheid bij onzeker causaal verband. Een rechtsvergelijkend onderzoek naar wenselijkheid, grondslagen en afgrenzing van aansprakelijkheid naar rato van veroorzakingswaarschijnlijkheid* (Katholieke Universiteit Brabant, 1997) A. J. AKKERMANS, *Proportionele aansprakelijkheid bij onzeker causaal verband. Een rechtsvergelijkend onderzoek naar wenselijkheid, grondslagen en afgrenzing van aansprakelijkheid naar rato van veroorzakingswaarschijnlijkheid* (Katholieke Universiteit Brabant, 1997), 219.

⁶³⁵ S. D. LINDENBERGH, *Schadevergoeding* (Kluwer, 2008), 52-53, who sees an assured "place" for the lost chance theory in Dutch law, the main question remaining as to in what cases and how exactly one would handle it – in his opinion, with a "definite degree of restraint".

In the German legal system, the recognition of lost chances is frustrated by the very doctrinal and narrow reading of the principles of liability under German doctrine. This is true in the field of medical liability as well as that of legal process, these usually being the typical areas of the lost chance.⁶³⁶

Damages claims can be separately based on delictual or on contractual claims – under the delictual scheme, following §823 I BGB, one distinguishes between violation, legally protected interest (*Rechtsgut*), and recoverable losses. Only those legal interests which are protected by §823 I may give rise to a damages claim; as a purely pecuniary loss, the loss of a chance - according to the large majority of doctrine - is not covered, so that the application of §823 I for most factual situations is precluded. For example, regarding the chance of healing, only a minority argues that such a chance would be covered by “other legal goods” or the legal goods of “life” and “health”. On German doctrinal grounds, this narrow interpretation makes good sense. The provision in the BGB is seen as an explicit legislative choice against a very wide general provision. Effectively, this reading limits liability claims by imposing an enumeration of compensable harm arising out of delict akin to a *numerus clausus*.

For contractual claims, on the other hand, the loss of a chance would have to be fitted within the provision of the lost profit under §252 s2 BGB.⁶³⁷ The straitjacket of the lost profit as defined by §252 BGB lies in the fact that it forces the lost profit as a realization of the profits; as discussed above in the theoretical part, in order to conceptually accept the loss of a chance, however, a shift in perspective has to occur in order for the loss of the chance to become valued independently of the eventuality of the realization of the profits. While the lost chance is discussed, it is far from accepted in Germany.

13.2.4 England

⁶³⁶ K. PÉGURET, *Schadensersatzansprüche übergangener Bieter im Vergaberecht* (Jenaer Wissenschaftliche Verlagsgesellschaft, 2010), 110-123 for a good summary on the German doctrine, comparing the different factual situations of other areas of law with those of public procurement procedures.

⁶³⁷ §252 BGB - Lost profits: “The damage to be compensated for also comprises the lost profits. Those profits are considered lost that in the normal course of events or in the special circumstances, particularly due to the measures and precautions taken, could probably be expected.”

The main authority for the lost chance in England dates to *Chaplin v Hicks* from 1911,⁶³⁸ in which the court accepted the recovery of damages for loss of a chance based on a 25% chance that the plaintiff would have won a beauty contest. *Hotson* was a subsequent medical case denying recovery of a 25% chance of causing damage to the plaintiff's hip. As many commentators have treated it as identical to *Chaplin v Hicks*, the case has called the authority of the latter into question. The major tension can be resolved based on a distinction that relies on the context, i.e. one being legal (*Chaplin v Hicks*), and the other medical (*Hotson*). Other explanations rely on characterizing *Chaplin* as a contractual and *Hotson* as a tort based claim, on past versus hypothetical facts, or probability theory.⁶³⁹

Without taking sides on the explanations advanced in this debate, it may suffice at this point to note that first of all the chance was, at least potentially, accepted in all its different theoretical manifestations, even the proportional kind. At the same time, as the quite numerous commentaries suggest, the importance of the doctrine of the lost chance is not one that is close to being settled for English courts.

13.2.5 Evaluation

On a theoretical level, albeit to varying degrees, the lost chance theory is debated in all jurisdictions. The survey also demonstrated that different understandings of the lost chance theory persist next to each other, with countries exhibiting an internal equivocity regarding the theory.⁶⁴⁰ On the general level, resistance to the lost chance stems from fundamental doctrinal considerations governing the legal systems. As always, fundamentals bend more easily to particulars and the area of procurement law has particular potential for a fruitful application of the lost chance doctrine.

13.3 THE LOST CHANCE IN PUBLIC PROCUREMENT DAMAGES CLAIMS

⁶³⁸ *Chaplin v Hicks* [1911] 2 K.B. 786.

⁶³⁹ H. REECE, 'Losses of Chances in the Law', (1996) 59 *The Modern Law Review*, 188.

⁶⁴⁰ Binon, in a wider survey, states that there is "no unanimity" between the Member States with regard to the acceptance of the lost chance theory J.-M. BINON, 'La réparation de la perte d'une chance dans la jurisprudence européenne : une question de chance ?', in, *Liber Amicorum Jean-Luc Fagnart* (Anthemis, 2008), , 380.

A strong tendency towards differentiation according to areas of law can be observed, the prime example being medical law. In adjudication, arguments on the lost chance theory in the abstract are heavily mitigated by the particulars of specific fields of law. The reason is that specific fields of law come with repeated typologies and factual situations. They also exhibit particular patterns of uncertainty based on which the lost chance doctrine has different implications. As we saw, this is also true for public procurement. As is evident from the country studies, all legal systems have developed rather “idiosyncratic” interpretations of the lost chance in public procurement scenarios which to some extent deviate from the general doctrine.

Discussions on the role of the lost chance in public procurement take on a largely national flavour, constrained by the available and existing national mould for providing damages in procurement contexts in the specific legal orders.

13.3.1 France

The lost chance is often understood in its form of a proportional liability, under which the lost chance - the lost opportunity - qualifies as an autonomous type of damage. Both civil and administrative jurisdictions apply the lost chance doctrine,⁶⁴¹ for both delictual and contractual claims.⁶⁴² Some have seen the emergence of a schism on this point between the civil and administrative jurisdictions, as several authors have observed that the administrative courts have started to use the lost chance - not in its version of proportional liability, but moving in the direction of a relaxation of the burden of proof. At least formally, this practice has been contradicted by the rulings of the higher courts, which insist on the proportional liability version of the loss of a chance.⁶⁴³ The rendering of these judgments must so be seen as an admonition of the administrative courts for re-uniting their jurisprudence with the civil court developed doctrine.

⁶⁴¹ P. JOURDAIN, J. GHESTIN & M. BILLAU, *Traité de droit civil / T.II Les obligations 4e Partie Les conditions de la responsabilité* (Libraire Générale de Droit et de Jurisprudence, 1998), 78.

⁶⁴² P. JOURDAIN, J. GHESTIN & M. BILLAU, *Traité de droit civil / T.II Les obligations 4e Partie Les conditions de la responsabilité* (Libraire Générale de Droit et de Jurisprudence, 1998), 79.

⁶⁴³ The following case are reverses the case law on the notion of chance: CE , 5 January 2000, *Telle*.

At the same time, one may question to what degree this ‘general’ understanding of the lost chance necessarily also finds its reflection in the case law pertaining to public procurement cases. The relevance of the authority of the Conseil d’Etat’s stance on the loss of chance doctrine lies in the potential turn for a jurisprudence which developed under the administrative law courts in quite a different direction. If the new (or actually, old) direction indicated by the Conseil d’Etat was followed by the administrative courts in general, much of the previously rendered jurisprudence would become questionable. In view of the importance of this shift, judgments on the lost chance in public procurement rendered after 2005 will therefore be subjected to greater scrutiny, and in case of divergence, must be held to be more authoritative.

Proportional liability seems to remain confined to medical law, rather than also finding an application in public procurement law.⁶⁴⁴ Globally speaking, there is strong evidence that the administrative court was “using the doctrine [of lost chance] as a sort of presumption of causation”.⁶⁴⁵ In this vein, Lichère remarked that it was unclear which version of the chance theory is deployed by the administrative judge in public procurement cases.⁶⁴⁶ In the cases covered (see Chapter 6, ‘Country Study: France’), the French system is seen to have oscillated over time, but now seems to have reached a point of stability in which the probability of the chance materializing for an aggrieved tenderer are fixed in categories. These categories are i) having been *entirely deprived of a chance* of being awarded the contract, resulting in a preclusion of damages. Where the tender is assessed as meeting the highest requirement, namely ii) a *very serious chance*, the lost profit is awarded. The classification in between of possible chances - those that are “merely” serious, but not very serious and the extent of damage these entail - is questionable.

13.3.2 The Netherlands

⁶⁴⁴ F. LICHÈRE, 'Damages for violation of the EC public procurement rules in France', (2006) *Public Procurement Law Review*, 171, 176.

⁶⁴⁵ F. LICHÈRE, 'Damages for violation of the EC public procurement rules in France', (2006) *Public Procurement Law Review*, 171, 177.

⁶⁴⁶ F. LICHÈRE, 'Damages for violation of the EC public procurement rules in France', (2006) *Public Procurement Law Review*, 171.

In the Netherlands, while lost chances have received increasing amounts of attention through the lenses of the proportional liability schemes, the fields of law most touched by this are procedural errors and medical malpractice. In public procurement the discussion has not gained ground, although some reputed scholars and public procurement practitioners champion a bigger role for the lost chance in alleviating the type of causality problems displayed in the Netherlands. The lost chance is discussed mainly in relation to the recoverable damage, and hence, as a head of damage. Although legal scholars discuss this possibility, there are only two court judgments in public procurement in which it has been applied, one of which is unpublished.⁶⁴⁷ These judgments use a proportional approach to the lost chance theory.

13.3.3 Germany

While principally, the German legal system is similarly foreclosed for the lost chance doctrine, this is different in the field of public procurement. The legislator introduced the lost chance wording into the GWB, thus forcing doctrine to come to terms with “the chance” as a concept. The wording relating to loss of chance was actually changed during the legislative procedure, and has been the subject of some discussion within the preparatory documents for the implementing legislation. Therefore, the German courts’ interpretation of chances is confined to the procurement damages article, namely §126 GWB, and is regarded at best as an exception to the general legal system.

The ‘real chance’ in §126 GWB – a causality requirement?

The legislative history of the provision is interesting as regards the “real chance” criterion and the intention of the legislator in drafting the provision. The initial proposal included the terminology of “*engere Wahl*”⁶⁴⁸ - that is “narrower selection” – which, in the course of the legislative procedure, was changed to the “real chance”. The wording “real chance” derives from Article 2(7) of Directive 92/13/EC. The national legislative proposal at the time interpreted the teleological purpose of the article to be that of lowering the burden of proof for the aggrieved tenderer. Therefore the wording “*engere Wahl*” was regarded as

⁶⁴⁷ Utrecht DC, 4 July 2001, BR 2002/91, Den Haag 29 March 2000, rolNr. 94/3490. Not published, see Pijnacker Hordijk, Van der Bend & Van Nouhuys, 2009, 661.

⁶⁴⁸ Legislative proposal *Vergaberechtsänderungsgesetz* (VgRÄG) §135, BT-Drucksache 13/9340, 9.

substantively equivalent to that of the real chance.⁶⁴⁹ The criterion “*engere Wahl*” is regarded as being broader than that of the real chance, which was ultimately chosen since just being included in a shortlisted group does not necessarily indicate that a bid would have had a real chance of being selected. During the legislative process, the wording of §126 GWB was changed, as a result of which the nature of the norm - as being either an evidentiary or causality norm or a specific basis for claiming public procurement damages - became disputed. It has, however, been accepted by the courts that the norm does not just constitute a shift in the burden of proof, but that it constitutes an independent and specific action for claiming damages.⁶⁵⁰

In the interpretation of the “real chance” criterion, different views prevail. One view defends a proper lost chance theory, in the sense that the lost chance itself becomes protected.⁶⁵¹ This view has generally been rejected under German law, and in other contexts as well. The loss of a chance under the second and prominent view is regarded as a modification, or actually a relaxation, of the causality element of the constitutive criteria granting an action for claims of damages under §126 GWB. However, one can also find commentators that interpret the “real chance” approach as following the causal test of the *conditio sine qua non*.⁶⁵²

13.3.4 England

Instead of the balance of probabilities, *Harmon* used the lost chance theory, through which the court addressed causality. The lost chance in England is therefore understood in its true form, namely as proportional liability. The court proceeded by applying *Allied Maples Group*

⁶⁴⁹ Legislative proposal *Vergaberechtsänderungsgesetz* (VgRÄG) §135, BT-Drucksache 13/9340, 22. The legislator additionally noted that the terminology had already been introduced by §25 3 (3) VOB/A.

⁶⁵⁰R. WEYAND, *Kommentar Vergaberecht. Praxiskommentar zu GWB, VgV, SektVO, VOB/A, VOLA/A, VOF* (Beck-online 2012), 42.5.

⁶⁵¹ Most convincingly C. ALEXANDER, 'GWB § 126 Anspruch auf Ersatz des Vertrauensschadens', in Pünder/Schellenberg (ed), *Vergaberecht* (Nomos, 2011), C. ALEXANDER, 'GWB § 126 Anspruch auf Ersatz des Vertrauensschadens', in Pünder/Schellenberg (ed), *Vergaberecht* (Nomos, 2011), rn 32-33.

⁶⁵² M. BURGI, 'A Report about the German Remedies System.', in Steen Treumer & Francois Lichère (eds), *Enforcement of the EU Public Procurement Rules* (Djof Publishing, 2011), M. BURGI, 'A Report about the German Remedies System.', in Steen Treumer & Francois Lichère (eds), *Enforcement of the EU Public Procurement Rules* (Djof Publishing, 2011), 25.

v. *Simmons & Simmons*.⁶⁵³ In a remarkably explicit application of the lost chance doctrine, regarding the heads of damages of both lost profits and bid costs in *Harmon*, the court held:

In summary therefore Harmon is entitled to recover its tender costs, taken by themselves, on the grounds that it ought to have been awarded the contract and would then have recovered its costs. If, notwithstanding, H of C had decided to place the contract elsewhere then Harmon would have been deprived of the chance of recovering its costs. I assess that chance as virtually certain - say 90% - for I do not consider H of C would have been so perverse as not to accept Harmon's tender. It is not therefore truly an expression of a chance for the purposes of "loss of a chance" but more of probability. If H of C had decided to go for some other course such as to award the contract on the basis of a version of Option B2, but after giving the other tenderers the opportunity to tender on the basis of that option or to award it on the basis of a performance specification complying with certain design criteria but with the detailed design being provided by the tenderer, I consider Harmon would have stood as good a chance as any and better than most of being awarded the contract. Unlike the primary scenario (lowest price) there can be no certainty but there is surely a real and substantive chance that Harmon would have been awarded the contract. I therefore assess its chance of doing as 70%. (I develop my reasons later.) I consider it quite improbable that H of C would run the risks inherent in starting all over again, but would have accepted Harmon's tender which was the lowest. Harmon's capabilities were denigrated solely to advance Seele/Alvis and Option B2. Issues 11(A) will be answered Yes and sub-issues (2) and (3): Not necessarily, it is sufficient if it ought to have been awarded the contract.

In this particular case, English jurisprudence strongly supports the idea of the 'true' proportional lost chance theory. However, in strands of law other than public procurement, this approach is highly contentious. While the procurement authority is clearly stated, it remains a fact that *Harmon* does not – even several years later – have the sufficient number of follow-up cases to conclude that the lost chance doctrine is steadily applied. In addition to the existential question of the validity of the lost chance doctrine, the question of how probabilities ought to be assessed remains entirely open.

13.3.5 Evaluation

While on one hand the factual situations giving rise to damages claims are identical in all jurisdictions, doctrinally the jurisdictions differ from each other even more than the adherence to a 'cause of action' approach would indicate. Of the selected jurisdictions, both France and the Netherlands have implemented the damages provision by means of a general tort law provision. However, the strength of the 'lost chance' doctrine generally in France has allowed for its application in public procurement disputes as well. Damages for breaches

⁶⁵³ *Allied Maples Group v. Simmons & Simmons* [1995] 3 All ER 907.

of public procurement rules are generally available. In theory, this is also the case for damages in England. One may conclude that in the jurisdictions in which damages claims are generally possible, doctrinally this is due to the fact that they have accepted the lost chance theory in the field of public procurement.

13.4 USING THE LOSS OF CHANCE DOCTRINE FRUITFULLY IN PUBLIC PROCUREMENT?

Normative frameworks on the doctrine of loss of chance can depart from two differing logics: the first departs from the general principles of compensation and an understanding of how the constitutive criteria of liability relate to each other. From this, one may dogmatically consider the chance as to how it fits within this doctrinal understanding of liability. The second approach stems from a bottom-up or fact-based approach, and looks at the nuanced versions of chances that typically present themselves in categories of situations. Not only does this perspective allow for greater differentiation in relation to the essence of the chances, but also the intrinsic connection to the “life world” creates a gate for normative considerations to creep into an otherwise strictly doctrinally normative discourse. By approaching the law through the facts it is increasingly possible to have recourse to arguments of justice. This allows the point of view of recurring ‘losers’ to be taken into consideration in a dogmatic application of the law, which in particular sets of circumstances may be systematically sealed off from successful damages claims.

13.4.1 Causation in the face of uncertainty

In relation to damages, the most widely recognized of general principles of causality within the EU is the all-or-nothing approach⁶⁵⁴ – granting full compensation where the causation can be established, but none where causation cannot be or has not been established. In these cases, either “complete” certainty is required or, in the face of uncertainty regarding the link between an activity and a damage, a likelihood or specific threshold such as a percentage or a ‘more probable than not’ conclusion must be reached – all resulting in

⁶⁵⁴ J.-T. OSKIERSKI, *Schadensersatz im Europäischen Recht : Eine vergleichende Untersuchung des Acquis Communautaire und der EMRK* (Nomos, 2010).

entire, full compensation. The result is a binary award of damages, which can differ massively with only marginal shifts in the degrees of certainty, a result that is often perceived as unfair. One way of alleviating the crudeness of the all-or-nothing approach lies in introducing elements of proportionality, through which degrees of probability of causation are matched by proportional compensation. The lost chance, or more appositely the lost opportunity, is situated here and from a functional point of view must be understood as an attempt to come to terms with uncertainty – however, the way this is done across legal systems is divergent, and can be categorized under the concepts of causality or head of damage.

The reason for recourse to the loss of a chance doctrine lies in the probably intuitive ‘feeling’ that unjust results are achieved through a strict application of the all or nothing approach. It is an acknowledgement of the fact that some liability claims are practically always precluded due to the problem of causality and the proof thereof. This is why as a variation on the material conditions, a shift in the burden of proof is often proposed. Apart from the obvious resistance to departing from established principles and doctrine, the dangers in terms of effect are seen to lie in the potentially unlimited proliferation of damages claims and overcompensation.

The merits of the loss of chance doctrine are comparable to those of a compromise. Bénabent summarized the lingering sentiment one faces in the presence of chances: *“En équité, le procédé est peut-être moins condamnable qu’en logique pure: il aboutit à ces sortes de compromise et de cotes mal taillées qui ne satisfont personne mais apaisent les esprits. On fait deux petites injustices au lieu de risqué d’en faire une grosse. Peut-être l’ordre social y gagne-t-il.”*⁶⁵⁵

Coming to terms with criticism of the lost chance theory

Criticism of the doctrine may be organized in the following categories. i) The maceration of causality: in the area of medical law, René Savatier furnished one of the strongest criticisms against the loss of chance doctrine, arguing that the loss of chance doctrine does away with

⁶⁵⁵ A. BÉNABENT, *La Chance et le Droit* (LGDJ, 1973), 191, n 4 cited in W. MÜLLER-STOY, *Schadensersatz für verlorene Chancen - Eine rechtsvergleichende Untersuchung* (Albert-Ludwigs-Universität zu Freiburg, 1973), fn 96.

one of the fundamental constituent variables of responsibility - the causal connection.⁶⁵⁶ ii) Violation of the principle of full compensation. iii) The use of probability in the statistical sense in order to establish the likelihood of a given effect materializing, therefore creating causality by means of a calculation, is rejected: The attribution of liability is a case by case assessment of the particular and individual circumstances of the case under consideration, rather than an application of a generalized, average likelihood to be drawn from mathematical computation. The process is not about “*d’établir une statistique générale, mais d’apprécier concrètement un cas particulier*”.⁶⁵⁷

At the same time, this is precisely the argument at which the critique cut, according to which proportional liability violates the principle of full compensation. More pertinent to our case is the criticism based on the violation of the *conditio sine qua non*, namely to see the compensation provided as partially only if justified, or, if in fact unjustified, as overcompensation.⁶⁵⁸ Both equivalency theory and adequacy theory share a common feature, the reliance on the condition *sine qua non* – authors proposing proportional liability therefore plead in favor of holding this element of both theories as uncompromisable.⁶⁵⁹

Hence, the “most fundamental criticism”⁶⁶⁰ charged against the use of proportional liability in the form of the loss of a chance doctrine is that it serves as an instrument to circumvent the requirement of causality. This is subject to a further distinction, namely an approach that takes loss of chance as a head of damage (would the damage have occurred

⁶⁵⁶ R. SAVATIER, 'Une faute peut-elle engendrer la responsabilité d'un dommage sans l'avoir causé?', (1970) *Dalloz*, 123.

⁶⁵⁷ R. SAVATIER, 'Note Cass. civ. 1re, 2 mai 1978, Mandryka c. Franck et autres', (1978) *J.C.P.*, 18966, citing for example the condemnation of instituting proportional liability practice by the Cour de Cassation belge 29 september 1974, *J.C.P.* 1976, II 18216.

⁶⁵⁸ In this respect, see for example R. SAVATIER, 'Une faute peut-elle engendrer la responsabilité d'un dommage sans l'avoir causé?', (1970) *Dalloz*, 123., 123.

⁶⁵⁹ J. BORÉ, 'L'indemnisation pour les chances perdues: Une forme d'appréciation quantitative de la causalité d'un fait dommageable', (1974) *JCP*, 2620.

⁶⁶⁰ A. J. AKKERMANS, *Proportionele aansprakelijkheid bij onzeker causaal verband. Een rechtsvergelijkend onderzoek naar wenselijkheid, grondslagen en afgrenzing van aansprakelijkheid naar rato van veroorzakingswaarschijnlijkheid* (Katholieke Universiteit Brabant, 1997), 193.

or not: a race horse could not start due to a fault, but would it have won the race?;⁶⁶¹ translated to public procurement: a contracting authority unrightfully precluded the participation of a tenderer, but would the tender have won the award?), in which case the causality requirements are still applied, and on the other hand loss of chance as lowering the requirement of causal relationships. Some authors deny that there is a difference between the two.⁶⁶²

13.4.2 How to establish criteria in an 'a priori' account

Typically, comparative treatments of the doctrine have clustered different groups of cases together, the most typical of these being situations of competition: litigation chances, in the context of lawyers' liability for malpractice; professional careers of victims; and in the area of medical malpractice, the loss of a chance to heal. This is already an indication of the fact that the need, acceptability, and practicability of the loss of chance doctrine are strongly determined by the factual situations and areas of law it is applied to.

In trying to create a typology, the following parameters influencing a legal system's stance on the lost chance can be identified:⁶⁶³ i) contractual versus delictual damages claims; ii) material versus procedural conditions; iii) the role of the judge in the evaluation of the damage, and his discretion. In defining criteria for what constitutes a chance, recourse is mainly made to a negative definition, defining those events which cannot be thus classified anymore for reasons of being too hypothetical, speculative, or contingent.⁶⁶⁴ Among the positive conditions that have been proposed, abstractly speaking, are: 1) no minimal chances - even though it is difficult to set a threshold in the abstract, the victim has to have invested

⁶⁶¹ A. J. AKKERMANS, *Proportionele aansprakelijkheid bij onzeker causaal verband. Een rechtsvergelijkend onderzoek naar wenselijkheid, grondslagen en afgrenzing van aansprakelijkheid naar rato van veroorzakingswaarschijnlijkheid* (Katholieke Universiteit Brabant, 1997), 195.

⁶⁶² A. J. AKKERMANS, *Proportionele aansprakelijkheid bij onzeker causaal verband. Een rechtsvergelijkend onderzoek naar wenselijkheid, grondslagen en afgrenzing van aansprakelijkheid naar rato van veroorzakingswaarschijnlijkheid* (Katholieke Universiteit Brabant, 1997), 195 et seq. and a further distinction made between past and future facts.

⁶⁶³ W. MÜLLER-STOY, *Schadensersatz für verlorene Chancen - Eine rechtsvergleichende Untersuchung* (Albert-Ludwigs-Universität zu Freiburg, 1973).

⁶⁶⁴ W. MÜLLER-STOY, *Schadensersatz für verlorene Chancen - Eine rechtsvergleichende Untersuchung* (Albert-Ludwigs-Universität zu Freiburg, 1973), 96.

some amount of time and money for the purpose of realizing the chance, hence mere “chances of luck” are excluded; 2) subsidiary role for lost chances, as only grantable where no other way of claiming damages is possible;⁶⁶⁵ 3) objective, not subjective conceptualization of the chance - personal evaluation of a chance is not decisive, it is an objective value;⁶⁶⁶ 4) additionally, the lost chance has to be factually lost, that means there can be no possibility of its future materialization.

Savatier⁶⁶⁷ based his criticism of the use of the notion of chance on an understanding of chance as probability - which is acceptable under certain circumstance only, but not in the case of a medical accident where statistical probability is entirely inappropriate to predict the probable unfolding of events. Savatier therefore only criticizes the doctrine of chance in certain circumstances or, phrased more positively, only accepts the doctrine under certain circumstances. Savatier – at least principally - accepted: in situations of participation in a competition, or even process chances, he argues that there are sufficient elements to give rise to the judge’s estimation of the likelihood of the chance materializing in a concrete case – being, for example, the previous classification or preparatory classification of the participant in a competition, or on the likely outcome of foregone court proceedings. A similar distinction is drawn by Reece⁶⁶⁸, who argues that in deterministic cases the balance of probabilities ought to be used, while in indeterministic cases recourse to the lost chance is opportune. This author also bases the distinction on the underlying factual situations and the question what type of uncertainty is at stake, whether it is one which is inherently unknowable, or one wherein some forms of evaluation are possible.

It is true that public procurement situations are characterized by similar features, which in theory establish indicators that may guide a judge on the probable development of

⁶⁶⁵ Williston, quoted in W. MÜLLER-STOY, *Schadensersatz für verlorene Chancen - Eine rechtsvergleichende Untersuchung* (Albert-Ludwigs-Universität zu Freiburg, 1973), 94.

⁶⁶⁶ W. MÜLLER-STOY, *Schadensersatz für verlorene Chancen - Eine rechtsvergleichende Untersuchung* (Albert-Ludwigs-Universität zu Freiburg, 1973), 183.

⁶⁶⁷ R. SAVATIER, 'Une faute peut-elle engendrer la responsabilité d'un dommage sans l'avoir causé?', (1970) *Dalloz*, 123.

⁶⁶⁸ H. REECE, 'Losses of Chances in the Law', (1996) 59 *The Modern Law Review*, 188.

an award; more strongly so because of the highly formalized procedures that are to be followed, which provide a cast, so to speak, based on which the future options are highly limited – for example, a limited amount of competitors or previously established selection and award criteria, all of which would make the outcomes of award procedures much more predictable than an entirely open competition. In other words, there are *indicators* which make the lost chance *measurable* to a certain extent.

The counterargument is that at no point in the procurement procedure is the contracting authority actually required to award a contract. While a judge is under a duty to make a judgment, and the content of that judgment must be predicted, or the holder of a competition or lottery must hand out a prize, the probability of the chance being subject to calculation, a contracting authority is free to contract. Thus the theoretical possibility of reducing the bidder's chance to nil at any moment in the procedure is retained. This absolute uncertainty, which is grounded of course in party autonomy and the freedom to contract, is actually not chanceous, but on the contrary is a recognition of the right on the part of a public authority not to contract. The only way to remedy this doubt is to prove that the chance, that is the contract, indeed would have - or in fact has - materialized. Practically speaking, two real life situations giving rise to such a conviction would be the scenario in which the contract has wrongfully been awarded to another tenderer in the same procedure, or where -albeit in a different procedure- an identical contract is tendered out again.

As we have seen, this theoretical reasoning is accepted in Germany, and applied by the courts in their determination of the heads of damages – under pre-contractual liability, lost profits are only claimable where the contract has actually come into existence in some way. In the research conducted for France, we have not come across this argument. Lost profits are granted for example to an aggrieved bidder that had a serious chance of being awarded a contract, regardless of whether or not the contracting authority ultimately tendered or not – hypothetically it is possible that the public authority would decide not to award a contract *tout court*.

13.5 CONCLUSIONS FROM AN EU PERSPECTIVE

There are three understandings of the ‘loss of chance’ doctrine: lost chance as autonomous damage, as causality alleviation and as proportional liability. This conceptual aspect is particularly relevant where the lost chance is used at EU level. If it is not sufficiently framed by a context, the lost chance terminology is burdened by a significant inherent degree of indeterminacy. The legal term ‘lost chance’ with regards to the public procurement directives has not been assigned conceptual content at EU level,⁶⁶⁹ and at the national level its content diverges. This is a classic situation for a conceptual and terminological misalignment in the implementation of EU law.⁶⁷⁰

Even internally, the legal systems expose a highly divided view on the loss of a chance and as to which version is best deployed. The internally inconsistent views are amplified when comparing across countries. There is, on a general level, a tendency towards exploring the lost chance theory and its relevance for particular legal systems. The equivocal state of the doctrine prevents a conclusion to the effect that a Member State tradition of the lost chance in general liability exists. The picture could vary with respect to highly specific areas of law, such as medical malpractice, legal process chances or as we explore public procurement claims. This assessment is, however, shy of constituting the existence of a common tradition regarding a *doctrine* of lost chance in public procurement.

Looking at damages claims in public procurement the picture is varied, as the lost chance has gained general acceptance in some jurisdictions (France), while in others it is specifically interpreted based on a legislative instrument (Germany), or practically ignored (the Netherlands).

13.5.1 Procurement damages

Regarding the desirability of damages in public procurement, Reich summarizes the main arguments advanced in favor of making procurement damages more widely available: firstly, to *compensate* the bidder for losses unjustly suffered, under a “moral justification for

⁶⁶⁹ I am here deliberately excluding the lost chance as applied by the General Court in its case law.

⁶⁷⁰ G. AJANI, L. LESMO, G. BOELLA, A. MAZZEI & P. ROSSI, 'Terminological and Ontological Analysis of European Directives: multilinguism in Law', (2007) *ICAIL*, 43.

compensation”; secondly, *to restore confidence in procurement processes*; and thirdly, *to create a deterrent effect*.⁶⁷¹

Reich suggests following a truly proportional approach, which is the lost chance as interpreted in the English *Harmon* case, and proposed to couple it with a reversal of the burden of proof.⁶⁷² Provided that there was a material breach, a court would assess a bidder’s chances of obtaining a contract and accord the corresponding percentage of the overall losses. Since it can be an onerous task to establish one’s chances of being awarded a contract, and the contracting authority would be in the better position in terms of information, Reich makes the radical proposal to additionally shift the presumption of proof. Thus the aggrieved bidder would be regarded by default as having had a 100% chance of obtaining a contract, a presumption which can then be altered through evidence introduced by the contracting authority.

Since this approach advocates the lost chance in its proportional version, it is burdened with the relevant criticism (violation of the full compensation and causality principles, discussed above). The proposal has the beauty of simplicity and efficiency. The incentives it creates, however, are probably strong enough to encourage plenty of “cowboy litigation”.⁶⁷³

Own appreciation

The particularities of the French lost chance version were previously described. It is a unique combination of categorization of lost chances which connects categories of chances to specific heads of damages. This categorization seems in effect to be a combination of different lost chance theories which comes to an effective, doctrinally acceptable, solution for public procurement fact typologies.

⁶⁷¹ A. REICH & O. SHABAT, *The Remedy of Damages in Public Procurement in Israel and the EU: A Proposal for Reform* SSRN eLibrary (2013) at <http://ssrn.com/abstract=2244909>, 28-29.

⁶⁷² A. REICH & O. SHABAT, *The Remedy of Damages in Public Procurement in Israel and the EU: A Proposal for Reform* SSRN eLibrary (2013) at <http://ssrn.com/abstract=2244909>, 38.

⁶⁷³ L. W. GORMLEY, *Gordian knots in European public procurement law : government procurement agreement : standards, utilities, remedies* (Bundesanzeiger, 1997), 5.

Where a tender was not devoid of any chance, bid costs are claimable; where she can prove a serious chance, the chance is assessed and lost profits are awarded. Under this approach, bid costs are awarded as something akin to the lost chance as a head of damage – one could say, bid costs are a pecuniary way of assessing this lost chance. In the category which enables lost profits ('a serious chance'), the lost chance approach works more in the function of alleviating the burden of proof. Here, the lost chance almost becomes a type of 'balance of probability' slanted in favour of the aggrieved tenderer. The approach is not strictly proportional, but the categories do fix the causality to the claimable damage in a rougher relation. So, there is an element of proportionality, which, however, sits easier with the principles of full compensation and causation.

The differentiation of the lost chance theories along different fields gives strong indications that a useful approach to the lost chance has to depart from the factual typologies it is designed to address. Reece (and Savatier) distinguish between different types of uncertainties or hypothetical situations in which the doctrine can come into play.⁶⁷⁴ One indeterminacy is absolute and it is impossible to know anything about the possibilities of the chance's materialization. The other is merely uncertain, yet there are possible indicators to assess the chance.

Breaches of public procurement law result in different uncertainties with regard to the future position of tenderers. This can depend greatly with the type of procedure chosen, and also with the point in time at which a breach occurs.⁶⁷⁵ Although the French solution is not put on this theoretical foundation, it seems to be able to accommodate these different kinds of uncertainties. Uncertainties with regards to chances lost are sometimes in some way measurable, while in other instances the position of an aggrieved tenderer is confined to the recognition of the fact that the deterioration of a potential future option has taken place – i.e. that he has suffered the loss of a business opportunity. The likelihood of that opportunity

⁶⁷⁴ See section section 13.4.2.

⁶⁷⁵ In fact, case typologies are fairly common when discussing the lost chance in public procurement. By way of example see R. CARANTA, 'Damages: Causation and Recoverable Losses', in Duncan Fairgrieve & François Lichère (eds), *Public procurement law : damages as an effective remedy* (Hart, 2011), and A. J. AKKERMANS & E. H. PIJNACKER HORDIJK, 'Schadevergoeding en schadeberekening', in W. H. van Boom, et al. (eds), *Aanbesteding en aansprakelijkheid* (Schoordijk Instituut Centrum voor aansprakelijkheid, 2001), .

having occurred or value of that loss can often not be further specified. Where one simply cannot assess the uncertainty, merely proof that a tenderer was not devoid of a chance is required. For example, in an open procedure the unlimited number of competitors with valid bids might be so large as to preclude the tender from substantiating its specific advantageous position. It is an indeterminacy which is simply not specifiable. On the other hand, where a tenderer was shortlisted, and the award criteria were previously laid down by the contracting authority, indicators for the hypothetical assessments do exist. In this case, the position of the tenderer can be substantiated and the French system works simply as an alleviation of proof of a tenderers chances. Note that through the connection between the fixed categories of chance (no chance, not devoid of a chance, real chance) and the extent of damage claimable (bid cost, lost profit), a mitigated element of proportionality is introduced.

Previously, attention was drawn to the possibility of using comparative law as a back coupling or interface to the national legal orders. In this respect, the suggested solution – while rendering damages claims more effective- also sits easier with the legal systems than strictly proportional liability. Other legal systems, next to France, seem capable of accommodating the proposal doctrinally. Although through different paths, the solution is similar in Germany; the statutory provision for bid costs and lost profits under the pre-contractual liability can arguably be interpreted along these lines.⁶⁷⁶ The Netherlands have no pronounced lost chance doctrine, but since the legal system in general is open to the lost chance in other areas, there seem to be no particular obstacles to its reception. Since *Harmon* did propose the proportional version of the lost chance, the UK is arguably the system with the most divergent approach and therefore with the potentially strongest opposition. Yet, since the French solution also incorporates a gradual element of proportionality, the system could also be acceptable there - all the more so since *Harmon* does not have the necessary backbone of follow-up actions. Importantly, the suggested

⁶⁷⁶ The biggest difference in Germany relates to the fact that an aggrieved bidder has to prove that the contract has or would have been awarded. In keeping in line with the 'private autonomy' rationale underlying this reasoning, I would defend a reversal of the burden of proof burdening the contracting authority with a rebuttable presumption that indeed it would have awarded a contract.

proposal would also be a defensible interpretation of the Utilities Remedies Directives damages article in relation to bid costs.⁶⁷⁷

13.5.2 Operationalizing the lost chance in EU law

However, beyond the functional question, the EU dimension remains unaddressed so far, as does the manner in which the solutions found can be operationalized from a European point of view. Since Member State liability and effectiveness under procedural autonomy were identified as the primary doctrines dealing with damages, the question arises as to whether these could be used. In the following, we will first refine the view of damages claims in EU law by distinguishing between two different types of damages, damages under Member State liability and damages required by the effectiveness of EU law.

Enforcement is not only understood in simplistic terms such as “is the remedy (category) of damages available”? Or, as we see with Member State liability: damages must be available. In contrast to this, the substance/procedure dichotomy realizes enforcement as a set of (in the case of damages) sometimes substantive and sometimes procedural subsets of rules – time limits, the burdens of proof and evidence, etc.

In addition, the example of the lost chance places an important question mark over the substance and procedure distinction as suggested under the heading of ‘procedural autonomy’. If one were to draw a competence between the national and European levels based on a distinction between constitutive and factoring of claims, the ‘lost chance’ defies these categories. One of the conclusions to be drawn on the factual use of the lost chance is that, since it comes guised in either substance or procedure (if we accept the burden of proof to constitute procedure), it demonstrates how flawed and difficult it is to put into practice a competence rule based on this distinction at EU level.

⁶⁷⁷ Article 2(7) of Directive 92/13 requires that “Where a claim is made for damages representing the costs of preparing a bid or of participating in an award procedure, the person making the claim shall be required only to prove an infringement of Community law in the field of procurement or national rules implementing that law and that he would have had a real chance of winning the contract and that, as a consequence of that infringement, that chance was adversely affected.”

14 DAMAGES BETWEEN RIGHTS AND REMEDY

After acquiring, in the previous chapters, a deeper understanding of national damages claims through detailed depictions and theoretical discussions, the following chapters aim to provide a possibility of making those insights fruitful for the process of legal *adjudication at EU level*. To a certain extent this requires the reader to take an initial mental breath and give some room for the EU related strand of the argument to unfold before both aspects are brought together.

At EU level, damages are seen as one of a multitude of remedies. In examining how the legal pillars of ‘primacy’ and ‘direct effect’ relate to remedies within the EU order, I explore ‘effectiveness’ as an organizing principle. There are two ways of conceiving remedies, one that follows a ‘rights as reason’ approach, and the other, a ‘rights as constitutive’ mechanism. This leads me to argue that two conceptions of effectiveness exist, endowed with distinct rationales. The ‘*effet utile*’ is geared towards the overall effectiveness of the EU legal order in a second-order structural or constitutional sense. The logic followed here is one of rights as constitutive of the remedy. The ‘effectiveness’ of posited EU law is a second mechanism whereby specific rights become reasons for matching remedies.

The distinction is also observable for damages in the EU legal order, that is, between damages under Member State liability and under the effectiveness of EU law. Damages liability can have diverse purposes. While compensation is the measure of the extent of Member State liability, it is not its sole purpose. This idea is further developed in the following.

14.1 DAMAGES BETWEEN RIGHTS AND LIABILITY

Before turning to the role of damages in EU law, some reflections on the notion of damages are put forward. ‘Damages’ can be strongly or weakly defined. Although they are often defined through rights and the connected remedial language, it is important to consider

variations on how they intrinsically relate to notions of sanction, reparation, compensation; contexts of tort or contract; and overarching theories of liability. Damages have not had a fixed meaning over time, and nor do they today. The authoritative textbook *McGregor on Damages* has abandoned the search for a comprehensive definition of damages, but proposes the following:

*Damages in the vast majority of cases are the pecuniary compensation, obtainable by success in an action, for a wrong which is either a tort or a breach of contract, the compensation being in the form of a lump sum awarded at one time, unconditionally and in sterling.*⁶⁷⁸

Actions for damages are as much a reflection of ideas about individual and societal relations, as they are factors which shape them. In particular legal systems, damages have been placed in carved out niches and are thus understood in particular, systemic ways. However, being social concepts, these are not essential characteristics. A meaningful account of damages addresses at least the following elements: what is the object of damages? What are the goals and means of damages claims? How can damages be justified? The following section develops the basic dimensions for an analysis of the structure of damages in EU law.

14.1.1 The object of damages

On a rudimentary level, “‘damages’ simply means a money award for a wrong”.⁶⁷⁹ This raises the question of what a wrong is and what its relationship is to the violation of a right. First, wrong has to be distinguished from ‘natural damage’ or harm, namely the distinction between harm that has been factually suffered and legally recoverable harm. “Even if a loss has been incurred, no damages can be awarded in the absence of a wrong: it is *damnum sine injuria*”.⁶⁸⁰ A wrong is then the violation of a right or a legally protected interest. Only wrongs give rise to the right to reparation, the factual harm necessitating the intermediary of a legal norm, entailing liability only where there is a legal instrument attributing liability.

⁶⁷⁸ D. A. THOMAS & H. MCGREGOR, *McGregor on Damages* (Sweet & Maxwell, 2009), 3.

⁶⁷⁹ Edelman in A. BURROWS, A. RODGER & OXFORD UNIVERSITY PRESS., 'Mapping the Law. Essays in Memory of Peter Birks', in, Oxford scholarship online. (Oxford University Press, 2006), 142.

⁶⁸⁰ D. A. THOMAS & H. MCGREGOR, *McGregor on Damages* (Sweet & Maxwell, 2009), 4.

At the same time, the mere violation of a right does not necessarily entail loss or damage. It is debated whether the notion of damage comprises the violation of a right independently and next to the factual harm incurred. If this proposition is accepted, damages awards are a way to compensate for factual harm in the form of legally recognized losses. However, money in and of itself does not vindicate the pure violation of a right: it does not address the actual act of the breach, only the consequences, namely the loss. Distinctions emerge here between the factual harm that occurred, legally recognized losses and wrongs understood as pure breaches of the right as an additional element of damage. So harm and wrong make up the overall object of a damages claim.

14.1.2 The goals and means of damages

Damages can also be defined through their function, often relating damages to the purpose of compensation for loss or damage. This purpose is not inherent and damages can be non-compensatory. Legal systems award a number of damages which are not compensatory in nature, for example nominal, exemplary, liquidated, restitutionary and vindicatory damages.⁶⁸¹ Roman law did not distinguish between sanction or punishment and reparation, the making good.⁶⁸² The gradual crystallization of the difference between punitive and reparative objectives has forged a closer conceptual link between damage and compensation.

Where damage is understood to entail an element of wrong, compensation through damages is for wrongful or illegal acts. Under a looser definition of damages, compensation damages can be due as a result of legal acts like causative events which did produce losses – the common example being unjust enrichment based claims.

Compensation for wrongs in turn can be distinguished from reparation for wrongs.⁶⁸³ Reparation denotes the retransformation of something from a damaged to an intact state, with such a transformation ‘making good’ any harm caused. Reparation can operate through

⁶⁸¹ D. A. THOMAS & H. MCGREGOR, *McGregor on Damages* (Sweet & Maxwell, 2009), 4.

⁶⁸² Both of these distinctions are pronounced in current French legal thought. J. GHESTIN & G. VINEY, *Traité de droit civil / T.II Les obligations 4e Partie Introduction à la responsabilité* (Libraire Générale de Droit et de Jurisprudence, 1995), 7.

⁶⁸³ For example, see M. SOUSSE, *La notion de réparation de dommages en droit administratif français* (L.D.G.J., 1994), 7.

multiple means. Compensation can refer to the *pecuniary* means of making good damage caused.⁶⁸⁴ Compensation is then a means to affect a specific form of reparation. However, compensation can also refer to the fact that the harm element of damage is addressed by pecuniary means, leaving the element of wrong (the breach of a right) unaddressed. The damage award may heal the losses caused but reparation would additionally require vindication for the fact that a wrong occurred in the first place.

14.1.3 The justifications for damages

“What does liability have to do with rights? Why should the violation by one person of the rights of another entail a transfer of assets from the one to the other, as opposed to the punishment of the wrong-doer? Why is the provision of compensation for losses that flow from a rights violation an appropriate response?”⁶⁸⁵

Another shift in argumentation occurs when looking at damages through the lens of liability. In the Hohfeldian system, to be liable is the ‘jural opposite’ to holding a legal power.⁶⁸⁶ The concept of damages is stabilized by means of legal relations,⁶⁸⁷ i.e. whether there is a legal duty to pay damages or whether a legal power is conferred at the point of the legal procedure. Two sides emerge: A duty based view of damages that encompasses rights-based⁶⁸⁸ as well as utility-maximizing theories⁶⁸⁹ and secondly, a legal power based view such as the liability/civil recourse approach:⁶⁹⁰

“The first way, which I call the duty view, supposes that damage awards confirm existing legal duties to pay damages. (...) Like these awards, damage awards are essentially rubber stamps: they require defendants to do what they should have done already. In contrast, the second way of understanding damage awards, which I call the liability view, supposes that insofar as it

⁶⁸⁴ M. SOUSSE, *La notion de réparation de dommages en droit administratif français* (L.D.G.J, 1994)7.

⁶⁸⁵ J. GOLDBERG & B. ZIPURSKY, 'Rights and Responsibility in the Law of Torts', in D. Nolan & A. Robertson (eds), *Rights and Private Law* 2012), 263.

⁶⁸⁶ W. N. HOHFELD, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning', (1917) 26 *The Yale Law Journal*, 710, 710.

⁶⁸⁷ J. GOLDBERG & B. ZIPURSKY, 'Rights and Responsibility in the Law of Torts', in D. Nolan & A. Robertson (eds), *Rights and Private Law* 2012).

⁶⁸⁸ Weinrib or Coleman although these authors hold diverging views in several respects.

⁶⁸⁹ For example Posner.

⁶⁹⁰ According to Smith, “[t]he main difference between Professor John Goldberg and Professor Benjamin Zipursky’s theory and the theory defended below is the former’s reliance on Lockean social contract arguments (in contrast to my focus on the nature and role of judicial awards) and its exclusive focus on tort damages.” S. A. SMITH, 'Duties, Liabilities, and Damages', (2012) 125 *Harvard Law Review*, 1727, fn 63.

*makes sense to speak at all of legal duties to pay damages, such duties are created — not confirmed — by damage awards.*⁶⁹¹

A distinction between primary and secondary obligation is drawn. The legal duty view explains the secondary obligation arising out of the primary obligation.⁶⁹² The primary⁶⁹³ and secondary obligation, according to the duty view, stand in one of the following two relations to each other: under the ‘continuity thesis’, the secondary obligation *“is a rational echo of the primary obligation, for it exists to serve, so far as may still be done, the reasons for the primary obligation that was not performed when its performance was due.”*⁶⁹⁴ The primary obligation transforms into the next best thing, namely damages as a secondary obligation. Under the “disjunctive thesis”, the duty bearer can either perform the primary duty or pay the damages (this is the version that supports the theory of the ‘efficient breach’ in contract theory).

By moving to a legal power or liability view of damages, “[d]amage awards are the law’s way of vindicating – not enforcing – the plaintiff’s right”⁶⁹⁵. The point in time of the coming into being is shifted to the point in time when it is claimed. It is a power to invoke, to go to court, to claim. Note that by moving from a legal duty to a legal power view, an additional conceptual shift can be effected:⁶⁹⁶ the legal power is granted by courts, and at least Smith accords a central role to the courts in creating damages awards. The law of damages *emerges as directed towards judges*, and the legal liability view leads to an essentially court or legal procedure based explanation of damages.

Looking at the result of the two approaches in damages awards, the legal duty point of view neglects the significance of wrongfulness; it *“fails to mark wrongs as wrongs”*.⁶⁹⁷ Under

⁶⁹¹ S. A. SMITH, 'Duties, Liabilities, and Damages', (2012) 125 *Harvard Law Review*, 1727, 1727.

⁶⁹² See also J. GARDNER, 'What is Tort Law for? Part 1: The Place of Corrective Justice', (2010) *SSRN eLibrary*.

⁶⁹³ A primary duty can arise out of a right (rights-based theories) but also out of utilitarian conceptions. See for this argument S. A. SMITH, 'Duties, Liabilities, and Damages', (2012) 125 *Harvard Law Review*, 1727, 1737.

⁶⁹⁴ J. GARDNER, 'What is Tort Law for? Part 1: The Place of Corrective Justice', (2010) *SSRN eLibrary*, 40.

⁶⁹⁵ S. A. SMITH, 'Duties, Liabilities, and Damages', (2012) 125 *Harvard Law Review*, 1727, 1728.

⁶⁹⁶ S. A. SMITH, 'Duties, Liabilities, and Damages', (2012) 125 *Harvard Law Review*, 1727, 1727.

⁶⁹⁷ S. A. SMITH, 'Duties, Liabilities, and Damages', (2012) 125 *Harvard Law Review*, 1727 1754. Further, 1752 “If the only available judicial response to a civil wrong is to try to induce rights infringers to comply with their post-infringement moral duties, then so far as litigation is concerned, civil wrongs are just another category of

the liability view, the wrong is vindicated. The damage award expresses that the wrong should never have happened. However, it leaves open the question of how the judge ought to evaluate the wrong in monetary terms: *“the possibility of courts’ imposing damage awards that might amount to criminal punishment in practice. Although vindicatory awards need not be arbitrary, their quantification is ultimately a matter of choice, not logic.”*⁶⁹⁸

14.1.4 Damages in EU law

The preceding very rudimentary discussion could not but make us realize that when we speak of damages, we could well be speaking of very different things. Instead of attempting to find an overarching definition of damages, legal doctrine is better advised to look at damages in the individual context, and which version of damages might be at issue in a given case. Smith does not discard either the legal duty or liability view as false, but questions whether it would be possible to apply both rationales cumulatively to a case (he finds that this would exceed proportionality).⁶⁹⁹ However, he argues that the continental systems hold a legal duty, while the liability view holds greater explanatory power for common law. Different legal systems have chosen a distinct justification of damages or variations thereof. It may be disproportionate to impose both rationales on a single causative event. However, from the legal process point of view adopted in this thesis, it may be possible to distinguish between different legal processes with regard to damages which correspond to different approaches. In the following Chapter on Member State liability as a public law of torts, we will pursue this hypothesis further.

14.1.5 Public procurement application

The public procurement situation brings the two fundamental conceptions of damages into conflict: the tort based view, which sees damages as a necessary secondary protection of rights, and on the other hand, the liability point of view of damages, which sees damages as an allocation of liability to stakeholders.

dutycreating events. The fact that a wrong has occurred is no different from the fact that the defendant promised to pay a sum of money or received money by mistake.”

⁶⁹⁸ S. A. SMITH, 'Duties, Liabilities, and Damages', (2012) 125 *Harvard Law Review*, 1727, 1754.

⁶⁹⁹ S. A. SMITH, 'Duties, Liabilities, and Damages', (2012) 125 *Harvard Law Review*, 1727.

The tort based view would principally demand the indemnization of the aggrieved bidder. Under the liability view on damages, on the other hand, a political balance is to be struck between the aggrieved bidder and the public, whose money is used to compensate. This is the big tension which characterizes the procurement situation. In the national arena, there is a 'political' balance to be struck between the enforcement of rights for aggrieved parties, and on the other hand, the public interest, as manifested in "the taxpayers' money".

However, there is an additional element in the EU context, which is the fact that the violated right is an EU right. This means that in a union of states which have agreed on substantive legislation, there is an additional reinforcing factor for EU law based rights, since an obligation *towards the European Union* exists to enforce the legal rights postulated. For EU law, this question translates into the independent 'value added' by the fact that EU law was violated, and that such a violation must be rectified and/or punished. It is the question of the value of the *Rechtsfortsetzung*, i.e. the continuity of the right. From the point of view that damages provide secondary protection for EU substantive law, damages are necessary in order to enforce the EU legal order. Rights violations demand damages.

Applied to the typical public procurement situation, this would mean that the interest of the aggrieved bidders in claiming their right would necessarily have to be protected.

This theoretical conflict also translates into different answers on the fundamental question of damages in public procurement. Viewed from the outcome of the legal procedure, the question is whether an aggrieved bidder should be better protected (tort based point of view) and be able to claim damages, or on the other hand, whether the interest of the public not to 'pay' twice by paying damages can be taken into account and ought to prevail (political view of damages as liability allocation).

14.2 PILLARS OF THE EU LEGAL ORDER

From the perspective of EU law, damages must be conceptualized also from a 'constitutional' point of view, and what the availability of damages means for the judicial construct of the EU legal system as a whole.

14.2.1 The judicial structure of the EU

The relationship between rights, remedies and procedure for EU law purposes remains far from settled, and damages claims are situated most ambiguously within this triangle. At the core of the issue lies the invocability of subjective rights under European law, determined on a fundamental level by whether one defends a unitary or dualist view of the EU legal order. These assumptions lead to opposing conceptions of the doctrines of 'direct effect' and 'primacy' and therefore of the ways in which EU norms take effect in the national legal orders. It is by means of direct effect and primacy, on the other hand, that norms of European law are enforced without containing in themselves their legal consequences.⁷⁰⁰

Inevitably, there are many commentators who defend variations of these conceptualizations.⁷⁰¹ The 'primacy' model accommodates direct effect and primacy as two independent concepts which, due to their autonomous nature, can apply at the same time.⁷⁰² Under the 'trigger' model, primacy is dependent upon direct effect: the principles operate "*in sequence – direct effect creating a cognizable conflict of laws, and supremacy resolving it in favour of the relevant Community norm*".⁷⁰³ This distinction amounts to fundamentally differing views on the world of EU law, in particular the relation between European and national law. The 'primacy model' construes one coherent legal system made

⁷⁰⁰ "dass sich eine Gemeinschaftsnorm durchsetzen kann, ohne dass sie selbst eine Rechtsfolge für tatbestandsmäßiges Verhalten enthalten müsste", T. EILMANBERGER, *Rechtsfolgen und subjectives Recht im Gemeinschaftsrecht: Zugleich ein Beitrag zur Dogmatik der Staatshaftungsdoktrin des EuGH* (Nomos, 1997), 21.

⁷⁰¹ For the purposes of this discussion a dichotomy of views is presented and the consequences of both views for rights, remedies and procedure are shown. So as not to pollute the academic debate with further terminological distinctions, Dougan's terms of 'primacy' and 'trigger' models are used.

⁷⁰² M. DOUGAN, 'When worlds collide! Competing visions of the relationship between direct effect and supremacy', (2007) 44 *Common Market Law Review*, 931, 948. Opinion of A-G Saggio in Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial SA and Salvat Editores SA v Rocío Murciano Quintero and Others* [2000] ECR I-4941 quotes D. SIMON, *La directive européenne* 1997) 4: "the proposed analysis presupposes a decoupling of direct effect and primacy, but this severance does indeed appear to constitute one of the principal threads in the recent development of the case-law both of the Court of Justice and of the national courts". In his opinion in Case C-287/98 *State of the Grand Duchy of Luxembourg v Berthe Linster and Others*, AG Leger notes that the Court does not in all judgments (e.g. Case 21/78 *Delkvist* [1978] ECR 2327 or Case C-435/97 *WWF and Others* [1999] ECR I-5613) determine direct effect before ruling on the applicability to a dispute and finds, at para 50, that "those judgments seem to owe more to the principle of primacy than to the principle of direct effect". He therefore asks "whether examining the direct effect of a directive is relevant in deciding all cases involving a directive which has not been transposed and a conflicting rule of domestic law.", para 51.

⁷⁰³ M. DOUGAN, 'When worlds collide! Competing visions of the relationship between direct effect and supremacy', (2007) 44 *Common Market Law Review*, 931, 948.

up of EU and national norms, ranked in favor of Union norms along the principle of primacy. On the other hand, the 'trigger' model conceives of two separate legal systems, the Community system and the national system, whereby direct effect enables norms of the Community order to penetrate and exist within the national legal orders. Only then does the concept of primacy grip in order to decide a conflict of laws.⁷⁰⁴

The core of the divergence between the two approaches lies in the formulation used to construe primacy in the *Simmenthal* case:

*..., in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but – in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States – also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.*⁷⁰⁵

Primacy in the 'primacy model' is self-standing, whereas the 'trigger model' reads *Simmenthal* as pre-requiring direct effect. Ultimately, they conflict in relation to what place to give to 'primacy' as opposed to 'direct effect' in the hierarchy.

Sometimes this difference is framed in terms of narrow, opposing, broader conceptions of direct effect itself.⁷⁰⁶ Hereby, the emphasis is placed on the role reserved for direct effect in relation to rights, and much less on its relationship to primacy.⁷⁰⁷ The 'primacy' and 'trigger' models embody different visions of the role of direct effect: one as creating direct rights for individuals; the other acting as a bridge and interface between the EU and national legal orders. The narrow and broad conceptions of direct effect affect

⁷⁰⁴ M. DOUGAN, 'When worlds collide! Competing visions of the relationship between direct effect and supremacy', (2007) 44 *Common Market Law Review*, 931, 943.

⁷⁰⁵ Case 106/77 *Simmenthal* [1978] ECR 629, para 17.

⁷⁰⁶ S. PRECHAL, 'Protection of Rights: How far?', in S. Prechal & B. van Roermund (eds), *The Coherence of EU Law. The Search for Unity in Divergent Concepts* (OUP, 2008), 161.

⁷⁰⁷ Criticism focuses on the idea of free standing primacy's ability to solve conflicts of law without any kind of threshold. In the end, opponents argue, the primacy model still requires a kind of threshold to determine which norms of Community law are 'cognizable' in a given conflict with national law. With Dougan: "Is the 'primacy' model really relying upon the principle of supremacy alone to resolve exclusionary disputes? It seems rather to be employing the substance of the doctrine of direct effect while merely seeking to avoid using those very words". M. DOUGAN, 'When worlds collide! Competing visions of the relationship between direct effect and supremacy', (2007) 44 *Common Market Law Review*, 931, 941.

remedies differently. Due to the disparity in the moment or hierarchy that primacy is effected, it is in one model capable of “demanding” remedies by itself in the national court, be it in a procedural way or by means of invocation.⁷⁰⁸ In the other, it has that capacity only in the event that direct effect has previously been accorded.⁷⁰⁹

14.2.2 Effectiveness as an organizing principle

*“It is therefore possible now to talk of ‘minimum enforceability’ where the ‘greater enforceability’ provided by recognition of direct effect cannot operate.”*⁷¹⁰

The two models are often equated with the irreconcilable positions taken as to whether the EU consists of one unitary legal system of hierarchies or two separate legal systems. This incommensurability surrounding the essence of the EU can be circumvented by a process perspective, which sees the EU as made up of co-existing processes rather. Both approaches explain the mechanism of effect of EU norms on the national legal orders. We want to explore the idea that the discussion is not best defined through the parameters of primacy and direct effect, but by the principle of effectiveness as an organizing principle and common denominator.⁷¹¹

The merits of the principle of effectiveness as an approach have been stressed by others before - above all by Ross, who argues that “*understood in these terms [the broad conception thereof, the *effet utile*], effectiveness is a more sophisticated and tailored mechanism than the blunt exhortation of supremacy.*”⁷¹² Many landmark decisions have ‘discovered’ new EU law principles; among others, the *Francovich* liability.⁷¹³ When one

⁷⁰⁸ W. VAN GERVEN, 'Of Rights, Remedies and Procedures', (2000) 37 *Common Market Law Review*, 501, 521.

⁷⁰⁹ “The ‘primacy’ model thus aligns supremacy with notions of invocability and judicial review... direct effect is more closely associated with the creation and enforcement of subjective and individual rights. By contrast the ‘trigger’ view sees supremacy... as little more than a remedy to be administered by the domestic courts” M. DOUGAN, 'When worlds collide! Competing visions of the relationship between direct effect and supremacy', (2007) 44 *Common Market Law Review*, 931, 934.

⁷¹⁰ AG LEGER in *Linster*, para 65, again citing D. SIMON, *La directive européenne 1997*), 308.

⁷¹¹ M. ROSS, 'Effectiveness in the European legal order(s): Beyond supremacy to constitutional proportionality', (2006) 31 *European Law Review*, 476, 480.

⁷¹² M. ROSS, 'Effectiveness in the European legal order(s): Beyond supremacy to constitutional proportionality', (2006) 31 *European Law Review*, 476, 496.

⁷¹³ But also for instance the ability of individuals to invoke framework decisions in *Pupino* in Case C-105/03, *Pupino*, [2005] ECR I-5285.

examines the reasoning in these cases, it is true that “*effectiveness is overtly surfacing as a dominant leitmotif in judicial reasoning*”.⁷¹⁴

In the following, I argue that two types of effectiveness co-exist. The first is effectiveness connected to the effectiveness of specific EU law provisions such as Competition law or within the upcoming ‘procedural autonomy’ doctrine. In this relationship, the rights created by Union norms are directly effective, and since they are enforced by direct effect they are able to require procedures and remedies for their specific protection from national courts. Even though direct effect in a broad sense may not always correspond to the creation of a right,⁷¹⁵ it is nevertheless within this relationship that the maxim *ubi ius, ibi remedium* is at its strongest and is forcefully exhibited. The EU right can itself be invoked in front of the Court, and must then be able to be exercised effectively and protected by effective remedies.

However, the second type of principle is grounded in the system of the treaty and can be of greater significance, as it has a “conceptualized, constitutional impact”.⁷¹⁶ As distinct from ‘effectiveness’ in the previous paragraph, its meaning is perhaps better reflected in the French *effet utile*. Through its constitutional sense, effectiveness as *effet utile* can determine when EU law intervenes for the purposes of the integrity of the EU legal order. The *effet utile* as a form of effectiveness can ‘create’ new connecting factors as to when to intervene, e.g. as happened in relation to *Francovich* liability, or the doctrine of consistent interpretation. It starts from requirements which are set on the consequences, i.e., on the remedy. From this point the reasoning is inverted. EU law and the EU legal order need to be fully effective, and from this derives the (remedial) ‘right’ of a party. The right itself, however, changes shape during this process. For example, *Francovich* liability changes the content of the underlying right, due to the higher threshold that parties have to satisfy, but also due to it being a

⁷¹⁴ M. ROSS, ‘Effectiveness in the European legal order(s): Beyond supremacy to constitutional proportionality’, (2006) 31 *European Law Review*, 476, 486.

⁷¹⁵ Prechal pleads for a separate consideration of the terms of direct effect and creation of rights, and asserts that a provision “may well confer rights upon a person but since directives do not have direct effect the person concerned cannot assert them against another individual”. S. PRECHAL, ‘Casenote on Cases C-397/01-403/01 Pfeiffer v Deutsches Rotes Kreuz’, (2005) 42 *Common Market Law Review*, 1445.

⁷¹⁶ M. ROSS, ‘Effectiveness in the European legal order(s): Beyond supremacy to constitutional proportionality’, (2006) 31 *European Law Review*, 476, 480.

monetary remedy in character. An individual right may be a necessary precondition, but it is the mechanism selecting the remedy that defines the shape of the right. This mechanism instead corresponds to the maxim *ubi remedium, ibi ius* – where there is a remedy, there is a right.

Conventionally, dualist and monist visions of the EU assume a single mechanism to be exhibited in all of the legal orders. Against this, I submit that the EU legal order entertains a mixed conception of remedies. The principle of *ibi ius, ubi remedium* holds for the direct effect ‘effectiveness’, which ensures the enforceability of specific EU law. It ensures the performative function of EU law. However, in the *effet utile* as a constitutional guarantee, the mechanism is reversed to *ibi remedium, ubi ius* (for example, in the doctrine of consistent interpretation, non-application of conflicting norms, Member State liability damages). The underlying *effet utile* ensures the systemic and structural functioning of the EU legal order, as a Union built on foundations of the rule of law.

14.3 RIGHTS AND REMEDIES

14.3.1 Right as condition, right as reason for remedy

The previously rather intuitively drawn difference between the *ubi ius, ibi remedium* and *ubi remedium, ibi ius* approaches can be refined on a theoretical level. The distinction between a relational conception of right and remedies and remedies as an independent postulate of a legal order is explained by Weinrib. He contrasts the Aristotelian and Kelsenian account of remedies: in the Aristotelian account (which he terms ‘reason conception’), a causative event and the remedy granted share an intrinsic and direct relationship or commensurability with each other. “*What the defendant has done to the plaintiff determines what the judge requires the defendant to do for the plaintiff*”.⁷¹⁷ The remedy becomes an instrument for the reversal of that injustice, a tool of corrective justice. Following Kelsen, however, the remedy is a legal consequence or sanction which is posited only by the law (in Weinrib’s terms ‘condition conception’). Although there is a relationship, this relationship comes into

⁷¹⁷ E. J. WEINRIB, ‘Two Conceptions of Remedies’, in C. E. F. Rickett (ed), *Justifying private law remedies* (Hart, 2008), 4.

existence only through the interface of the posited legal order. The causative event is merely a condition and the scope of the remedy is undefined by and independent of the causative event.

We identified Member State liability and its requirement of a sufficiently serious breach (as a condition) to formulate a remedy as an exponent of the *ubi remedium ibi ius*; in the same vein we can say that the causative event - i.e. the infringement of an EU right - is the condition. But this infringement of a right is only a condition. Once it is triggered, the remedy is not substantively linked to the right that was infringed, and the remedy is not fashioned *according* to that right.

The 'reason conception' better describes the 'effectiveness' mechanism present under procedural autonomy types of remedies which, by their very nature, view the right as a reason for the given remedy granted. Weinrib goes further in this distinction and posits that for the Aristotelian 'reason conception', rights are not only individual enforceable rights but must always be seen in the context of a 'system of rights'. Due to the context, a particular right can also lead to remedial justice. The example Weinrib provides is one of nuisance law, when a small infringement of a plaintiff's right can be compensable by damages rather than the normally granted injunction because the defendant's detriment is disproportionately large relative to the plaintiff's compensable injury. Under specific circumstances, "the remedy does not match the plaintiff's particular right but is rather the product of considerations present only at the remedial stage"⁷¹⁸ (which can be called remedial fairness). In this vein, "by not awarding an injunction the court prevents the plaintiff from abusing his or her right".⁷¹⁹ The 'reason conception' of remedies, therefore, takes into account the right with which there is an intrinsic connection in the larger system of connected rights. This systemic view makes other available remedies relational to the one administered in the specific case.

14.3.2 Towards a rationale

⁷¹⁸ E. J. WEINRIB, 'Two Conceptions of Remedies', in C. E. F. Rickett (ed), *Justifying private law remedies* (Hart, 2008), 29.

⁷¹⁹ E. J. WEINRIB, 'Two Conceptions of Remedies', in C. E. F. Rickett (ed), *Justifying private law remedies* (Hart, 2008), 29.

This observation leads us to propose that *effet utile* in its constitutional sense is not simply an expression of supremacy. Rather, it is an expression of the degree of effectiveness that the EU requires based on supranational justice and constitutional considerations. It is not concerned with the realization of one or another *specific* law or right, but is concerned with the organization and construction of the legal order, the site being European judicial integration. By nature these remedies are trans-substantive, as they stand independent of the right, but in the rationale of judicial organization. In a non-technical sense they are a type of second order rules; structural rules. If anything, they represent the right of the community of Member States collectively. The instrument may be the individual right, yet the protected interest is the individual's interest in an effective legal Union. In the following, we are taking this suggestion further for the incidence of Member State liability.

This makes Member State liability a constitutional tort provision, which follows an *ubi remedium, ibi ius* approach. While its existence is dependent on an individual's right, once come into being, the liability's contours are not deduced from the interpretation of a specific right. In Member State liability the right is merely a constitutive condition⁷²⁰, a postulate of EU law, with little pretence concerning the interpretation of the specificities of the underlying individual right.

Under the effectiveness of EU law, the right works as a 'reason condition'. Together they shape the requirements of specific rights, understood as causative events. Procedural autonomy, bearing the weight of 'effectiveness' and 'equivalence'⁷²¹ requirements, addresses the question of what exigencies EU law claims and whether a measure is contrary to EU law. Therein it always refers to the realization of a right, which is judged in a concrete individual situation against a domestic measure in the determination of the remedy. Damages here function as a secondary form of protection of rights – rights which are coupled to a set of potential remedies (i.e. ineffectiveness, injunction and so on) and to which the action for damages stands in relative relation.

⁷²⁰ Thus corresponding to Weinrib's definition of the relationship between the right and remedy as being merely constitutive E. J. WEINRIB, 'Two Conceptions of Remedies', in C. E. F. Rickett (ed), *Justifying private law remedies* (Hart, 2008), .

⁷²¹ Note how the 'equivalence' criterion fulfills an important function with regard to placing and seeing the remedy in its remedial context in relation to the concrete national remedial context specifically.

As an evolving legal order, the EU has not yet accorded an immutable place for damages or liability. Although informed by theory, ultimately we will not follow a specific *a priori* account. Instead, we depart from the emerging indeterminate EU legal doctrines and support them with fitting theoretical frameworks.

14.4 MEMBER STATE LIABILITY AND EFFECTIVENESS DAMAGES: THE SEPARATION THESIS

While it is strongly asserted, more than twenty years after the *Francovich* judgment, Member State liability remains poorly defined. Articulation of its basic ideas, fundamental justification and purpose are lacking. *Francovich*-based litigation across the EU has increased, but in comparison to, for example, *Courage*-inspired damages awards, the number of cases is negligible. Much of the remedy's weakness in terms of litigation stems from its lack of clarity, as is also indicated by the numerous proposals to reconceptualize and clarify the doctrine. Even in those few cases in which damages have been successfully claimed in national courts, confusion has arisen regarding some of the major tenets of the doctrine, and there has been some conflation of Member State liability damages and those available under Competition law.⁷²² Omnipresent though it may be in the ECJ case law, Member State liability has remained devoid of the sharp contours that would allow its manifestation in and through national courts.

Factually, Member State liability is being pulled into assimilation with general damages available under the direct effect of EU law, in particular Competition damages, but also those stemming from non-contractual liability of the EU (see the 'conflation thesis' discussed in Section 4.2) Under the 'conflation thesis', Member State liability would become an EU law general liability clause. Conflation pulls from both sides: likening Member State liability to EU Institutional liability makes for a general EU public liability clause; likening damages under Member State liability to damages for breaches of EU law in general corrodes the public nature of the liability incurred. Having substantiated the current indeterminacy of the

⁷²² For the application of the Member State liability doctrine by the Swedish courts in *Laval* see N. REICH, 'Free Movement v. Social Rights in an Enlarged Union: The *Laval* and *Viking* Cases before the European Court of Justice', (2008) 9 *German Law Journal*, 125.

doctrine, this section aims to carve out the specific purpose and function of Member State liability by means of a ‘integration/supranational justice’ based justification. It aims to vest Member State liability *with a normative framework based on considerations of supranational justice, in which it provides a ‘tertiary protection’ of EU integration through the protection of EU rights*. Thus conceived, damages awarded under the doctrine of Member state liability are distinct from other types of damages awarded under EU law (the ‘separation thesis’).⁷²³

We argue against the conflation thesis and justify Member State liability as a third, distinct level of liability – a tertiary form of protection of EU law conferred rights. The *effet utile* argument makes Member State liability a constitutional instrument that specifically enforces *Member States’ implementation duties to transpose, give effect to and apply* EU law.

14.4.1 An implementation duty based view of Member State liability

The first step in constructing the justification for Member State liability concerns looking at *upon whom* EU law provisions impose *which obligations*. We might be tempted to frame the answer by means of the “horizontal direct effect” discussion which has two dimensions. The first is the personal scope of those provisions: who is the addressee of an EU legal norm? In this respect, the horizontal status of Treaty obligations emerges as one of the frontiers of contemporary EU law: to what degree can private entities hamper free movement under the internal market provisions? The second dimension is that of direct applicability or the lack thereof. Is the duty imposed directly on private parties, or only indirectly so that the Member State is needed as a transposing intermediary?

In addition to the obligation of compliance with EU law, a secondary obligation emerges which is of a structural nature: in the case of directives, the action required is more or less straightforward. The Member States must pass transposition measures. Where obligations have no direct horizontal effect, the Member States’ action is necessitated in

⁷²³ I am not presenting this thesis with the claim that it better explains all existing case law, but with the goal of purposefully developing it.

order to provide the necessary legal interface between EU law obligations and the individual. There is a duty of transposition.⁷²⁴

However, the structural obligations go further. There are additional implementation duties which arise for Member States, but not possibly for individuals. These concern, for example, the maintenance of a compliant regulatory and judicial environment. An obligation to ensure a general environment was adjudicated in the *Omega/Schmidberger* litigations, holding that a Member State was under an obligation to obstruct systematic breaches of EU law by individuals (indirect horizontal effect). Similarly, regulations may not necessitate transposition through law-making but through additional implementation efforts. Competition law provisions create duties of compliance on individual actors. In contrast, duties to effectuate a functioning legal system in order to enable effective enforcement are duties implied in a Treaty, but which are incumbent on the Member State and not the individual.⁷²⁵

While implementation can, for example, be understood as the simple transposition of an EU directive into national law, it can also be given a much wider meaning which comprises duties of effectuating a legal text in a larger sense. Here, implementation does not simply refer to transposition but also covers compliance and enforcement. In this respect, the perspective of the literature concerning implementation studies may be educative, but has seen a shift in focus away from the legal obligation towards implementation as a process and later an emphasis on implementation contexts.⁷²⁶ The ECJ has in several judgments

⁷²⁴ If EU law provisions create direct obligations on private entities, the Member State may not have a duty to transpose by means of legislation. In terms of creating an effective EU law regime, an EU law regime without horizontal direct effect arguably requires a stronger form of Member State liability in order to hold Member States accountable for their duties of transposition. In the light of the political direction of European legal integration, the problematic nature of Directives has become apparent, because the EU has seen an acceleration in the passing of secondary legislation, but the fact is that, in the wake of subsidiarity and the political climate, directives are the default legal instrument for secondary EU law – a preference which is enshrined and underscored formally in the provisions of the Lisbon Treaty.

⁷²⁵ One could imagine a negative duty on individuals of an ‘effectuating’ nature in the form of prohibiting the systematic use of arbitration clauses in contracts.

⁷²⁶ Generations of Implementation studies have focused on the implementation of trade agreements, for example, emphasis was first placed on the enacting of laws, then in the second generation the focus was on implementation as a process (variables of time and actors). The third wave sees arguably more contextualized versions (embedded in wider real-political contexts, institutionalization of commitment and negotiation

exhibited this wider understanding of implementation duties, for example in the *Spanish Strawberries* case, in which a favorable environment was required. Implementation is not simply legal text-based but also concerns practice, at times opening up conceptually towards positive duties of facilitation.

To capture the different types of implementation obligations on Member States, one can distinguish between transposing (legislative duties), effecting (facilitative duties) and applying (operational or executive duties) EU law. These obligations encompass both implementation as a one-off duty as well as a compliance aspect in the sense of continuous observance and enforcement – implementation as a process.

The implementation duties (transposition, effecting and applying) result in different margins of discretion and standards of review which nuance the ‘sufficiently serious’ test. While the Member State is a unitary addressee, implementation duties play out differently in terms of how they burden specific branches. The judiciary has a ‘supranational justice’ or ‘higher-order’ duty not only to (correctly) apply EU law, but also to refer preliminary questions. It is a given that some breaches, such as non-referral, can only be committed by a specifically charged entity, i.e. the judiciary. For the purposes of Member State liability, this differentiation is not to be made based on the public or private nature of an entity, but based on their distinctive role regarding the implementation of EU law.⁷²⁷

14.4.2 The difference between Member State liability and effectiveness damages:

Consequences of the Separation Thesis

Member state liability, I argue, is correlative to these structural implementation duties. It is a constitutional remedy, the judicial guardian of the Treaty, of itself formulating a positive obligation on the Member States in the name of integration. We have advanced the argument that Member State liability is a tertiary, international law type of responsibility borne by the Member States. There are several characteristics which support this reading

mechanisms). S. BARRETT, 'Implementation studies: Time for a revival? Personal reflections on 20 years of implementation studies', (2004) 82 *Public Administration* 249.

⁷²⁷ This characteristic goes very much in the same direction as our understanding of the EU legal structure as a bundle of processes, rather than hierarchical structure made up of impenetrable entities.

and result in a distinction between Member State liability damages and damages available under the effectiveness of EU law.

The nature of the duties are distinct: as argued above, obligations of compliance with EU law stand next to further reaching duties of effecting implementation. Obligations on Member States vary with different types of breaches (transposition, application, giving effect), and with different branches of government (judiciary, legislative, administrative bodies). Where the Member State was said to dispose of no margin of discretion, misapplication of EU law has, in the past, lead to objective liability. The different margins of discretion which are presupposed are strong indications that the CJEU differentiates between situations in which the Member State was under a duty to transpose, to effect or to apply the law correctly. This point is underscored by the fact that member State doctrine as it currently stands perhaps allows for slight variations with regards to the implementation type default but not with the kind of right that was at issue.

The justifications under Member State liability are different from those for breaches of EU law under effectiveness considerations. The justifications allowed are geared towards the ‘intentionality’ of the implementing and effectuating Member State, but they are not substantive reasons found in the underlying legislation. The justifications corroborate the fact that the underlying obligations against which these justifications may be invoked are implementation obligations. The common definition of a ‘sufficiently serious’ breach relies on:

*“clarity and precision of the rule infringed and the measure of discretion left by that rule to the national authorities, whether the infringement or the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a Community institution may have contributed towards the adoption or maintenance of national measures or practices contrary to Community law”.*⁷²⁸

On one hand, the legal obligation at the basis of an implementation duty is assessed against the standard of determinacy (clarity) of the EU norm. Implementation is rather seen to constitute a process and for example actions of EU institutions supporting a particular

⁷²⁸ Case C-278/05 *Robins and others* [2007] ECR I-1053, para 77; Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-01029, para 56; Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239, para 55.

interpretation of a legal text exculpate a Member State for misimplementation. In addition, the '*mens rea*' or intention of a Member State is taken into account. All of these justifications refer to duties of implementation and, in a wider sense, supranational loyalty and solidarity in relation to the implementation of EU law among Member States. They are not based on the particular relationship between the individual and the Member State.

Member State liability limits and defines the liability incurred to a pecuniary remedy. In the case law, Member State liability has been limited to pecuniary damages. Those damages at the moment seem confined to compensation damages. The ECJ held that from an enforcement point of view, the imposition of State liability pursues different goals than the imposition of penalties. Look at *COS.MET*, for example: "*the purpose of a Member State's liability under Community law is not deterrence or punishment but compensation for the damage suffered by individuals as a result of breaches of Community law by Member States.*"⁷²⁹ Yet deterrence as such is to some extent factored into the constitutive criteria and whether liability is incurred. The deterrence rationale disappears after liability has been affirmed. Compensation damages become the measure and extent of Member State liability.

The sources of law which are cited by the Court differ. Member State liability is on one hand grounded as implicit in the Treaty. This criterion echoes the fact that certain duties are incumbent upon Member States in their capacity as signatories and parties to a Treaty. Additionally, the Court has relied on the Member States' traditions as a common denominator, sometimes reinforced by an analogy to the non-contractual liability of the EU as a source of law either national law, or comparative law as a common tradition of the Member States. Effectiveness in interpreting EU law provisions directly does not benefit from this source of law.

The applicable sources of law were the result of differing institutional processes, which are also subject to lay claim to different types of legitimacy. Member State liability is grounded in the common traditions of Member States and the Treaty System. In terms of form, it is a general provision and primary law. Secondary legislation, instead, constitutes a specific agreement concerning a political process carried out by the EU legislator (as

⁷²⁹ Case C-470/03 *A.G.M.-COS.MET Srl v Suomen valtio and Tarmo Lehtinen* [2007] ECR I-02749, para 88.

opposed to the intergovernmental Treaty changes). This matters for institutional reasons and from the connected legitimacy point of view. On one hand, the Court interprets the Treaty or principles of primary law (which are equally ranked), and derive from a document that was agreed upon by the Member States. Member State liability has the status of Treaty law, while secondary legislation can be changed by EU amendments to secondary legislation taking place through the EU legislative procedure. It is a widely accepted argument that secondary legislation cannot ‘trump’ primary legislation.

14.5 APPLICATION OF THE SEPARATION THESIS IN PUBLIC PROCUREMENT

A conflation of Member State liability with ‘effectiveness’ has been observed. It is not a potential scenario, or one simply invented by some commentators. The Court of Justice has also gone down this road in the *Combinatie Spijker* judgment. It held that the damages provision contained in the Public procurement remedies directive “gives concrete expression to the principle of State liability for loss and damage caused to individuals as a result of breaches of EU law for which the State can be held responsible.”⁷³⁰

14.5.1 Application of the separation thesis

In the previous section, the separation thesis has been defended. The case of public procurement provides an excellent example to illustrate the dangers of conflation regarding: type of duties, justifications, extent of the remedy, sources of law and the institutional process legitimacy of the latter.

Member State liability and the procurement directives have different personal scopes. As previously discussed, for Member State liability the scope of the meaning of the word “State” is blurred. Whether or not the *Foster*⁷³¹ definition in State aid of emanations from the State can and should be accepted has been debated. It is clear from case law that the notion of the State in liability cases is drawn widely, including decentralized authorities and

⁷³⁰ Article 2(1)(c) of Directive 89/665, in Case C-568/08 *Combinatie Spijker Infrabouw* [2010] ECR I-12655, para 86.

⁷³¹ Case C-188/89 A. *Foster and others v British Gas plc* [1990] ECR I-03313.

bodies.⁷³² There is thus a rather large intersection between a contracting authority and State body under liability but the two concepts are not congruent with each other. However, not all contracting authorities are public in this sense and there will be a certain degree of incongruence between the personal scopes of the two provisions. Regarding the question on whom EU law imposes which obligations, the case of public procurement is especially telling. The personal scope of application of the procurement directives is highly positively defined. Although broadly speaking there is a large overlap between procurement authorities and State entities, there is no congruence. Within the applicability of the Remedies Directives, it is the contracting authority which is liable for damages. Under Member State liability on the other hand, one of the implicit conditions is first and foremost that a given act has been carried out by the State. Based on certain technicalities of the public procurement regime, it is possible to argue that not every contracting authority is necessarily an organ of the State. Public and private partnerships are a case in point. In addition, under the utilities public procurement directives, explicitly private law entities are covered by the legal regime as well.⁷³³ The question of which State instance a liability action has to be brought against is on the other hand for the internal organization of national law to answer,⁷³⁴ whereas under public procurement law it would be the contracting authority.

The type of duty and the connected justifications under the public procurement regime are those contained in the legislative regime. Strict observance of the rules is necessary, and finding a breach may not be made contingent on the finding of fault. Unless otherwise stated, violations are subject to an objective liability, independent of the intentions of the entity breaching EU law. In the procurement context, the intention of a contracting authority to breach EU law is irrelevant for a damages claim under the directives. The public interest exception, which would allow a national court not to pronounce the

⁷³² See for a discussion M. DOUGAN, *National remedies before the Court of Justice : issues of harmonisation and differentiation* (Hart, 2004) 252-255. See also G. ANAGNOSTARAS, 'The allocation of responsibility in State Liability actions for breach of Community law: A modern Gordian knot.', (2001) 26 *European Law Review*, 139. Also A. BIONDI & M. FARLEY, *The right to damages in European law* (Kluwer Law International 2009), 61-63.

⁷³³ For an analysis of the State or non-State identity of utilities, see P. A. TREPTE, 'When is a Utility not a 'Utility'?', in Laurence W. Gormley (ed), *Gordian knots in European public procurement law : government procurement agreement : standards, utilities, remedies* (Bundesanzeiger, 1997), and the cited jurisprudence.

⁷³⁴ A. BIONDI & M. FARLEY, *The right to damages in European law* (Kluwer Law International 2009), 66

remedy of ineffectiveness even though ordinarily required, is also a specific kind of justification. It is valid only in an autonomous procurement related interpretation, and it is a justification available to the national court (not the contracting authority) for not granting a specific remedy.

Member State liability is limited to the remedy of damages; it is abstract in nature, and hence more general. By contrast, damages articles in secondary legislation and the corresponding liability are relative to their substantive reasons. Secondary law accords liability based on more specific and connected reasons whereby a different kind of balancing is carried out. The constitutive criteria differ as do the respective consequences: effectiveness asks which heads of damages (material condition) are available, whereas in Member State liability the consequences are arguably limited to compensation.⁷³⁵ In the case of public procurement, the general remedies must first be interpreted in accordance with the specific legal regime. For example in the case of public procurement, the ineffectiveness of contracts might be required under the 2006/77 Remedies Directive and have priority over the damages remedies (specific 'hierarchization of remedies'). To what extent a remedy is sufficient is for the EU level to judge in relation to the specific 'effectiveness' requirements. However, Member State liability is based on compensation as a measure, and they are damages in tort. In the context of procurement, there is often a contractual or statutory element to damages awards. By equating the damages available under the Remedies Directive with those for Member State liability purposes, the specificity of the public procurement context is neglected. Other rationales become suppressed, such as the pre-contractual/*culpa in contrahendo* action for damages. In addition, it is problematic in legal orders which have not transposed the damages article by means of one single cause of action. In many legal orders, tort provisions sit alongside specific statutory damages actions for violations of public procurement rules or strong pre-contractual doctrines. Heads of damages which are not commonly granted under tort may well be granted in contractual damages. On the other hand, Member State liability usually grants

⁷³⁵ M. DOUGAN, 'What is the point of Francovich', in T Tridimas & P Nebbia (eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order* (Hart Publishing, 2004), Dougan for example argues that the choice of remedy granting reparation is up to the Member State. In any case, compensation is always among the sanctioned remedies to put right the wrong caused.

lost profits. In a public procurement context, this may be excessive in several factual constellations.

Another consideration brings us towards the sources of law and legitimacy of the process. Member State liability and effectiveness damages dispose of different sources of law. Under Member State liability, several interpretations would be available to the Court, which it arguably would not be able to have recourse to in an interpretation of the public procurement damages article. In the first instance, the Directive's damages notion is an autonomous one. Unless one were to accept a 'comparative law based' interpretation of secondary law,⁷³⁶ it is not possible to rely on the common traditions of Member States in an interpretation of the damages article.

However, a strict separation between the interpretations of the Member State liability process and the effectiveness process can be phrased in a more positive way. The interpretation of EU law is to some degree protected from the tyranny of the common-denominator effect of comparative law. In the case of public procurement, one might be forced to conclude that the *non-availability* of damages is common to the Member States and hence acceptable. On the other hand, the constitutional protection of rights accorded under Member State liability is isolated from the interference of the EU political process. If we were to take the statement of the ECJ in *Combinatie Spijker*⁷³⁷ at face value, the national political forces of the EU legislative process would dispose of the power to curb their own liability for violations of EU law. To follow the separation thesis is therefore also a constitutional guarantee that preserves a separation and balance of power in the EU legal order.

14.5.2 The effectiveness of EU provisions and Member State liability operate in sequence

In line with the proposal to see Member State liability as a tertiary protection, it makes sense that it be not applied as a hybrid or minimum floor, but sequentially.

⁷³⁶ As is argued in the comparative law methodology part, in the CJEU such a comparative law informed interpretation is the standard practice of judges coming to terms with cases. However, the common traditions of Member States are not a recognized 'source of law' as such, in the same way as is the case for Member State liability that strives to promulgate general principles of law.

⁷³⁷ Case C-568/08 *Combinatie Spijker Infrabouw* [2010] ECR I-12655.

A successful claim for damages under the Directive on the other hand would probably preclude a claim under Member State liability because, *prima facie*, *Francovich* is a tool to make the Member State comply with EU law, which under these circumstances a Member State would arguably have done. However, if the conduct of a Member State can serve to immunize the Member State against liability claims in this way, the two damages claims are not conceptually independent of each other. To illustrate: imagine a contracting authority, which can also be regarded as a State body under the substantive Directives, commits a serious breach of the substantive public procurement Directives. As a result, the tenderer acquires rights under the Remedies Directive, potentially a right to damages. At the same time, the Contracting Authority/State body would be liable for *Francovich* damages. However, if the contracting authority now follows the procedure set out in the Remedies Directive, technically speaking it has again fulfilled its obligations under the Directive, that is, under EU law. However, according to the Remedies Directive, in such a review procedure the damages are less highly regulated than under Member State liability, resulting in a complete dependence on the national system of damages – which may very well grant the aggrieved tenderer no damages at all. The Remedies Directive would in this way serve a purpose exactly opposite to that for which it was created, in conjuring a loophole through which the Member State might escape liability by retreating safely into national law. The most pertinent example in this respect might be time limits. Arguably, the time limits for preclusion of *Francovich* claims are longer than the short ones granted under the Remedies Directive.

Where a breach has occurred, but effective remedies are made available, the Member State is not liable for a claim under Member State liability. Providing effective remedies for a breach of EU law addresses the compliance default and a violation of an implementation duty no longer persists. We can imagine an action of an aggrieved tenderer against a procurement authority, claiming damages for the violation of the procurement directives. Assuming the public authority to be a State entity, the State has not complied with EU law. The non-compliance would be addressed by the national court through the granting of damages or an ineffectiveness remedy, as required to give secondary protection to the EU right.

To incur Member State liability, on the other hand, the obligation against which the remedy would be measured is not the constitutive right itself - it would be determined by the failure of the Member State to implement. Did the Member State have broad discretion? Could it have reasonably failed to understand the exigencies of EU law? Taking the example in the case of the damages article in the procurement directives and given the meager wording, it is legitimate for any Member State to argue that the provision is too indeterminate.

In these cases, national courts can apply for a preliminary ruling to interpret the exigencies of EU law on remedies. The ECJ, especially regarding the nature of damages, has a certain legitimacy in endowing this article with specific requirements on damages. However, if it is a clarification (in which case a court reference was obviously not sufficiently clear), this would not necessarily amount to a violation of the Member State's implementation duty. For example in the *Combinatie Spijker* ruling, the damages provisions in the public procurement directives were arguably not sufficiently clear as to establish a breach of an implementation duty. However, the Court might have interpreted the damages article in a way that defines the permissible types of 'causation'. From that moment onwards, the clarity of the legal provision would be altered and be a higher standard put in place against which an implementation duty would be evaluated.

14.6 CONCLUSION

In this sense, Member State liability is explored as a "liability [that] can become a way to enforce federalism".⁷³⁸ This interpretation can be aligned with the "process towards the constitutionalization of remedies".⁷³⁹ Along the same lines, Member State liability was described as a "high point in the evolution of the principle of supremacy".⁷⁴⁰ All of these descriptions express the underlying supranational justice type considerations – ensuring treaty compliance, by means of guaranteeing the invocability of individual rights for Member

⁷³⁸ A. BIONDI & M. FARLEY, *The right to damages in European law* (Kluwer Law International 2009), 29.

⁷³⁹ T. TRIDIMAS, *The general principles of EU law* (Oxford University Press, 2006), 441.

⁷⁴⁰ T. TRIDIMAS, *The general principles of EU law* (Oxford University Press, 2006), 323.

States' nationals. Member State liability is a constitutional guarantee. In institutional terms, we would have to call it a structural rule, fashioned along the lines of Hart's second-order rules.

15 A PROCEDURAL THEORY CRITIQUE OF PROCEDURAL AUTONOMY

Chapter 3 showed Member State liability and Procedural Autonomy to be the main doctrines through which the CJEU tackles damages. The fact that the CJEU used them concurrently in public procurement was illustrated by the collection of cases *Stadt Graz/Strabag AG*, *Simvoulio*, and *Combinatie Spijker Infrabouw* in Section 4.2.1. Through the Separation Thesis, for which I argued in the previous Chapter, I separated the constitutional *effet utile* of Member State liability from the performative effectiveness test of EU law. Currently, the performative version of effectiveness is applied to all enforcement rules (process, procedural and remedial), under the umbrella of the procedural autonomy doctrine. The following section examines how ‘procedural autonomy’ guides the reasoning of the Court on damages. Insights from the national level of adjudication are combined with procedural theory in order to illustrate several problematic issues which emerge when ‘procedural autonomy’ as it currently stands is applied to damages.

15.1 THE GRADUAL EMERGENCE OF A DOCTRINE OF PROCEDURAL AUTONOMY

The term and concept of procedural autonomy has been under very diverging scrutiny and criticism, to say the least. Some deny its existence, while others rely on it unreflectedly, as though it were a natural obstacle to EU law interference. This autonomy has been referred to as “more apparent than real”,⁷⁴¹ and it has been argued that in any case, autonomy does not equal independence.⁷⁴² The creation of the term ‘procedural autonomy’ was credited to the commentator Joel Rideau in 1972 and a subsequent textbook.⁷⁴³ In 1996, Tonne was able to write that only the older literature spoke of procedural autonomy as a limitation to

⁷⁴¹ AG Tesouro C. N. KAKOURIS, 'Do the Member States Possess Judicial Procedural "Autonomy"?', (1997) *Common Market Law Review*, 1389.

⁷⁴² Statement by Cavallini, quoted in C. N. KAKOURIS, 'Do the Member States Possess Judicial Procedural "Autonomy"?', (1997) *Common Market Law Review*, 1389.

⁷⁴³ Haapaniemi dates the term back to the commentator Joel Rideau in 1972 and a textbook released thereafter, P. HAAPANIEMI, 'Procedural Autonomy: A Misnomer?', in Laura Ervo, et al. (eds), *Europeanization of procedural law and the new challenges to fair trial* (Europa Law Publishing, 2009), 89.

Community competence.⁷⁴⁴ In 1998, Judge Kakouris questioned the very existence of procedural autonomy,⁷⁴⁵ a call which was echoed by van Gerven in 2000, who referred to the procedural competence, rather than autonomy, of the Member States.⁷⁴⁶ All of these observations reflect the same sentiment, namely skepticism in relation to the principle.

Originally, the contours of the “principle” of procedural autonomy, namely effectiveness and equivalence, were what shaped the concept. The lack of normative significance of procedural autonomy *itself* was underscored by the attitude of the Court. It continued to refine the *Rewe/Comet* formula but for the longest time did not use the notion of procedural autonomy as such.⁷⁴⁷ It was mainly Advocate Generals, especially AG Darmon and Jacobs (and from time to time, parties in their submissions), that started referring to a principle of procedural autonomy. In 2004, for the first time, the CJEU used the terminology ‘procedural autonomy’ in the *Wells*⁷⁴⁸ case. It then appeared in a string of consumer law cases, and is now commonly encountered in CJEU judgments.

Initially, the ECJ constructed the *Rewe*-formula, and it was only later that this was termed the principle of procedural autonomy. Chapter 3.1 identified different versions of ‘effectiveness’, through which the CJEU has modified its methods of reasoning over time.⁷⁴⁹ The early version of procedural autonomy stipulated that national procedure must give sufficient effect to European law. The concept changed with the introduction and proliferation of the balancing approach, which stipulates that the rationale of a national procedural rule must be taken into consideration.

⁷⁴⁴ M. TONNE, *Effektiver Rechtsschutz durch staatliche Gerichte als Forderung des europäischen Gemeinschaftsrechts* (Heymanns, 1997) 315.

⁷⁴⁵ C. N. KAKOURIS, 'Do the Member States Possess Judicial Procedural "Autonomy"?', (1997) *Common Market Law Review*, 1389

⁷⁴⁶ W. VAN GERVEN, 'Of Rights, Remedies and Procedures', (2000) 37 *Common Market Law Review*, 501

⁷⁴⁷ In 1997 Kakouris was still able to write that the Court had never used the notion. C. N. KAKOURIS, 'Do the Member States Possess Judicial Procedural "Autonomy"?', (1997) *Common Market Law Review*, 1389.

⁷⁴⁸ Case C-201/02, *The Queen on the application of Delena Wells and Secretary of State for Transport, Local Government and the Regions* [2004] ECR I-723.

⁷⁴⁹ V. TRSTENJAK & E. BEYSEN, 'European Consumer Protection Law: Curia semper dabit remedium?', (2011) 48 *Common Market Law Review*, 95, 101, writes “[t]he case law of the ECJ has, however, been marked by an important evolution in the application of the effectiveness test.”

The CJEU is not consistent in using any one approach, and there is no single way of reasoning which could justify all of the case law rendered. We can state, however, that procedural autonomy moved from being a descriptive to a potentially prescriptive concept that could shield national rules against requirements of effectiveness from European law.

Of the contributions on procedural autonomy, Pekka Haapaniemi captures the *use* of the principle of procedural autonomy very well by drawing attention to the dangers of the ‘nominalist fallacy’:

“...when we speak of procedural autonomy, we suppose that there must somewhere be procedural autonomy. So, by speaking of it we, in fact, tend in some way to create it at least in our minds. The danger is that we draw a conclusion that there is procedural autonomy, because we speak about it. By contrast, we should examine what is behind the expression we use i.e. analyze the contents of the legal phenomenon.”⁷⁵⁰

Procedural autonomy is a doctrine which has gradually been manifested. While we can affirm its existence, its meaning remains open. The moment is ripe for a sharper definition, which I attempt to achieve in Chapter 16. First, however, an analysis of how ‘effectiveness’, as used in connection to the procedural autonomy principle, is shaping the adjudication of enforcement rules, and damages in particular.

15.2 PROCEDURAL THEORY AND THE EFFECT OF APPLYING PROCEDURAL AUTONOMY IN EU LAW

Since the principle of procedural autonomy apparently deploys ‘procedural law’ as a connecting factor, I begin this inquiry from a perspective of procedural theory. The purpose is to sketch some broad lines that offer a new perspective from which to conceive damages. It is not a promise of answers, but points towards a means of analysis of damages in EU Law.

⁷⁵⁰ Pekka Haapaniemi in A. RÖSENKOTTER & T. WUERSIG, *The Impact of the Lisbon Treaty in the Field of Public Procurement* (European Parliament, 2010), 114.

The first question which may arise in this respect when dealing with damages is “why *procedural* theory?” Many lawyers would instinctively classify damages as substantive, and so a procedural discussion may strike some initially as counter-intuitive. However, the implications of procedure for damages claims have led to a well known controversy, for example in international law. In reality, and as was worked out in great detail in the preceding conceptual work on damages, damages claims are a bundle of rules. These are sometimes split into constitutive and quantificatory rules. Even in the most traditional assessment, it would be hard to deny that some rules regarding damages are open to classification as procedural. Time limits are a particularly grey area. On the other hand, the discretion of judges in estimating the actual monetary awards or valuation of evidence traditionally concerns procedural rules.

The following section highlights some of the important and perennial controversies dealt with by procedural justice theory: the *distinction between substantive/material and procedural*, the issue of *trans-substantivity* and the question of the *purpose of procedural law*.

Procedural theory can provide new valuable insights for EU law, in particular to support the following observations: first, the connection between procedure and substance is intrinsic. Second, the conflation thesis, spill-over interpretations and taxonomies of rights lead to a transsubstantive trend in the interpretation of EU law, i.e. that procedural law is applied across substantive areas. Third, the performative effectiveness of EU law is often ‘accuracy based’ and supports the pretence of procedural law as value neutral and without impact on substance.

15.2.1 The procedure – substance distinction

Talking about procedural law presupposes that there are two types of legal rules, substantive and procedural, or material and adjective. However, there is a tension between the apparent usefulness of the distinction between substance and procedure⁷⁵¹ in heuristic

⁷⁵¹ Even this dichotomy is simplified, and the problem can be extended to aspirations distinguishing between formal, procedural and substantive legal rules.

terms, and the incapacity of providing a clear line of demarcation and hence a definition of either. This is the issue of ‘separability’.

The apparently easy case in favor of separability is made in quite exemplary manner in the following statement:

“Procedure concerns the process or steps taken in arriving at a decision; substance concerns the content of the decision. The two are conceptually distinct, for one can use different procedures for the same substantive issue and the same procedure for different substantive issues. Hence a substantive topic cannot imply a procedure, nor a given procedure imply a particular substantive topic”.⁷⁵²

At closer inspection, however, it is hard to deny that procedural modalities perform substantive functions. “The procedures used determine how much substance is achieved, and by whom.”⁷⁵³ The pervasive,⁷⁵⁴ and hence ineliminable connection lies in this characteristic of procedure as “particulariz[ing] abstract and general substantive rules” in the “application of abstract rules to concrete cases”.⁷⁵⁵ We are circumnavigating some intricacies of the discussion,⁷⁵⁶ and remain with the appraisal that, ultimately, we have to accept a certain entanglement of substance and procedure while recognizing that they remain useful heuristic categories.

The statement that procedure and substance are intrinsically linked has two dimensions. First, the *categories* are notoriously difficult to practice, i.e. it is impossible to come up with an *a priori* definition which satisfactorily differentiates one from the other. In terms of mere labeling, the problem for EU law is that national legal orders do not have the same procedural or material classifications for the same type of rules – the classical example being time limits. Secondly, procedure *impacts* on substance, i.e. it affects the substantive outcome.

⁷⁵² M. D. BAYLES, *Procedural justice : allocating to individuals* (Kluwer Academic Publishers, 1990), 3.

⁷⁵³ F. H. EASTERBROOK, 'Substance and Due Process', (1982) 1982 *The Supreme Court Review*, 85, 112-113.

⁷⁵⁴ Pervasive as opposed to intentional, referring to legal procedural rules intentionally being instrumentalized by the legislature to achieve substantive goals.

⁷⁵⁵ L. B. SOLUM, 'Procedural Justice', (2004) 78 *Southern California Law Review*, 181, 224, 225.

⁷⁵⁶ Proposals for separability are for example based on “intuitionist formalism” or “outcome determinacy”, based on the possibility of influencing the outcome of litigation in its different versions. L. B. SOLUM, 'Procedural Justice', (2004) 78 *Southern California Law Review*, 181, 194.

The conceptual analysis of damages in the previous chapters provides a rich repertoire of examples which challenge the validity of the procedure-substance categories.

The lost chance is a prime example of a rule that defies these *categories*. The lost chance can take the shape of a head of damage, of a means of alleviation of the causality requirement, or of the burden of proof. From the point of view of classifying it as a rule, the lost chance oscillates between procedure and substantive. Time limits are another example. In terms of classification, some jurisdictions classify time limits as procedural, whereas others regard them as substantive.

It is also often proposed to define something as procedural based on the *impact* it has on the outcome of a case. In case of damages claims, the outcome can be defined as the value of a claim. Basing ourselves on this definition, one can argue that the outcome in monetary terms between rules granting different losses under the same heads of damages, or even different heads of damages, has a sufficiently determinative effect on a claim as to be considered a substantive rule.

One can also consider time limits in terms of their impact on substantive rights. In some jurisdictions they are as short as 90 days for public procurement damages claims; in others, they can be four or even up to six years. In terms of rights, these differences are so striking, that one is easily tempted to agree that these are almost different 'rights' in substantive terms.

The last example I am going to give is that of no fault requirements. A no-fault requirement has been set by the CJEU in *Strabag*⁷⁵⁷ for public procurement. However, when looking at some of the 'procedural' rules of Member States, one discovers that the amount awarded can ultimately be at the discretion of the judge. In some jurisdictions, it is common that the judge incorporates fault at the stage of valuation. So for example, if (s)he finds one of the parties at fault, there can be a reduction in the damages award by approximately 30% - 60%. Fault thus 'sneaks' in through the procedural back door. All these examples indicate

⁷⁵⁷ Case C-314/09 *Strabag and others* [2010] ECR I-8769.

that the substance procedure distinction is a formal classification at most, which in their effect can be easily circumvented.

Procedure and remedy as a necessary secondary protection of rights

In examination of the examples, we moved deeper and deeper into the realm of procedural law, and yet the examples provided no support for the denial of the intrinsic impact of procedure on substance. The degree of impact on the outcome may vary, but in principle the impact of merely 'procedural' aspects *can* be so prevalent on the outcome as to annihilate a right. *A fortiori* this is the case for 'remedial' aspects.

On a theoretical level, we can further refine impact by distinguishing an *ex-post* from an *ex-ante* point of view.⁷⁵⁸ In the *ex-ante* view, procedure commands the primary behavior of an agent. When a procedural rule effectively precludes any secondary protection of a right, that right ceases to exist meaningfully. The substantive right loses its power to command the compliance of the primary actions of an agent, and hence that agent's actions are altered. This can be a test of the distinction between "merely" procedural rules and rules which affect "the outcome of a case", which is a classic international private law definition. Excluding adjacent law in a categorical (as opposed to functional) way from the EU would compromise EU rights. In analogy to international private law, effectiveness with regards to procedure emerges as an expression to determine the decisiveness of a rule on the process outcome in terms of result.

The substance-procedure distinction on which procedural autonomy is premised is problematic. In practice, the doctrine has failed to address the implicit assumption of the separability of the two types of rule.

15.2.2 The idea of trans-substantivity

Procedural theory also discusses the idea of the transsubstantivity of procedural law. Transsubstantivity is the transversal application of procedural law across various substantive areas of law. For example, general time limits are often rules which apply to many substantive areas. At that, transsubstantivity *must* presuppose the separability of procedural

⁷⁵⁸ L. B. SOLUM, 'Procedural Justice', (2004) 78 *Southern California Law Review*, 181.

and substantive law. The discussion in procedural theory concerns the level of generality that can be achieved through transsubstantivity and at what detriment it comes to substantive law. Overall, a positive correlation between transsubstantivity and the level of generality of legal rules is recognized i.e. the more types of substantive law are covered, the more general the 'justice' motivation for procedural rules will be.

Trans-substantive trend of EU law

In the following section, I argue that the use of effectiveness has facilitated a significant trend towards trans-substantivity in EU law. This trend is enforced in three ways: the convergence of interpretations put forward in different actions, inter-instrumental spill-over interpretation and taxonomies of rights.

In EU law, trans-substantivity is strongly reinforced by 'conflation', for example between Member State liability and the performative effectiveness of EU law. It is aggravated by the spill-over of institutional liability into Member State liability. This example of conflation has been discussed in section 14.4. The example of public procurement in a concrete case has demonstrated the consequences by providing: an empirical account of trans-substantive pressures mounting in an area of law, specifically through the conflation of primary and secondary law by Member State liability incorporation of the reading of the damages article contained in the public procurement remedies directive; and secondly, the conflation between Member State and Institutional Liability principles in the case law rendered by the General Court. It therefore enables the illustration of trans-substantive perils when giving shape to damages in such generalist terms.

Within the case law on procedure, a cross-fertilization of judgments, and association between different strands of lines of case law has taken place.⁷⁵⁹ The ECJ is forced to produce statements, and therefore judge-made law, on procedural issues by virtue of being obliged to provide the national courts with answers to the referred preliminary questions. These are the dynamics of any legal system, including the European one. In the absence of legislative guidance, the Court, through a system of precedence (or coherency if we want to

⁷⁵⁹ This has led most commentators to despair about making sense of the case law, since the case law was neither confined to branches of law such as criminal or administrative, substantive law -for example competition or consumer, nor procedural rules, for example time-limits or access to justice.

phrase it more neutrally), relies on similar cases. One pull towards trans-substantivity for example on time limits, access to justice, *ex-officio* and the like lies in the obviously constructive nature of the case law, which grows organically, producing more and more judge-made law. As currently deployed, the extensive use of the principle of effectiveness under procedural autonomy gives rise to a trans-substantive interpretation of EU law. This phenomenon can be very positively phrased as system building and as a legitimate ‘methodology’⁷⁶⁰, i.e. a spill-over interpretation that applies these ‘super procedural rules’ across substantive areas.

The use of rights language, such as taxonomy of rights based on general principles or in the third limb of the ‘procedural autonomy’ test in the form of judicial protection as a fundamental right, also reinforces a general and trans-substantive interpretation of procedural law. This is in addition to the spill-over of case law and inter-instrumental interpretation, which have the same effect.

All of the above tendencies raise – to use the proceduralists’ term - the trans-substantivity question,⁷⁶¹ namely as to whether the same procedural rules should apply regardless of the substance of the case.

I have argued that ‘effectiveness’ can imply a finding on procedural *principles* in the form of judicial protection under the third limb of procedural autonomy. Such principles were taken into account by relying on a taxonomy of general procedural justice principles, such as the right to be heard, the right to a remedy or notions of human rights under the ECHR and now the Charter. From this perspective, the procedural law question is

⁷⁶⁰ “...examples of “systematic interpretation” or “construction”, using in the process leading cases decided by the ECJ (...). In these sections, the variety of possible dimensions is then also narrowed down to such cases of systematic interpretation which have to do with multiple legal instruments, not only systematic interpretation within one such instrument. These cases of inter-instrumental interpretation seem not only to be more interesting from a theoretical perspective, but also of higher practical importance today.” S. GRUNDMANN, ‘»Inter-Instrumental-Interpretation« Systembildung durch Auslegung im Europäischen Unionsrecht’, (2011) 75 *RabelsZ*, 882, 932.

⁷⁶¹ “Trans-substantive rules do not privilege any area of law, reflecting, (...) that procedural rules should have no purpose but to implement efficiently policy choices made in the substantive law.” D. MARCUS, ‘The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure’, (2010) 59 *DePaul Law Review*, 54.

approached across all differing substantive areas in a general nature. Factually,⁷⁶² the ECJ case law concerning “procedural justice”/due process adds to the tendency towards trans-substantive reasoning.

Criticism of transsubstantivity

The criticism targeting transsubstantivity targets the generality of the procedural law thus created in order to cover different substantive areas of law. Rules stretching across doctrinal substantive areas operate at a level of abstraction that is much greater than would be the case if connected to a specific area of law. The requirement that procedural rules apply equally across doctrinal categories “make[s] it quite difficult for rulemakers to deliberately single out a vulnerable group for a particular procedural burden.”⁷⁶³

Separated from their specific material context, these generalizations can become unsuitable. As an example of the potentially negative effects of trans-substantivity, we can take the *Courage* case law on lost profits. In the *Courage* case, the Court ruled that lost profit heads of damages must be available in cases of breaches of Competition law. One can recognize that there is a specific immanence for this case law to also be applied to other fields of law. The potential is large, especially in public procurement. However, looking more closely, the factual situations in public procurement diverge to an important degree. Depending on the stage in a tendering procedure at which a procurement violation has taken place, a limitation to the bid costs as available heads of damages can be warranted. In some cases, the general and systemic availability of the lost profit head of damages would constitute grave over-compensation.

The ECJ can be tempted to refer to the statement again and again in specific circumstances of specific cases (cross-fertilization), which would slowly create a self-perpetuating chain of incidents to which the rule applies. In the same way, *acquis* and principles of EU law scholars alike tend to read the case as a general requirement for lost

⁷⁶² Contrary to the United States’ experience, it does not seem that trans-substantivity has become a value in and of itself in a normatively disguised claim.

⁷⁶³ D. MARCUS, 'The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure', (2010) 59 *DePaul Law Review*, 60.

profits. In other words, in an entirely abstract way, the ruling is meaningless; applied in concrete cases, it is a blind application.

In terms of impact and in terms of doctrine regarding the heads of damages, this is understandable in so far as the judgments were rendered in concrete circumstances and it was therefor clear that circumstances corresponding to those of the cases in question would at least be covered by a similar ruling. The country studies and the ‘European transcendental understanding’ of issues demonstrate that it is legally significant, and therefore short of being an interpretation or illumination of any EU law, to stipulate for example as *Manfredi* (or possibly worse: *COS.MET*) does, in the abstract, that lost profits must be theoretically available. The Court had said:

the “total exclusion of loss of profit as a head of damage for which compensation may be awarded cannot be accepted in the case of a breach of Community law since, especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible”⁷⁶⁴.

Public procurement on lost profits illustrates where trans-substantivity requires modification. One should be wary of applying the lost profit requirement too willingly and assuming the award of lost profits to be the default head of damage for all violations of the public procurement rules. Arguably, lost profits constitute a remedy which is manifested more often as the positive interest in a contractual relationship. In a tortious act, reaching lost profits would not only require the presumption that the tortious act not occurred, but also that it had been replaced by the legal one. This notion is disputed among tort lawyers. From a pragmatic point of view I am inclined to argue that the correctness of the respective claims varies along with the factual circumstances. Public procurement violations, especially in early stages, may warrant limitations to the recovery of bidding preparation costs only, rather than lost profits. The difference between the two measures finds their origin precisely in the contractual and tortious understanding of liability. In a tort based action, damages grant no right to presume conclusion of contract, while lost profits accrue under a contractual theory. The factual circumstances determine whether a specific procedure has features more akin to representing a contractual model, whereas other procedures or timings of breaches are adequately compensated by tort rationales.

⁷⁶⁴ Joined Cases C-295/04 to C-298/04 *Manfredi and others* [2006] ECR I-06619, para 96.

The above is a simple yet meritorious example of how factual contextualization can and ought to stand in the way of substance uniform approaches, even in an *a priori* manner, and ought to be grounded in a factual understanding of a subject area and the broad orientations of Europeanized concepts.

This is but one demonstration of how transsubstantive application without particularization can lead to absurd results. The intrinsic link between substance and procedure demonstrates the need for a particularization of procedural and remedial rights in EU law.

15.2.3 Procedural law is not value neutral

The last point concerns the ‘neutrality’ of procedural law, or the role that procedural law plays in relation to substance. Procedural justice has theorized this relationship in three ideal types: the ‘Outcome/Accuracy Model’, the ‘Balancing Model’, and the ‘Participation Model’.⁷⁶⁵ Broadly speaking, these diverge as to whether they see procedure as neutral, or as comprising inherent value choices.

The *Accuracy Model* is a functional approach based on the idea that the fairness of process depends on the procedure producing correct outcomes, i.e., reaching a ‘correct’ result in applying the law to facts.⁷⁶⁶ Procedure takes a servile position in relation to substance, giving truthful and accurate effect to substantive law “without undue waste or friction or consumption of fuel”⁷⁶⁷. Procedure here has no independent effect on the values expressed through the substantive law; it is simply a way of arriving at the ‘truth’ in a process.

⁷⁶⁵ The categorization of the following paragraph heavily draws on L. B. SOLUM, ‘Procedural Justice’, (2004) 78 *Southern California Law Review*, 181, as providing the most global overview of the different models and their various subcategorizations.

⁷⁶⁶ L. B. SOLUM, ‘Procedural Justice’, (2004) 78 *Southern California Law Review*, 181, convincingly discards the pure ‘Accuracy Model’ as it is unable to explain doctrines such as *res judicata*. Additionally, distinguish again the *ex-post* and *ex-ante* versions of accuracy: was a particular case (*ex post*) correct? Or *ex-ante* does it produce correct results for all future cases (i.e. systemic accuracy). I.e. statutes of limitations may purchase systemic accuracy at the expense of case accuracy.

⁷⁶⁷ R. POUND, ‘Some Principles of Procedural Reform’, (1909) 4 *Illinois Law Review*, 388, 394.

The *Balancing Model* by contrast implies that procedure has a ‘formal’ impact on substance through the balancing exercises it undertakes: it takes into account the fact that legal processes are costly, and therefore in different variations proposes a balancing between benefits and costs. The main different ideas within balancing either focus on i) balancing accuracy with costs, which is essentially consequential or utilitarian balancing. Then there is ii) a rights based approach that puts deontological constraints on balancing, that is “discovery” as a violation of the moral rights of parties, i.e. the right to privacy. Rather than balancing the costs of privacy against benefits with increased accuracy, rights based approaches look to whether a right has been waived and at which right is ‘more fundamental’. The idea of the balancing model is that a fair procedure is one which reflects a fair balance between the costs of the procedure and the benefits it produces.

The *Participation model* is part of a social-psychological strand and has tremendously varying foundations. It posits that a fair procedure is one that enables those who are affected by an opportunity to participate in the making of the decision.

None of the ideal models is able to furnish a comprehensive account of procedural justice in isolation – theorists therefore usually propose forms of conciliation combining all the elements found that can constitute a necessary (yet not sufficient as such) condition for procedural justice. Procedural justice values are therefore defined by a framework extending along the three broad dimensions of i) accuracy, ii) cost-benefit balancing, iii) participation⁷⁶⁸.

EU law articulates a largely “Accuracy Model” based vision of procedural law

There is a connection between the function of procedural law and effectiveness as used in procedural autonomy in EU law. Tzankova and Gramatikov can be credited for first drawing attention to it. In an upcoming publication, they argue that *“the principle of national autonomy [‘procedural autonomy’] implicitly recognizes that the main, if not the sole, function of procedural law is to make substantive law effective. Substantive law, thus, comes*

⁷⁶⁸ The value of participation (notice and an opportunity to be heard) is based on legitimacy, “[b]ecause a right of participation must be afforded to those to be bound by judicial proceedings in order for those proceedings to serve as a legitimate source of authority, the value of participation cannot be reduced to [outcomes] or [subjective preference/satisfaction]” L. B. SOLUM, ‘Procedural Justice’, (2004) 78 *Southern California Law Review*, 181, 286.

*first.*⁷⁶⁹ In particular, they claim that the use of effectiveness is ‘accuracy’ based. Procedure is seen as a mere servant to substance. Therefore at the European Union level there is a fundamental disregard of the “independent virtues and values” *inherent* in procedural law itself (the ‘participation model’).

Phrased in procedural justice theory vocabulary, the way procedural law is dealt with through the CJEU is highly committed to the ‘Accuracy Model’ of procedural justice. Based on this rationale, EU law demands (in theory) the effectiveness of EU law to an unlimited degree. And yet, already AG Jacobs has rightly stated, in his opinion on *van Schijndel*, that:

*“the proper application of the law does not necessarily mean that there cannot be any limits on its application. The interest in full application may need to be balanced against other considerations such as legal certainty, sound administration and the orderly and proper conduct of proceedings by the courts. Legal systems commonly impose various restrictions which, in the absence of a reasonable degree of diligence on the part of the plaintiff, will lead to full or partial denial of his claim.”*⁷⁷⁰

Procedural theory demonstrates the need for a balancing approach. Based on these insights, I argue that dealing with ‘procedural’ rules always comes at some cost to the substantive rule. The acceptable costs are determined by balancing values such as the accuracy of the decision with other values such as rapidity, expediency, legal certainty and so on. Somehow, at the moment, EU law (specifically when employing effectiveness as a standard) presupposes procedural law decisions to be value neutral.

It has been shown in Section 3.1.2 above that the principle of effectiveness can be extended to cover *different* kinds of effectiveness tests, effectiveness as a standard, as a balancing exercise and as judicial protection as a fundamental right. These limbs of the effectiveness test correspond to the three different understandings of procedural law in relation to its own value content: a) servant or accuracy which accords no selfstanding content to procedural law, b) balancing, in which procedural law becomes the mechanism that balances values (however, values deriving from external sources) and c) procedural law *as* value.

⁷⁶⁹ I. TZANKOVA & M. GRAMATIKOV, 'A Critical Note on Two EU Principles: a Proceduralist View on the Draft CFR', in R. Brownsword, et al. (eds), *Legal Foundations of Private Law* (Hart Publishing, 2011).

⁷⁷⁰ Joined Cases C-430/93 and C-431/93 *Van Schijndel / Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705.

Within the balancing type effectiveness test, substantive principles which arguably belong to principles of procedural justice (e.g. *res judicata*) are implicitly contained. The statement on the “concerns”, or function, of the effectiveness principle is conceptualized as serving only is thus based on an incomprehensive analysis thereof, namely one limited to effectiveness as a standard.

It is important to note that the argument presented here is not that the CJEU has never balanced, or that it always balances, but that the *articulation* of what is balanced and why is often missing. On the contrary, I think the Court does very different things and articulates them to greatly varying degrees in cases deploying procedural autonomy. But it is true that reflections on procedural justice have not taken explicit form. It is therefore important to identify procedural justice explicitly as an aspect that must be taken into account in Union law. As demonstrated in Part II, the procedural autonomy reasoning of the ECJ allows for the incorporation of procedural values in the ‘contextualised effectiveness’ version.

The incorporation of procedure specific values

On one hand, therefore, the accuracy approach provides a highly integrated approach between a procedural rule and the substantive European rule. Departing from a view of effectiveness on procedure in its purely servant function brought us to the rudimentary discovery of independent procedural fairness considerations. I would argue that the upcoming judicial protection strand, which will be strengthened in the future by stronger judicial attention paid to the Charter of fundamental rights, is a vehicle for direct procedural justice concerns.

But then, how will these principles be filled with content? One way to approach the substantive values of procedural fairness is by starting off with a taxonomy of traditional principles. To illustrate, Bayles,⁷⁷¹ for example, identifies four broad traditional clusters in his taxonomy: 1) impartiality of the procedure, that is a judge with no personal interest or bias, independence, investigation, prosecution, *ex parte*; 2) the opportunity to be heard, characterized by notions of openness, promptness, notice, discovery, written/oral/rebuttal

⁷⁷¹ M. D. BAYLES, *Procedural justice : allocating to individuals* (Kluwer Academic Publishers, 1990), 2.

evidence, counsel, record, appeals; 3) grounds for decision, such as mentions of findings, reasons, burden of proof, judicial review; and 4) principles of formal justice, such as adherence to consistency, precedents, rules.

It is a daunting question to ask how to combine the insights into trans-substantivity – namely the need for particularization - and the insights into the need for balancing to occur in order to accommodate procedural concerns.

The CJEU has at times stressed the need for particularization, because as it recognized, case law was rendered in sector specific circumstances, which do not readily lend themselves to other policy fields. “The *Rewe* and *Palmisani* decisions cited by *Cofidis* and the French Government are thus merely the result of assessments on a case by case basis, taking account of each case's own factual and legal context as a whole, *which cannot be applied mechanically in fields other than those in which they were made*”⁷⁷². *Palmisani*,⁷⁷³ for example, concerned Directive 80/987 on the protection of employees in the event of the insolvency of their employer, whereas *Cofidis* interprets Directive 93/13/EEC on unfair terms in consumer contracts.

I would advocate a move away from trans-substantive procedural rules spanning across substantive areas; the need for factual contextualization of procedural justice is overwhelming. Procedural autonomy can be enriched by an ‘effectiveness’ understanding which refers explicitly to situational classifications, enabling a differentiation of situations along the spectrums determining the truth (accuracy), minimizing error costs (balancing), and process benefits (participation).

The answer is that, because of the intrinsic impact of procedure on substance, the ‘effectiveness’ test chosen *always* undertakes some form of balancing, but it differs with regard to how it weighs the criteria. In effectiveness as a standard, ‘accuracy’ seems to trump all considerations, but as we have seen in the previous section, accuracy is never an unlimited value. It thus just constitutes a decision on the part of a court, which does not imply that other factors, such as process economy, were not affected.

⁷⁷² Emphasis added by author. Case C-473/00 *Cofidis SA v Jean-Louis Fredout* [2002] ECR I-10875, para 37.

⁷⁷³ Case C-261/95 *Rosalba Palmisani v Istituto nazionale della previdenza sociale (INPS)* [1997] ECR I-04025.

15.3 THE DANGERS OF THE PROCEDURAL AUTONOMY THEORY

There is a fundamental problem in the notion of procedural autonomy which is responsible for much of the controversy which this concept continues to generate. It conflates distinct purposes under the umbrella of one term, and by doing so obstructs a structured and principled understanding of the various issues at stake. These conceptual connotations are problematic because procedural autonomy is becoming a blueprint for the organization of legal reasoning. It is crucial that after the vesting of this new formalized structure through which the concept guides the 'permissible' means of argumentation available to the ECJ, the purpose and function of 'procedural autonomy' are clarified.

Its crescendo over the last ten years demonstrates a real need for a doctrine such as procedural autonomy as a vehicle of judicial reasoning on behalf of the Court. But then it operates under extraordinary tension. On one hand, it is a safeguard of national procedural and remedial rules. At the same time, it comes accompanied by a demanding effectiveness postulate, which to date has no clear limits.

Some vest procedural autonomy with a negative claim. This claim is that EU law cannot determine national procedural rules. Structurally, the difference in international private law is that there is no clash between different procedural rules. In the absence of explicit EU legislation on the matter there are simply no EU rules to determine the "procedural/adjective" side of the substantive rights created. In the absence of an identifiable EU rule, the national procedural rule is the default position embedded in the system of application of EU law in national courts. In other words, the presumption is *de facto* in favor of the national procedural rule. One thing is clear... once a perception of "procedural autonomy" also gains ground in the national courts, they will simply no longer refer to the ECJ on these issues, thereby making a large part of the enforcement mechanisms elusive.

An entirely negative conception of procedural autonomy is descriptively inadequate. After all, the procedural rules are themselves overruled in the name of 'effectiveness'. In the name of legal certainty, positive criteria that organize the intervention of the CJEU need to be established in order to flesh out the 'effectiveness' postulate of EU law. Arguably, as a principle and source of law it is self-legitimizing, due to which it may come to be used in an instrumentalist manner for adjudication. Although it grants flexibility, it lacks inherent boundaries. What is needed is a critical appraisal of the limits of the principle of effectiveness.

Both aims of procedural autonomy are legitimate. The result, at this point, unfortunately seems arbitrary. The question is how to operationalize the doctrine in a better way. I claim that EU law is currently in need of a theory of adjudication of damages. Our endeavor is to construct a procedural autonomy/'effectiveness' framework, within which we can identify several relevant questions concerning damages. Instead of a negative postulate, we attempt to draw up positive criteria in relation to when the ECJ *should* intervene. At the same time, the theory is not a technical exercise, but one which helps to organize reasons. What are the confines? These proposals on the content of the effectiveness application within the procedural autonomy test are worked out in the following.

16 A CONSTRUCTIVE APPROACH TO EFFECTIVENESS UNDER PROCEDURAL AUTONOMY

The idea from here on is to refine damages adjudication by using those legal vehicles which have to date been developed by the Court. One is the doctrine of procedural autonomy as containing a principle of enforcement effectiveness which is applicable to procedural and remedial rules of the national legal systems. The goal is to clarify the effectiveness criterion with regards to its substantive *content*, and to establish several *limits* that mark its outer confines.⁷⁷⁴

The EU system is based on the Court as an actor taking on specific *roles* in legal processes, at the same time as being constrained by systemic *structural rules*. Limits to the procedural autonomy doctrine in adjudication therefore derive in part from a combination of *institutional capacities* and *legal process* allocations. Such arguments are dependent on the characterization one accords to one or other institution (in capacity and role). Most disagreements in EU law have their origin in underlying assumptions on institutions, for example, pertaining to the democratic process and the way in which institutions behave ‘legitimately’ in relation to their respective spheres of activity.

It seems clear that the Procedural Autonomy principle tries to achieve an institutional allocation of some sort. In the following, we look at the different kinds of limits inherent in the systemic restraints on the CJEU. In respecting these limits, the content of the effectiveness test is deepened, as the ‘material’ scope ascribed to procedural autonomy entails institutional implications.

These factors limit the effectiveness adjudication of the CJEU. One structural limit to action could derive from the Court’s competence *preclusion* due to a lack of conferred powers on the EU in matters of procedure. Less absolute limits are found in doctrines allocating institutional responsibility in either a horizontal or a vertical direction. The vertical dimension is an institutional choice of responsibility between the national and EU level. It

⁷⁷⁴ This is not at all to say that the ‘equivalence’ criterion of procedural autonomy is insignificant. However, with regards to its content, the effectiveness criterion seems the less determinate.

can also be more actor-specific and deal with the role of the CJEU, as opposed to national courts. The horizontal dimension assigns responsibility between the CJEU and the EU legislative process and is commonly expressed as one of institutional balance.

Essentially, the issue concerns what the normative value of Procedural Autonomy is. Does it preclude the Court from adjudicating on 'mere' enforcement rules? I argue that the autonomy of the Member States is not a competence based argument, in a sense that precludes the Court from entering such questions. Procedural autonomy could be constructed as a subsidiarity argument, which implies a choice in favor of the national level in procedural rules if it can be achieved at that level. As a standard of review, it might imply that the Court enters into procedural questions on only a rudimentary level, giving a larger margin of discretion to the national level. Or else, effectiveness could be construed as a proportionality principle, which allows certain considerations of a procedural nature to enter the rationale.

16.1 A REINTERPRETATION OF PROCEDURAL AUTONOMY: MATERIAL LIMITS

16.1.1 The Scope of the Procedural Autonomy Doctrine

As a precursory issue, it is necessary to define the reach of the doctrine. I argue that procedural autonomy covers an autonomous European notion of procedure and remedial law. This kind of 'super adjective law' comprises both procedural and remedial enforcement rules. It thus covers a different scope of concepts than those contained in national understandings. In particular, it is one that extends to damages. The CJEU has rendered consistent case law in which it subjects the unitary concept of remedies - and also damages - to the procedural autonomy doctrine. In terms of types of rules covered, the scope of 'procedural autonomy' extends to remedial and substantive/procedural rules indiscriminately.

Procedural and remedial autonomy?

Some authors conclude that two principles exist, namely procedural *and* remedial autonomy,⁷⁷⁵ in a way that implies that they are two doctrines which can be meaningfully distinguished. For damages, such a claim to remedial autonomy would have different consequences than a substance/procedural claim. The ‘law of damages’ is at least partially substantive and therefore outside of the realm of procedural autonomy taken in a literal sense. ‘Remedial autonomy’ would remove damages claims from the scrutiny of the ECJ altogether, including their supposedly substantive part. It is therefore impossible to accept *full* remedial and procedural autonomy *in parallel*.

However, neither form of autonomy is born out by the case law of the CJEU.⁷⁷⁶ As a descriptive claim, ‘remedial’ autonomy therefore fails. The ECJ has imposed the creation of new remedies on the national Member States.⁷⁷⁷ The Court has at times mentioned procedural and remedial, but usually refers to procedural autonomy alone. Equally, it seems clear that ‘procedure’ does not define the scope of the doctrine of procedural autonomy. The doctrine would then not cover definite substantive elements such as the head of damages or causality. However, the Court does just that - as we have seen in the horizontal issue overview. The scope of the procedural autonomy doctrine extends to a bundle of rules, to which the term ‘procedural’ does not meaningfully apply.

Conceptually, damages have emerged as a bundle of rules, comprising many elements concerning constitutive criteria such as heads of damages, causation, access rules regarding time limits and standing, and quantification rules relating to the burden of proof, discovery rules, presumptions, discretion of the judge, etc. In other words, a remedy is not simply one

⁷⁷⁵ See also J. ENGSTRÖM, *The Europeanisation of Remedies and Procedures through Judge-made Law - Can a Trojan Horse achieve Effectiveness? Experiences of the Swedish Judiciary* (European University Institute, 2009) and V. TRSTENJAK & E. BEYSEN, 'European Consumer Protection Law: Curia semper dabit remedium?', (2011) 48 *Common Market Law Review*, 95.

⁷⁷⁶ V. TRSTENJAK & E. BEYSEN, 'European Consumer Protection Law: Curia semper dabit remedium?', (2011) 48 *Common Market Law Review*, 95 in fn 34 concede that “[i]n its case law, the ECJ does not explicitly refer to the notion of “remedial autonomy” of Member States. The ECJ rather extends the concept of “procedural autonomy” to cases concerning national remedies for the enforcement of individuals’ rights under EU law, thus mixing the concepts of procedural and remedial autonomy.”

⁷⁷⁷ The prime examples being the *Factortame* case line for interim relief against the Crown, as well as *Francovich*. See Case C-432/05 *Unibet (London) Ltd. and Unibet (International) Ltd. v. Justitiekanslern* [2007] ECR I-2271 for references to further case law.

unitary rule, but a bundle of procedural and substantive rules which together define the notion. In the same vein, to state that a remedy must be available is only to state that a cause of action must be open. A cause of action is defined by constitutive criteria, such as fault, and is linked to the kind of losses that are claimable.

The correct observation with regards to the scope of the doctrine, I think, is to redefine the *object* of the procedural autonomy doctrine by stating that the CJEU applies it to ‘remedial *and* procedural rules’ – that is, rules governing the existence of a cause of action and the procedural or substantive rules defining them. In the process of applying EU law, the CJEU creates an EU law of ‘adjective law’ or enforcement rules which comprises the bundle of procedural and remedial rules (which I sometimes call enforcement rules).

16.1.2 The *nature* of the rule at issue shapes the role of the CJEU

As a first issue, deriving from procedural theory, we must make the case that procedural law is actually law, and that it impacts on norm-subjects’ behavior. Otherwise one might argue that procedural or in any case process law is not really law at all – law understood as a conduct guiding norm. Procedural theory labels this as an *ex-post* as opposed to an *ex-ante* view of law.⁷⁷⁸ Essentially, the distinction questions the ‘norm creation’ effect of procedural law. From an *ex-post* point of view, the action or conduct guiding function of law on primary agents is inherent to substantive law only. Thus, “substantive law regulates primary conduct and procedural law regulates the adjudicative process”.⁷⁷⁹ We can visualize this approach as ‘*ex-post*’ because through it, procedural law only looks back. From an *ex-post* point of view, one could make sense of procedural autonomy by reasoning that the *effect* of procedural law is so negligible that it does not matter for the purposes of EU law. Procedural rules are merely rules that organize the conduct of a process. They are not seen to organize the conduct of the norm subjects. Against this, the *ex-ante* point of view posits that, due to several constraints,⁷⁸⁰ procedure guides conduct after a judgment has been made.

⁷⁷⁸ L. B. SOLUM, 'Procedural Justice', (2004) 78 *Southern California Law Review*, 181, 183.

⁷⁷⁹ L. B. SOLUM, 'Procedural Justice', (2004) 78 *Southern California Law Review*, 181, 225.

⁷⁸⁰ L. B. SOLUM, 'Procedural Justice', (2004) 78 *Southern California Law Review*, 181, 188, constraints such as for example the problem of imperfect knowledge of law and fact, the problem of incomplete specification of legal norms, and the problem of partiality on behalf of the law abider, L. B. SOLUM, 'Procedural Justice', (2004) 78 *Southern California Law Review*, 181, 186.

Procedural law thus conceived carries a forward looking perspective, and serves an intrinsic action-guiding and law creating function.

Procedure and remedy as a necessary secondary protection of rights

Several examples were given in section 15.2.1 that moved deeper and deeper into the realm of procedural law, and yet none of these have given us basis to deny the intrinsic impact of procedure on substance. In terms of their impact on outcome there may be gradations, and the impact of merely 'procedural' aspects *can* be so prevalent on an outcome as to annihilate a right. *A fortiori* this is the case for 'remedial' aspects.

At a theoretical level we have explained this through the *ex-post* and *ex-ante* point of view. In the *ex-ante* view, procedure determines the primary behavior of an agent. Where a procedural rule effectively precludes any secondary protection of a right, that right ceases to exist meaningfully. The substantive right loses its power to command the compliance of the primary actions of an agent, hence that agent's actions are altered. This can be a test of the distinction between "merely" procedural rules and rules which affect "the outcome of a case", which is a classic international private law definition. Excluding adjacent law in a categorical (as opposed to functional) way from the EU would compromise EU rights. In analogy to international private law, effectiveness with regards to procedure emerges as an expression to determine the decisiveness of a rule on *the process outcome*.

An effect based approach to enforcement rules

The range of rules on process, procedure and remedial exercise exhibit different gradations in the ways they impact on procedure. A procedural theory approach can underpin that there are different types of rules, which impact and guide the behavior of subjects to different degrees. Solum provides an account that distinguishes several categories of enforcement rule archetypes.⁷⁸¹ The outcome of a process is therefore a meaningful marker, although it will not decide all cases at all times.

⁷⁸¹ In addition, in the US, the procedure substance doctrine, for example, is based on two doctrines, *Erie* and *Hanna*. Solum shows that *Erie* is based on an *ex-post* view of litigation in distinguishing substance from procedure, while *Hanna* uses an *ex-ante* view. See L. B. SOLUM, 'Procedural Justice', (2004) 78 *Southern California Law Review*, 181.

On an intuitive level, this distinction based on effect recurs in international private law, and also in EU law. Both Private international law and EU law practice a kind of separation of procedural and substantive. I say ‘kind of’ because both exhibit a pragmatic approach to adjective law and damages. These are not *a priori* and categorical separations, but have been tested in concrete instances. Similarly to the current scope of the procedural autonomy doctrine, the kinds of rules subject to the examination in principle can be extended to cover remedial aspects beyond strict procedure, and damages are typically a grey area.

At the European level, the distinction between procedural and substantive rules has come to the fore in respect of the *rationae temporis* question of legislative measures. Whereas procedural rules apply to pending proceedings from the moment they enter into force, substantive rules usually do not apply to situations arising at a point in time before their respective entry into force.⁷⁸² This principle derives from respect for the principles of legal certainty and legitimate expectation.⁷⁸³ The Court has therefore continuously drawn a distinction between substance and procedure. A reservation can be made in this respect: where an EU law instrument contains both procedural and substantive rules, these in specific instances “may not be considered in isolation with regard to the time at which they take effect since they form an indivisible whole”.⁷⁸⁴ Such *indivisibility* may therefore occur, but is seen as an exception to the rule of interpretation.⁷⁸⁵

The international private law field is more revealing in this respect. Although doctrinally the separation is contentious, its practice is not impossible. Procedural law in the conflict of law usually follows the *lex fori*. The action of damages under this distinction becomes a bundle of rules, some of which are regarded rather universally as substantive in nature (such as the action itself, constitutive criteria and heads of damage). Others are classified differently in legal systems for various reasons. These are the rules of burden of

⁷⁸² See, for example Case C-450/06 *Varec* [2008] ECR I-581, para 27; *Molenbergnatie* [2006] ECR I-2049, para 31 and cited case law.

⁷⁸³ Case 66/79, *Salumi* [1980] ECR 1237, para 10; as the Court also emphasized in Case C-162/96, *Racke* [1998] ECR I-3688.

⁷⁸⁴ In Case C-201/04 *Molenbergnatie* [2006] ECR I-2049, para 30 with respect to Regulation No 1697/79 applied to the post-clearance recovery of a customs debt incurred prior to 1 January 1994.

⁷⁸⁵ Case C-201/04 *Molenbergnatie* [2006] ECR I-2049, para 31.

proof, laws of evidence and interest rates – which we can mostly group under the heading of quantification. However, the classification of a rule is undertaken by means of well recognized arguments which presuppose a certain rationale for the field of international private law. These are, for example, goals that are behaviorally based, such as a general prevention of forum shopping, and institutional capacity restraints, such as the realistic recognition that a national judge cannot be asked to apply special laws of discovery of a country he simply cannot know. While the demarcation line is expressed in terms of substance and procedure, the pragmatic distinction is undertaken by means of the *underlying organizing rationales* as having conventional currency *in the specific field*.

Of the proposed demarcation lines, one test may prove more decisive in one case and less so in the next. In any event, it provides a structure to address the questions, allowing the construction of a normative rationale for preserving some local/procedural rules. Procedural autonomy provides the forum for treating this question.

Defining the ambit of review of the Court, different kinds of rules

The previous argument placed focus on the *kinds* of adjective rules and found procedure/remedy and substantive law not to be dichotomies; rather, that they are at various points on a spectrum.

The first ‘rule’ to ask in assessing a national procedural/remedial rule is whether this rule significantly impacts on the behavior of agents. If a rule significantly impacts on the outcome of a case, the expectations of that outcome will modify actions. The issue boils down, again, to the impact of procedure on substance. Because the ECJ operates within the preliminary reference procedure in the interpretation of law, there is a strong but implicit selection in national courts to refer only questions relating to procedural rules which appear ‘grey’ in their characterization along the substance-procedure spectrum.

The degree of impact on substance from an *ex-ante* point of view would significantly define the intensity of review of the Court, on grounds of substantive effectiveness. This is so because we derived the Court’s competence for intervening in procedural/remedial law from its connection to substance. The more ‘procedural’ – i.e. outcome indeterminate - a

rule is, the less stringent the review of the Court needs to be from the point of view of effectiveness of EU law.

An example of an indicator, at the national level, that supports the value neutrality of a given procedural rule could be its inclusion in the general procedural code. By their nature, procedural codes comprise mainly trans-substantive rules – therefore kinds of rules which were thought to be suited for application across substantive law areas precisely because their degree of impact on the substantive enjoyment of rights would be limited. As a side-effect, this solution would also benefit the systemic integrity at the national level and prevent fragmentation. At the same time, it can also be read as an example of a form of equivalence – namely the fact that the procedural rules are applicable across substantive areas, means that the substantive claims are treated indifferently (read equivalently) as well.

However, this requirement would always have to be assessed vis-à-vis the specific impact of even a general procedural rule on the specific right at stake (*particularization*).

Considering damages claims, they are in part substantive, in part more procedural. The search for categorical classifications is in vain. At least the constitutive rules of damages, it is clear, are substantive in nature. I am not in favor of automatically “exempting” all quantificatory rules from the scrutiny of the Court. As we have seen, procedure, or quantificatory rules, define substance. Instead, on the merits of the case, the impact of a given rule on substance provides a much more relevant demarcation line for the purposes of EU law. It is an effect-based test for given national rules.

This is also the answer to the “why procedural law” question. Why should *procedural* law enjoy specific protection from EU law? Simply stated, it is because not all procedure may have sufficient connection to the substantive rules.

16.1.3 Material scope application in public procurement

An example taken from the public procurement context could be rules on the composition of tribunals. In principle, it is doubtful whether the composition of a tribunal would have a determinate impact on the behavior of those subject to the public procurement regulation. However, it should be noted that the public procurement directive does contain several

rules on this particular matter. Therefore the ‘procedural autonomy’ principle would not be pertinent regarding those aspects which are actually regulated at EU level. Other aspects however, for example a national rule on -let’s say- the age of judges, would fall under the procedural exception. Simply put, the substantive connection would not be sufficient to warrant the Court’s interference.

The question of damages is by nature more difficult to answer. As has happened in previous references,⁷⁸⁶ the Court may simply be asked about the availability of damages claims. Based on the conceptual model, damages were structurally demonstrated to be constituted of a bundle of rules, instead of simply one. The availability of heads of damages is one of the strongest motivators that decide whether tenderers claim damages. As an incentive, the available heads of damages determine the litigation attitude of the aggrieved bidders and hence fulfill a strongly conduct-guiding function. Therefore, the Court emerges as a law maker. Constitutive rules are likely to fall within the “substantive” scale.

Support for this suggestion can be read into *Metallgesellschaft*, where the Court referred to the procedural presumption in favor of national legislation, but continued to examine whether the conditions for the claim of interest were ancillary questions. In the particular case, it concluded that the question was “not ancillary, but [...] the very objective sought by the plaintiffs' actions in the main proceedings” (para 87). To be sure, what was at issue was a restitutionary claim and not primarily a damages action. Nevertheless, the Court effectively decided whether or not to enter the question of interest based on the relevance to the claim brought. In other words, since the question was a ‘procedural one’ but had become a point of contention in law, the ECJ decided to enter into material scrutiny on this point.

Further, with regard to interest, the Court held:

*“93 Admittedly, the Court ruled in Sutton that the Community directive at issue in that case conferred only the right to obtain the benefits to which the person concerned would have been entitled in the absence of discrimination and that the **payment of interest on arrears of benefits could not be regarded as an essential component of the right as so defined**. However, in the present cases, it is precisely the interest itself which represents what would have been available to the plaintiffs, had it not been for the inequality of treatment, and which constitutes the essential component of the right conferred on them.*

⁷⁸⁶ Case C-568/08 *Combinatie Spijker Infrabouw* [2010] ECR I-12655.

94 Moreover, in paragraphs 23 to 25 of *Sutton*, the Court distinguished the circumstances of that case from those of Case C-271/91 *Marshall* [1993] ECR I-4367 (*Marshall II*). In the latter case, which concerned the award of interest on amounts payable by way of reparation for loss and damage sustained as a result of discriminatory dismissal, the Court ruled that full compensation for the loss and damage sustained cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value, and that the award of interest is an essential component of compensation for the purposes of restoring real equality of treatment (*Marshall II*, cited above, paragraphs 24 to 32). The award of interest was held in that case to be an essential component of the compensation which Community law required to be paid in the event of discriminatory dismissal.” [emphasis added]⁷⁸⁷

At the end of the day, we can conclude from case law that interest is not always an essential component of an EU right; on the other hand that in order to achieve full compensation it has to be taken into account. In the case of discriminatory dismissal it was held to be an essential component. Hence the availability of interest on a claim of damage was a requirement to be determined at the level of EU law.

However, quantificatory rules ought not to be principally excluded from the review of the CJEU either; as has been demonstrated, although procedural in nature, these rules can have very strong substantive implications. Even ‘hard-core’ procedural rules, such as the estimation of amounts granted to judges, have often strong substantive undertones. First of all, in terms of impact, estimations can grossly impact on the end result. This can be because of the quantification “method” – such as the judge in *Harmon*, who estimated that a substantial profit reduction was warranted due to risk inherent to the business. Also in the German system, the framework of §287 ZPO is used to estimate the amount of damages and can often lead to reductions in damages awards, “[c]ontrary to other countries, a recovery sum of 60 per cent of the estimated profits does not necessarily mean that the tenderer has lost a chance of 60 per cent”.⁷⁸⁸ However, “[a]s the judges are entitled to assess the level of damages awarded, it is possible to adjust the amount of compensation to the level of fault. An intentional infringement often results in a higher amount of damages than a violation of minor importance”.⁷⁸⁹ In fact, in the estimation of the sustained damages a sort of ‘fault valuation’, rather than fulfillment of a fault criterion, takes place. Because the provision is so

⁷⁸⁷ Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and others* [2001] ECR I-1727.

⁷⁸⁸ M. BURGI, 'Damages for Breach of Public Procurement Law. German Perspectives.', in Duncan Fairgrieve & Francois Lichère (eds), *Public Procurement Law. Damages as an Effective Remedy*. (Hart Publishing, 2011), 32.

⁷⁸⁹ M. BURGI, 'Damages for Breach of Public Procurement Law. German Perspectives.', in Duncan Fairgrieve & Francois Lichère (eds), *Public Procurement Law. Damages as an Effective Remedy*. (Hart Publishing, 2011), 35.

open-ended, ultimately, some very diverse judges' impressions on the 'weaknesses' of the proof of damages can find their way into this estimation.

This is very interesting since here, beyond the realm of the substantive constitutive criteria for damages, a very influential and ultimately substantial mutation of a claim takes place. This can be used as an example that further corrodes the utility of the substance/procedure distinction, and also helps to refine the understanding of use and rule which shape the outcomes of damages claims.

To summarize, procedure and substance have been shown to be intrinsically entangled. With *Solum*, it was argued that the nature of the rule can oscillate on different sides of the scale, procedural or substantive. The test to be applied would be one of *ex-ante* outcome determination, in order to test whether a 'procedural' rule has an action guiding impact on norm subjects. This requires that norm subjects would alter their behaviour *because of* a given rule. The degree of proceduralism of the nature of the rule at issue then determines the margin of appreciation left to Member States.

16.2 STRUCTURAL LIMITS TO THE COURT'S LAWMAKING POWERS

16.2.1 The Court as law maker

Because adjective rules impact substance, even in the legal process under the preliminary reference procedure, the CJEU emerges as a law maker. This raises the need to address the courts as law makers in relation to procedural law, specifically with regards to the legitimacy courts enjoy vis-à-vis political processes.

It is impossible to make a perfect separation of interpretation and lawmaking. Still, it has important bearings on the central tenet of procedural autonomy. If we remember the procedural autonomy formula, it is always preceded by "in the absence of EU law". One can argue, then, that the Court in procedural autonomy is never really in the realm of mere interpretation, as it is always acting "in the absence of EU law". Instead, they are situations which (due to decentralized enforcement) involve enforcement rules as provided by the

national level. The types of rules are by definition enforcement rules not postulated at EU level.

Therefore, procedural autonomy intrinsically recognizes a lawmaking function with regard to enforcement rules. Observing the different degrees of impact that enforcement rules have in substantive terms, it is possible to say that the Court sometimes acts more and sometimes less as a lawmaker. For example, with respect to damages claims which are not mere interpretations, the Court clearly exercises greater lawmaking powers when entering such issues.

The argument that the Court is not merely interpreting law, but is also a law maker is not new. Harmonization as it is currently understood can refer to positive harmonization, that is to say legislation, and negative harmonization which is essentially the striking down of national rules. However, the judiciary can also interpret existing European instruments in such a way that their interpretation amounts to positive judicial harmonization.⁷⁹⁰ We have seen the CJEU act as a law maker, even in areas which fall principally outside legislative competence areas. De Búrca discusses this aspect and cites the *Bosman* case. Although competence in sports was precluded, under internal market law the Court drew up rules on precisely this subject. This made way for the argument that the scope of EU law is different for the Court than it is for the Legislative.⁷⁹¹

On the other hand, one can convincingly argue that the Court's power diverges with the question of whether it engages in mere interpretation, or an activity of negative harmonization and even positive harmonization by setting a standard. The more 'substantive' a given issue is, the more the Court emerges as a law maker.

When returning to the damages issue, and taking into account our conceptual analysis, damages claims are a bundle of rules which comprise rules of both procedural and

⁷⁹⁰ G. DE BÚRCA, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor', (1998) 36 *Journal of Common Market Studies*, 217. For one of the most prominent critical views on the legitimacy of the CJEU see F. SCHARPF, 'Legitimacy in the Multilevel European Polity', (2009) *MPIfG Working Paper 09/1*, .

⁷⁹¹ G. DE BÚRCA, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor', (1998) 36 *Journal of Common Market Studies*, 217.

substantive nature, including a part (often denominated the constitutive criteria) firmly placed on the substantive side.

In addition, these rules are so intertwined, in fact, that the outcome is never determined by one rule alone. For example, to say that damages claims are available or not is almost meaningless. The 'extent' of protection of an EU right derives from the concrete heads of damages that are claimable, and the individual prerequisites that have to be fulfilled for each. The cause of action of a damages claim thus does not tell us much about the extent of the secondary protection of connected rights. Due to the factual nature of losses and the question of legally protected losses, damages claims are inherently tied to a violation's factual constellations.

Systemic limits example

Depending on the intensity of the scrutiny of the Court, it is put in a position for what can legitimately be called law making. Even in cases where the Court is only exercising its capacity for 'negative integration' by striking down national rules, the aggregation of such litigation at the end of the day amounts to a positive requirement.

A telling example from the public procurement field would be the *Alcatel*⁷⁹² timelines – which were first set by the Court before they were finally codified in the amendment 2006/77. Initially in *Alcatel*, the Court initially held that there must be a standstill period between the award decision and the conclusion of a contract in order to allow for an effective challenge to the award in review proceedings. The Court initially held that “a reasonable period must elapse between the time when the award decision is communicated to unsuccessful tenderers and the conclusion of the contract”.⁷⁹³ In the beginning, it was uncertain whether this requirement was uniquely valid in the Austrian context, or was

⁷⁹² C-81/98 *Alcatel Austria and others* [1999] ECR I-7671 and Case C-212/02 *Commission / Austria*, unpublished.

⁷⁹³ Case C-212/02 *Commission / Austria*, unpublished, para 23.

applicable beyond the particular facts of the particular case⁷⁹⁴ as the requirement received diverging interpretation across the Member States.

When striking down national rules, indirectly, a standard is required and set by the Court. This is what I understand as 'lawmaking' power, although it could arguably still be categorized as interpretation and also is certainly a matter of degree.

The question then is where the limits to the *lawmaking* powers of the Court lie. Some of these are embedded in the systemic framework that entails limits imposed by virtue of the *role* accorded to the Court in a given legal process, and draws heavily on its capacity. I argue that where interpretation takes on the traits of lawmaking, the Court is bound to undertake subsidiarity and proportionality considerations.

16.2.2 Structural limits to damages law making?

The European Union operates on the basis of the "conferral of powers" principle

The first obvious potential structural limit that comes to mind is the framework of the EU Treaty, in terms of competence. The Union can act only within the limits of powers conferred upon it.⁷⁹⁵ Different degrees of competences (shared, exclusive, complementary) are attributed along a number of bases, for example subject-area or functionally oriented. Since Lisbon, the classification of competences which had previously been disputed is now clearly enumerated in Title I 'Categories and Areas of Union Competence' TFEU.

Some authors assume that the Union lacks legislative competence in the field of sanctions (in a wide sense, that is sanctions as prescribing consequences of violations of Union norms).⁷⁹⁶ While the EU does not possess an explicit general procedural legal basis,

⁷⁹⁴Many regarded the case as uniquely pertinent for Austria, for example M. DISCHENDORFER & S. ARROWSMITH, 'Case C-212/02, Commission v Austria: the requirement for effective remedies to challenge an award decision', (2004) *Public Procurement Law Review*, 165 .

⁷⁹⁵ The conferred powers doctrine, Article 5 TEU. Article 5(1) reads: "The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality."; Article 5 (2) "the Union shall act only within the limits of the competences conferred".

⁷⁹⁶ J. KÖNDGEN, 'Die Rechtsquellen des Europäischen Privatrechts', in Karl Riesenhuber (ed), *Europäische Methodenlehre. Handbuch für Ausbildung und Praxis*. (Walter de Gruyter, 2010), 209. Even though the author indicates the existence of several instruments of secondary legislation containing detailed rules on sanctions,

this lack of attribution of general competence cannot be construed as barring the EU.⁷⁹⁷ In specific areas of procedure the EU has received harmonizing competence explicitly.⁷⁹⁸ These provisions allow for instruments which regulate procedural issues across the board. Such trans-substantive and general procedural ‘codes’ require a competence basis.

Procedural law in secondary instruments and primary law

Looking at Community legal instruments, one will realize that the Community has legislated in many fields which touch national procedure. By regulating on substance, procedure is often regulated simultaneously, the provisions of both intermingled in one instrument. This attests to the fact that there is no distinction between procedure and substance in terms of legislative competence.⁷⁹⁹ Where substantive competence is asserted, punctual procedural competence goes with it. The regulation of procedural modalities is regarded as purely accessory to the substantive competence.

There is no principled competence preclusion to rule on procedure, as long as substantive competence has been conferred. Hence, procedural autonomy cannot be

such as the product liability directive, or also the financial services directive. He contends with a reference to the tensions thereby created in relation to the system of national law. Köndgen substantiates this view with “among others” a reading a contrario of Article 103 (2) TFEU/83(2) EC. The article provides a specific mandate to the Union legislator with the view to giving effect to the Competition rules – they contain specific remits regarding the design of the directive or regulation. It is unconvincing to derive therefrom that, because the Treaty rules “in particular” instruct the Union legislator to incorporate several designs into a legislative instrument giving effect to the Competition rules that for the reason that there is greater detail as to what the design is supposed to look like, where the Treaty omits such practical instructions, competence on the part of the EU were lacking.

⁷⁹⁷ By analogy, think of, for example, the fact that policy fields which are outside of the competence of EC legislation nevertheless cannot impede those Community law rules which have been adopted (as in Viking and Laval cases).

⁷⁹⁸ For example in the civil procedure instruments regulating civil procedural matters envisaged by Art. 65EC. In addition one may consider as appropriate legal bases for procedural regulation independent of substance those legal bases for harmonization arguably Article 308 EC for residual objectives of the Community and Treaty, 94 and 95 EC for the attainment of the internal market. See E. STORSKRUBB, *Civil Procedure and EU Law* (OUP, 2008) p 33 ff. However, in several instances does the Treaty explicitly used to preclude EU action, for example Article 135 EC on national criminal law, and 280(4) EC as well. This can support the argument that the drafters of the Treaty implicitly departed from the possibility that the Community would take action, therefore positivated their opposition to such action in specific fields. P. HAAPANIEMI, 'Procedural Autonomy: A Misnomer?', in Laura Ervo, et al. (eds), *Europeanization of procedural law and the new challenges to fair trial* (Europa Law Publishing, 2009), 115.

⁷⁹⁹ The significance of the legislative process having exercised its competences is treated below.

construed as an argument based on the lack of CJEU intervention in procedural law due to the EU's lack of *competence* in procedural matters *per se*.

16.2.3 Damages law making and the principles of subsidiarity and proportionality

Between national and EU courts, where do the vertical boundaries to the CJEU's lawmaking powers originate in the preliminary reference procedure if we accept that in procedural/remedial terms they are not grounded in a competence claim?

Vertical allocations between EU and national level are typically made through doctrines of subsidiarity or by a 'margin of appreciation'. Within particular legal contexts, these doctrines have been fleshed out in *specific* ways. For example, the margin of appreciation in the ECHR is an allocation mechanism that uses a European Standard test in order to appreciate the margin left to signatories. In the EU context, subsidiarity is sometimes understood as a presumption in favor of the national level unless the EU level is better suited to act, and is also (as a legislative principle) determined by the type of competence the community enjoys in a given area. Neither is an absolute preclusion to act, but they are vehicles for institutional allocations. In addition, with respect to legislative subsidiarity, the mechanism has been fleshed out and complemented by several measures which safeguard that subsidiarity is taken into account.⁸⁰⁰

In an open formulation, subsidiarity is "the sharing of powers between several levels of authority".⁸⁰¹ In the EU, subsidiarity – although applicable to all EU institutions – has traditionally been a legislative principle. Since Lisbon, the principle of subsidiarity has been regulated by Article 5 TEU and the Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality.

De Búrca raised the question of whether subsidiarity is applicable to the Court as a law-maker. "The act of interpretation itself can constitute the exercise of law-making power by the Court, yet it is unclear whether or how the subsidiarity principle might affect this

⁸⁰⁰ 25 October 1993 in the conclusion of an interinstitutional agreement between the Council, Parliament and the Commission to commit to subsidiarity, under Article 5(3) and Article 12(b) TEU national parliaments monitor compliance with the principle of subsidiarity and so on.

⁸⁰¹ European Parliament, 'Subsidiarity protocol fact sheet of the European Parliament', available at http://www.europarl.europa.eu/factsheets/1_2_2_en.htm.

particular exercise of judicial power.”⁸⁰² The principle of subsidiarity is mainly considered as a legislative principle while as an adjudicative principle it had received less attention.⁸⁰³ In 2012 Craig⁸⁰⁴ concluded that there is no evidence to suggest that the Court is restrained by subsidiarity.

Subsidiarity is a principle that applies once the EU has already been found competent in principle. It is a question of degree, and *in concreto*, whereas competence applies *in abstracto*. It may preclude the EU’s competence to act, but in a specific matter. Procedural autonomy, on the other hand, in its normative understanding can furnish a test to determine whether, at the adjudicative stage (which we have accepted to be *normsetzend*/lawmaking), the EU is competent to create law or not.

The fact that subsidiarity and proportionality intermingle has been documented.⁸⁰⁵ There are some ‘problems’ in the application of subsidiarity within the legislative process, for example in the exclusive competence argument. As de Búrca has observed, subsidiarity considerations enter the Commission’s thinking – and probably for good reason – even in areas where, strictly speaking, they are unnecessary. They are then dressed in terms of proportionality.

I would argue that it is possible to conceive of procedural autonomy as judicial procedural subsidiarity; and hence as an adjudicative principle. At the end of the day, it is more a question of politics whether one wants to commit to one word or the other. From an analytical perspective, I want to draw attention to the vertical and horizontal dimension of institutional allocation which the procedural autonomy doctrine will have to address and delimit. Subsidiarity/proportionality are discussed as pertinent principles where the Court

⁸⁰² G. DE BÚRCA, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor', (1998) 36 *Journal of Common Market Studies*, 217, 222.

⁸⁰³ Notably de Búrca examined the relevance of subsidiarity for the Court itself, and T. HORSLEY, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?', (2012) 50 *Journal of Common Market Studies*, 267 applied it to the interpretation of free movement.

⁸⁰⁴ P. CRAIG, 'Subsidiarity: A Political and Legal Analysis', (2012) 50 *JCMS: Journal of Common Market Studies*, .

⁸⁰⁵ G. DE BÚRCA, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor', (1998) 36 *Journal of Common Market Studies*, 217.

enters the realm of lawmaking. In particular I want to imagine and illustrate how they could work out in practice as considerations guiding the Court in its adjudication on damages.

Public procurement and subsidiarity and proportionality

In the exercise of these powers, I argue that the Court ought to be guided by subsidiarity and proportionality considerations, and suggest several techniques for how these can be fleshed out: a strong interpretation of EU law through taking into account the remedial universe of a right; by taking into account the EU level of regulation of factual situations; and lastly, the use of comparative law.

I first elaborate on three techniques in relation to how the assessment of proportionality and subsidiarity could be undertaken at the judicial level.

16.3 THE BALANCING VERSION OF EFFECTIVENESS TEST DEPLOYED AS PROPORTIONALITY AND SUBSIDIARITY

It has been shown that procedural law is never neutral and always incorporates some kind of balancing act. Balancing within procedural autonomy could be explicitly accommodated within the effectiveness test in its balancing version (*van Schijndel/Peterbroeck*). For the effectiveness test it is desirable to express that balancing occurs - and what kind thereof. It can then highlight the fact that, during the balancing of procedural values, either EU values *or* national values are taken into consideration. This element of institutional allocation remains otherwise unarticulated and hidden within procedural autonomy.

It is here that the 'procedural value at stake' should be judged according to considerations pertaining to the question of which institution is able to posit procedural fairness rules in a specific area. Where proportionality and subsidiarity are pertinent, I propose a balancing of values based on a *particularized* (i.e., tailored to the substantive law at issue) interpretation of EU law on one hand, and *cognition of the national level* on the other to express the subsidiarity thought. This cognition could take place by means of comparative law.

16.3.1 Particularization through rights as causative reasons: Factual interpretations and typologies

With substantive competence comes competence to rule on procedural and remedial matters (because of their accessory nature). At this point we speak about a *substantial* differentiation not based on (policy) sectors, but on rights and the taxonomy of violations.

Particularization can be achieved through the intrinsic connection between procedure and substance, which results in an interpretation of effectiveness based on the factual interpretations of the underlying EU law, expressing a *commensurability between regulation of violations of EU law and enforcement, substance specific balancing through effectiveness* and interpretation of the remedial landscape, taking into account the relative *contextualised secondary protection surrounding a right*.

Commensurability between regulation of violations of EU law and enforcement

The extent to which the legislator (public procurement) or the Court (internal market, competition law) has been active in defining the substantive content of violations varies and can be very detailed. I would suggest that the greater the degree of harmonization in deciding whether factual circumstances meet the application criteria, the greater the legitimacy of interference with the enforcement rules. If a given area is highly Europeanized, then Court scrutiny is more readily acceptable. In these circumstances, EU law has already been defining the factual situation, the environment of a legal rule as it relates to the lifeworld in substantive terms. Differentiation can only be based on factual situations or typologies, and the more what counts as a violation is streamlined at EU level, the more the enforcement shifts to the EU level.

Against the trend of transsubstantive application of procedure, I derived the need for particularization. Particularization gives us reason to turn to rights and the kinds of violations that may occur. In order to tailor the remedies regime, one must look at the kinds of violations that occur, through a factual lens. In cases where the taxonomy of situations is highly regulated at EU level, thus resulting in an almost identical regime of situational taxonomies of violations across the EU, the corresponding remedy regime can also be more uniform.

This explains why remedies are heavily regulated at EU level in the fields of Competition law, Consumer law and public procurement – but also that there is variance amongst them. First of all, they are all quite exhaustively regulated with regards to the types of violations. This results in the intensity of EU law interfering. At the same time, the solutions are quite different. This is due to the fact that their situational logic requires a different remedy regime.

Substance specific balancing through effectiveness

If that substance procedure connection exists, then the effectiveness as a standard version is an illusion. A material balancing always takes place. This balancing, even if not articulated, strikes different compromises between the broad procedural functions (see section 15.2.3).

The intrinsic impact of procedure on substance then is a reason to differentiate along the substantive rights at stake. This implies on one hand a non-transsubstantive interpretation, i.e. one which takes into account *specific* procedural values. Particular balancing implies assigning different values to particular rights on the procedural justice spectrums of determining the truth (accuracy), minimizing error costs (balancing), and process benefits (participation). For example, the public procurement directives recognize a particular procedural value, namely rapidity of decisions. The need for expediency is justified by the procurement sector and the particular need for legal certainty relating to contracts which are, after all, concluded in the public name. In this case a much shorter time limit can be acceptable than in other areas of law, at the expense of the “accuracy” of a decision.

Substance specific interpretation is the starting point for an adjudicative theory and works against trans-substantivity and formal reasoning. To illustrate: where a time period in public procurement is at stake, the answer as to whether or not the ECJ intervenes should not come from a principled argument against ECJ intervention in national procedural law (competence argument). Neither should it refer to the pre-existing case law on timelimits (trans-substantivity) – as both furnish general answers. Rather, it is the procedural and remedial context within which public procurement procedures are set, and the specific characteristics of public procurement law. These are for example the focus on rapidity and

efficiency of procedures and a heightened concern for quick legal certainty in view of the public nature of the contracts to be executed.

The universe of secondary protection surrounding a right

Rights within the 'effectiveness' test have been characterized as reasons for remedies. Under the label 'rights as reasons', a right is understood as a causative *event*.

In the first instance, the balancing version of effectiveness requires a strong interpretation of the EU rules at stake. Indications as to the specific 'procedural' value to be struck can be found by looking at: EU regulation of the remedial side, i.e. through secondary legislation; other remedies; or fundamental rights. If the taxonomy of factual situations of breaches is highly harmonized, then the intrinsic connection between right and remedy warrants secondary protection to a greater degree as a matter of EU law.

The intrinsic connection to the right at stake presupposes the possibility of differentiation. This is differentiation first of all in connection to the right and all second order protection within which it is set and by which it is relatively determined. This means that we presuppose a contextualized reading of the 'effectiveness' of overall secondary protection available. This protection could either refer a) to the EU context, or in the absence thereof, b) to the definite national context. Indicators that legitimize ECJ intervention could be: a) if the legislative has acted extensively on the substantive rights has the legislative acted, and how extensively is the given area regulated? b) Have specific remedies been legislated? So, for example when testing damages, damages would have to be examined in light of the overall "intra-instrumental"⁸⁰⁶ applicable framework, including such measures as interim injunctions and so on.

The test legitimizes enhanced intervention by the ECJ where a secondary remedies regime exists.

A strong interpretation of the universe of remedies of public procurement

⁸⁰⁶ S. GRUNDMANN, '»Inter-Instrumental-Interpretation« Systembildung durch Auslegung im Europäischen Unionsrecht', (2011) 75 *RabelsZ*, 882.

In adjudicating remedies, the interpretation of the surrounding remedial landscape is pertinent. Because they are relational to each other, the availability of interim measures or for example ineffectiveness of contracts guides the interpretation of public procurement damages. Since other remedies are highly regulated, there are better reasons for the Court to enter the debate.

Under the conception of rights as reasons it has been argued that a given right must be interpreted in its immediate context, i.e., within the concrete set of rights and remedies which have been elaborated. In the case of the public procurement Remedies Directive, the ineffectiveness of contracts as well as the set-aside conditions are regulated in detail. Under these circumstances, the doctrinal interpretation on damages must fit within this set. For example, those remedies which regulate specific situations exhaustively – such as the ineffectiveness of contracts – take priority of other unregulated remedies such as damages. Specific factual circumstances (namely the *de facto* award of a contract without any effort to follow the procurement rules) have been designated to trigger the ineffectiveness of a contract as a mandatory remedy.⁸⁰⁷ Where remedies have been explicitly regulated for specific factual typologies, these remedies take priority over damages claims.

However, the particularization requirement would also make us realize that a remedy for ineffectiveness or interim injunctions would be of quite a different nature and expediency than the damages remedy. In this respect, I would argue that time limits for actions cannot be valid for procurement proceedings *per se*, but ought to be considered specifically for damages remedies. Arguably, for example, the extremely short time limit for damages claims might – in comparison to the European standard, which usually fluctuates between three and six years – be unnecessarily short, given that a damages claim in no way threatens contracts already concluded, nor precludes public contracts from being executed.

⁸⁰⁷ It can be argued that the ineffectiveness constitutes a restitution in natura of the chance of participating in an award procedure. As it used to be handled under the Dutch legal doctrine. Rescission of contracts can be a remedy clothed as an in natura reparation.

The call for particularism calls for questions to be answered not in a trans-substantive, general way, but to be tailored to the specific field of law at stake. In the field of public procurement, the availability of lost profits for all breaches results in overcompensation. In addition, the availability of both *lucrum cessans* and *damnum emergens* at the same time can lead to double counting. The lost chance therefore has the potential to strike a specific balance between the full compensation of bidders on one hand and the public interest in opposition to overcompensation on the other, which is tailored specifically to the kinds of uncertainties that are typically exhibited in the public procurement sector. The particulars of the field are needed in order to overcome the impact of the Competition law based judgments (*Courage* and *Manfredi*, see section 4.2.4), which arguably require lost profits to be systematically available.

16.3.2 Comparative law as a communicative tool of the Court

I have already addressed the role of comparative law in Chapter 5, with one of the functions accorded being the operationalization of comparisons in the adjudication of the CJEU. How can the insights gathered through comparisons of national regimes be made relevant for EU law? Where is their entrance gate, their recognition in the code of EU law, to lead to an operationization of comparative law based findings?

The use of comparative law at the Court

Of course, comparative law is only one recognized method of interpreting EU law among others.⁸⁰⁸ But it goes beyond being just a ‘positive’ source of law.⁸⁰⁹ Others have extended their esteem for the functions of comparative law beyond these traditional items to include the communicative and discursive functions of comparative law within the adjudication process. Comparative law also has an important teleological function at the CJEU. Comparative law “vise aussi à conférer à l’ordre juridique communautaire un “socle”

⁸⁰⁸ J. BENOÛT, N. MACCORMICK & L. MORAL SORIANO, 'Integration and Integrity in the Legal Reasoning of the European Court of Justice', in Grainne de Burca & Joseph H H Weiler (eds), *The European Court of Justice* (Collected courses of the Academy of European Law, 2001).

⁸⁰⁹ K. LENAERTS, 'Le droit comparé dans le travail du juge communautaire', in François van der Mensbrugge (ed), *L'utilisation de la méthode comparative en droit européen* (Presses universitaires de Namur, 2004).

d'acceptabilité auprès des ordres juridiques nationaux."⁸¹⁰ Ultimately, EU law depends on the disposition of the interdependent national courts to make correct applications.

From this, Lenaerts for example ascribes an alerting function to comparative law which ensures that a middle-line with good chances of survival (and of being applied) is followed.

This is the reception by the national systems. The two are not necessarily connected. While the first step implies the use of comparative law in order to *imagine* the reception in national courts and legal systems, this is not necessarily connected with the normative presumption of *accepting* the middle ground, i.e. following the common denominator. Comparative law goes beyond being a positive source of law by representing a form of visualization of the common conception of the Member States.⁸¹¹

We can also distinguish with Lenaert the kind of solution to which the use of comparative law leads the ECJ judge – or, on the other hand, the purpose for which he instrumentalizes comparative law as a justification. As a justification, comparative law works by providing supporting reasons for a given decision either because the national laws exhibit a converging tendency, a contradiction among themselves, or because the judge sometimes selects a national solution. Perhaps counterintuitively, divergence found in a comparison can also open and legitimize the EU judge to find possible solutions of law which depart from the national solutions.⁸¹²

In the following, I argue that comparative law can be an additional device to use in order to fill the search for subsidiarity and proportionality with content.

⁸¹⁰ K. LENAERTS, 'Le droit comparé dans le travail du juge communautaire', in François van der Mensbrugge (ed), *L'utilisation de la méthode comparative en droit européen* (Presses universitaires de Namur, 2004), 123.

⁸¹¹ C. KAKOURIS, 'L'utilisation de la méthode comparative par la Cour de justice des Communautés européennes', in Ulrich Drobnig & J. H. M. van Erp (eds), *The use of comparative law by courts* (Kluwer Law International, 1999), 99.

⁸¹² P. PESCATORE, 'Le recours, dans la jurisprudence de la Cour de justice des Communautés européennes, à des normes déduites de la comparaison des droits des Etats membres', (1980) 32 *Revue internationale de droit comparé*, 337, 354.

Comparative law as problemistic reasoning

EU subsidiarity⁸¹³ involves problemistic reasoning – i.e. the identification of problems. It further relates to the determination of the level that is going to address the problem most appropriately. I propose how subsidiarity and proportionality can be filled with content within the adjudicative use of procedural autonomy.

Subsidiarity and proportionality⁸¹⁴ have (varying) degrees of respect for the national level. Engaging in balancing with national values does not necessarily mean balancing the national rules themselves. An alternative to adopting a single Member State's values in this respect can be through recourse to comparative law, in aiming to create a plural vision of values across the Member States. This would be used to guarantee – much like the various subsidiarity mechanisms within the legislative sphere – that the national levels are taken into account. In several ways, comparative law can serve as a technique to enhance the conception of subsidiarity and could go hand in hand with judicial procedural subsidiarity.

It is here that the role of comparative law in the adjudication of the Court could be more highly esteemed. Comparative law can be helpful in a number of ways. First of all, it enables the Court in a problemistic manner to establish (for the purposes of a subsidiarity style argumentation) whether there is need for harmonization at EU level. It is a tool of *problem discovery*.

In this thesis, comparative law has been used in order to confirm the hypothesis that damages claims are problematic in the national jurisdictions, not only on behavioral but also to some extent on simple doctrinal grounds. It is useful at EU level in order to alert the Court to the fact that damages claims are, to say the very least, differently regulated across the EU countries. Secondly, it clarifies that the causes of actions are broadly different and,

⁸¹³ It seems to this author that, *prima facie*, there is a difference between EU subsidiarity as defined, for example, in the protocol on subsidiarity, and praxis, diverging from historically well fed understandings of subsidiarity, for example in Germany. The difference between the two understandings might be rooted in their different normative reasons in favor of EU/Member State level; centralized/local; and legal (State)/non-legal action.

⁸¹⁴ Referring here to the fact that both are so intermingled that even in areas where strictly speaking subsidiarity does not reign, the Commission has assessed subsidiarity type elements through proportionality.

particularly critically, that the kinds of damages claimable (lost profit versus bid costs) vary widely.

This finding must be assessed against the higher level argument that where in the guise of a heads of damage rule, burdens of proof, valuation etc, damages claims are systemically unavailable, the necessary protection of EU rights is at stake.

Taking the public procurement example, the comparison demonstrated that in a number of Member States, damages claims are not generally available. Public procurement is mostly seen as a particular problem, and particular solutions have been sought – but not necessarily successfully. Damages appear to be a *problem*, as claims in public procurement, in many examined jurisdictions and systems, are found to be difficult.

Comparative law as a standard to influence the degree of review

Comparative law, for example, helps us to understand where within a given range of plural national solutions a particular rule at issue falls. One example could be that of time limits. For example in the UK, the time limits for damages in public procurement are currently set at 30 days, while for the other jurisdictions surveyed these limits are set at between four and six years. Arguably, therefore, this pronounced discrepancy between the existing solutions in some Member States can act as a presumption against that national rule. It does not mean that a national rule is illegal *per se*, but it does alert the Court to a lack of unity, to the fact that something of a common standard seems to exist across (parts of) the EU, and where contested national rules are situated in that range of solutions.

Such a mechanism would be inspired by the working of the ECHR, which uses comparative law in order to establish whether a European Standard exists, and shapes the margin of appreciation accordingly.

Under the ECHR, the European Consensus doctrine determines whether a State enjoys a wide or narrow margin of discretion. “This standard has played a key-role in the wider or narrower character the application of the margin of appreciation adopts in practice. Generally speaking, the existence of similar patterns of practice or regulation across the different Member States will legitimize a wider margin of appreciation for the State that

stays within that framework and delegitimize attempts to part ways with them.”⁸¹⁵ Thus, the existence of a European Consensus framework on a given issue shapes the margin of appreciation at hand.

In EU law, comparative law could be used in order to inform an inquiry into the national legal systems. Then, the overall level of conformity will determine the standard of review systems and indicate how far the Court will penetrate into a given issue.

Comparative law points to functional solutions

The legislative process in this respect has been quite progressive, because of the establishment of formal mechanisms through which the national levels can feed back into the law making process. In the judicial arena, comparative law can play such a role. Based on the *discursive* function of comparative law, it can be used to find solutions to legal problems by providing better justification, but also, for example, by testing the acceptability of different models for the purposes of the legal orders in the plural.

Comparative law can then make a functional contribution. Let us assume that subsidiarity supports the view that the ECJ is competent to fix the heads of damages which ought to be available for breaches of EU law. Comparative law points to *solutions*.

The lost chance in public procurement operationalized through comparative law

Taking the hypothetical case that the Court was confronted with a preliminary reference regarding the heads of damages available for public procurement violations. This use of comparative law can operationalize the lost chance at EU level, for example.

In the first instance, in our thesis, comparative law has helped to frame public procurement damages as doctrinally *problematic*. Particularly, the comparison showed that praxis with regards to regularly claimable losses diverges to a great extent. Germany, for example, demonstrated that the availability of bid costs alone may be insufficient to warrant anything approaching full compensation, or the closest approximation of the damages that

⁸¹⁵ Council of Europe, ‘The Margin of Appreciation’, available at http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp.

were actually incurred. This appeared as problematic, all the more so because further reaching losses *are* available in other jurisdictions.

Of the solutions which seemed to provide more readily for compensation, the French solution of the categorized lost chance (See Chapter 13) emerged as a potential residuary head of damages. In cases where the extent of damages cannot be fully ascertained, the lost business opportunity is one means by which this gap in legal protection can be mitigated. The lost opportunity in this form is not a purely proportional lost chance theory - as we have seen, it is a form of mitigation leading to a sort of categorization of causality, but not to proportionality in a strict sense. At best, it approaches a very rough sort of proportionality.

From a *functional* point of view, France has demonstrated the most advanced system for the availability of damages, and this has been done through a form of the lost chance which is based on a categorized version of the chance. It seems that damages claims are working well due to this particular understanding of the lost chance. It is very close to describing the lost chance as a lost business opportunity, that is an autonomous head of damage. There are a fixed number of qualities of chances (no chance, a real chance, and a very serious chance) which attach to different heads of damages (nothing, bid costs, and lost profits respectively). The lost chance in this form is therefore not one of true proportional liability.⁸¹⁶

From the *discursive* angle of comparative law, the solution of the lost chance can be tested using comparative law as a back coupling or interface to the national legal orders. Based on the country comparisons, it would be impossible to conclude that there is general acceptance of the lost chance theory in the Member States. However, the studies also exposed the strong tendency of the Member States towards idiosyncratic public procurement solutions with regards to damages, i.e. clusters of particular rules for specific fields of law. In addition, the law of damages is largely judge made law.

In this respect, the suggested solution –while rendering damages claims more effective- also sits easier with the legal systems than proportional liability. Other legal

⁸¹⁶ As for example advocated by Reich A. REICH & O. SHABAT, *The Remedy of Damages in Public Procurement in Israel and the EU: A Proposal for Reform* SSRN eLibrary (2013) at <http://ssrn.com/abstract=2244909>.

systems, next to France, seem to be capable to accommodate the proposal doctrinally. Although through different paths, the solution is similar in Germany; the statutory provision for bid costs and lost profits under the pre-contractual liability can arguably be interpreted along these lines.⁸¹⁷ The Netherlands have no pronounced lost chance doctrine, but since the legal system in general is open to the lost chance in other areas, there seem to be no particular obstacles to its reception. Since *Harmon* did propose the proportional version of the lost chance, the UK is arguably the system with the most divergent approach and therefore with the potentially strongest opposition. Yet, since the French solution also incorporates a gradual element of proportionality, the system could also be acceptable there - all the more so since *Harmon* does not have the necessary backbone of follow-up actions. Importantly, the suggested proposal would also be a defensible interpretation of the Utilities Remedies Directives damages article in relation to bid costs.⁸¹⁸

From the point of view of testing the possible reception of an EU Court-based development concerning compensation for the lost chance, these are positive factors supporting the likelihood of reception and acceptability in the national legal orders.

Based on the legal process idea (taking a more holistic view of the legal process by including national adjudication), the language of the ECJ acts as an interface from which the national courts draw their input. This has usually happened in a top-down manner, or in a way that is almost entirely dislocated from national practices, on the grounds that the ECJ furnishes an autonomous answer. According to our model, we also include facets which feature in a bottom-up direction, which feeds into the language and conceptual practice of the ECJ in the field of damages.

⁸¹⁷ The biggest difference in Germany relates to the fact that an aggrieved bidder has to prove that the contract has or would have been awarded. In keeping in line with the 'private autonomy' rationale underlying this reasoning, I would defend a reversal of the burden of proof burdening the contracting authority with a rebuttable presumption that indeed it would have awarded a contract.

⁸¹⁸ Article 2(7) of Directive 92/13 requires that "Where a claim is made for damages representing the costs of preparing a bid or of participating in an award procedure, the person making the claim shall be required only to prove an infringement of Community law in the field of procurement or national rules implementing that law and that he would have had a real chance of winning the contract and that, as a consequence of that infringement, that chance was adversely affected."

16.4 THE ROLE OF THE COURT: PROCEDURAL AUTONOMY AS INSTITUTIONAL/LEGAL PROCESS ALLOCATION

The previous limits to the procedural autonomy doctrine were enunciated on grounds of substantive content. The first related to the material impact of procedural rules on substantive law. Where rules are 'more' procedural, the intensity of review of the Court lessens. By contrast, the substantive connection of enforcement rules has been shown to necessitate the inclusion of a value balancing exercise that has law making character which, as I suggest, can be performed by applying proportionality and subsidiarity to the judiciary. The latter have been operationalized in terms of content through an emphasis on particularization (see 16.3.1) and the use of comparative law (see 16.3.2).

Another dimension of limits is based on the perspective of the Court as an actor in potentially diverging legal processes in which it possesses distinct mandates, roles and capacities. Based on these considerations, I sketch vertical institutional limits for the preliminary reference procedure when procedural autonomy is applied to distinguish the role of the CJEU as a European Court from the national court within which the underlying legal dispute originates. In addition, there is an argument for institutional balance concerning the horizontal allocation of institutional capacity. I reinforce the idea that procedural autonomy is a judicial doctrine, which therefore has some implications vis-à-vis the legislator and is also guided by inquiries pertaining to the legitimacy of courts for law making in relation to the legislative process.

16.4.1 Vertical institutional limits based on law and fact

Between the national and EU courts, and depending on the relevant legal procedure, there is a demarcation line other than (substantive) competence, which is the separation of law and fact. The CJEU has different responsibilities depending on the particular legal processes in question (preliminary reference procedures, enforcement procedures, reviews of institutional acts, etc.) which are characterized by varying mandates in terms of applying the law, particularly with respect to interpretation and application. They result in entirely different roles for the CJEU - for example, as the General Court in an action against EU institutions, or the ECJ in a preliminary reference procedure. This is why, for example, the

case law rendered in procurement proceedings adjudicated by the General Court simply cannot be regarded as pertinent in preliminary reference interpretations.

It is common to introduce divisions of competence, usually of a hierarchical nature, within a single legal system on the basis of a separation or division of tasks relating to law and fact which are conceptually closely linked to interpretation and application of the law. In the EU legal order, under the preliminary reference procedure, the Court of Justice is called upon to interpret EU law, but not to apply it to facts – that is the task of the national courts.⁸¹⁹ The task of applying as opposed to interpreting the law is based on the separation of law and fact.⁸²⁰

Some elements of the procedural autonomy doctrine reflect this division of tasks element more than the competence related question of whether it is for the European or national level to rule on a given issue. The distinction is similar to that of procedural and material law - but far from identical. The difference here is that a competence question would resolve the issue of which norm (of rival legal norms) is applicable, whereas within one legal order, the different instances would be bound by the same set of legal norms. Although within the preliminary question system the Court of Justice is not formally characterized as a court of appeal, depending on how the referred question is phrased (the national court may present their solutions⁸²¹), the system can become more like one of *ex-ante* scrutiny. Why (some aspects of) damages claims should not come under the procedural autonomy test could be down to their factual nature, it being their nature to translate the 'finding' of the law back into factual realities. Although the Court has methods - such as questioning national courts - to ascertain pertinent facts, it is not the ECJ's mandate to go on

⁸¹⁹ "Under the preliminary ruling procedure, the Court's role is to give an interpretation of European Union law or to rule on its validity, not to apply that law to the factual situation underlying the main proceedings, which is the task of the national court. It is not for the Court either to decide issues of fact raised in the main proceedings or to resolve differences of opinion on the interpretation or application of rules of national law." Point 7, Court of Justice of the European Union, Information Note on references from national courts for a preliminary ruling, 2011/C 160/01, OJ 2009 C 297, p. 1.

⁸²⁰ Bearing in mind that "Whatever the theory, courts of review of "pure law" feel the pressure of the individual case, and strain to decide it right." K. N. Llewellyn, *The Bramble Bush: Some Lectures on Law and Its Study 1* (1930), p 29.

⁸²¹ "Finally, the referring court may, if it considers itself able, briefly state its view on the answer to be given to the questions referred for a preliminary ruling", Court of Justice of the European Union, Information Note on references from national courts for a preliminary ruling, 2011/C 160/01, OJ 2009 C 297, p. 1, point 23.

fact finding missions. Therefore this is another pertinent delimitation between the national and the ECJ's jurisdiction.

Vertical limits in public procurement

In the national legal systems, the distinction between law and fact is situated across different instances, whereby the hierarchically higher courts of appeal may be scrutinizing the application of the law *ex-post*; considering only (depending on the legal system) questions of law, as distinct from matters of fact, which are for the determination of the lower court.

For example, in the country studies, the task of adjudicating losses of chance in public procurement was seen to be disputed in the framework of an appeals procedure. As a result it has been divided in the French jurisdiction along the following lines: *"Il semble qu'on doive: 1. Reconnaître au juge du fond le pouvoir souverain de dégager des pièces et des débats les constatations sur les chances en litige ; 2. Exercer un contrôle de la déduction qui en a été faite, sur le point de savoir notamment si la chance existait réellement, si son existence était certaine et s'il a été tenu compte de sa perte."*⁸²² In the French system, therefore, the higher instances carry out a control on the deductions that have been made on the lost chance, particularly in ascertaining whether a chance had come into being, whether it was certain and whether its loss had been taken into account.

In relation to damages claims as seen as a bundle of rules, those pertaining to loss valuation methods provide pertinent examples.

Precisely because valuation seems to be such an indeterminate issue, procedural justice balancing often goes unnoticed. However, the trade-offs between the 'accuracy' of the calculation and the costs of gathering the necessary data to calculate the accrued costs are clear examples of procedural justice balancing.⁸²³ *In addition*, there is a jurisdictional

⁸²² J. BORÉ, 'L'indemnisation pour les chances perdues: Une forme d'appréciation quantitative de la causalité d'un fait dommageable', (1974) I JCP, 2620.

⁸²³ For example, see the weighing undertaken in the area of competition law with regards to the 'right' of an undertaking to benefit from privileges under the leniency programme and, on the other hand, private parties' need for discovery in order to be successful in their damages claims in Case C-360/09 *Pfleiderer* [2011] ECR I-5161.

perspective which is based on the law and fact distinction, and which removes questions of mere 'application' from higher instances of review.

Valuation methods on a functional level are determined in the individual facts available for the case, and they do not lend themselves to very many generalizations. As regards valuation methodology, Ripinsky⁸²⁴ observes that they seem comparatively chosen with the facts available for the case. The same approach is supported by the Oxera study on quantification.⁸²⁵ On one hand, one might plead for a more systemic consideration of all valuation methods available, instead of simply assuming that there is only one. At the same time, the valuation methods are 'universally' adapted to the available data, and can even be pooled in order to enable the best estimate. From a functional perspective, the goal would be to arrive at a valuation that is not arbitrary, one that best reflects the actual pecuniary value of the damage inflicted.

The law and fact dimension is pertinent because the choice of the valuation method is based on the available data. These are highly factual questions, which the CJEU does not always have the capacity to come to terms with. Again, this depends on the legal process, and the role and capacity of the Commission in relation to Competition law varies greatly with respect to that of public procurement dispute situations. On the basis of the law and fact distinction, these kinds of rules would remain in the jurisdiction of the national courts, always subject, of course, to the fact that, like in other systems of appeal, the Court may be called upon to make a distinction as to whether a specific rule amounts to a rule regarding law or fact. Nevertheless, if we accept the principle that the precise choice of valuation method is tailored to the available data set and facts, then that choice is only open to a margin degree to be questioned by the CJEU, at least in public procurement cases, since the CJEU is not in a position to consider the facts in sufficient detail.

⁸²⁴ S. RIPINSKY & K. WILLIAMS, *Damages in international investment law* (British Institute of International and Comparative Law, 2008).

⁸²⁵ OXERA CONSULTING, *Quantifying antitrust damages. Towards non-binding guidance for courts. Study prepared for the European Commission* (Oxera Consulting Ltd, 2010).

16.4.2 Horizontal limits: unchaining the legislative from the judge-made law of procedure⁸²⁶

The final important dimension is not grounded in the EU - national level legal dichotomy but instead attaches to the role of the Court as a power within the balance of power of a political system.⁸²⁷ When this dimension is made part of the doctrine of procedural autonomy, two concerns arise: first, does procedural autonomy apply to the legislature? Secondly, what is the role of the ECJ in making enforcement law *relative to the legislature*?

The horizontal limits of the procedural autonomy doctrine

I first briefly put forward the argument that procedural autonomy is an adjudicative doctrine, and by itself is not applicable in the legislative sphere. The legislature is bound by substantive competence questions, and as was shown, procedural autonomy is a judicially developed concept.

At the same time, it must be pointed out that in the field of public procurement the legislature has shown some signs of a reception of a very strict interpretation of the procedural autonomy doctrine. The Commission stated: “[w]hatever the solution may be, the principle of the procedural autonomy of Member States will be maintained since Member States would not be required to change their administrative/judicial system.”⁸²⁸

The inherent tension is obvious: were the Member States in possession of procedural autonomy regarding a specific matter, then the Commission would lack the competence to legislate, and would hence be legally precluded from taking action.

This reference by the Commission is best regarded as a misnomer. The considerations which follow in the Commission report use the language of subsidiarity. Unlike arguments of procedural autonomy, subsidiarity can work in both ways, i.e. at national or European level,

⁸²⁶ For a strong plea for a court intervening in rights, remedies and procedure, see H.-W. MICKLITZ, *The ECJ between the individual citizen and the member states : a plea for a judge-made European law on remedies* (European University Institute, 2011).

⁸²⁷ In the United States, the discussion on federal procedure has intrinsically linked questions of procedural lawmaking to trans-substantivity and used this rule in order to devise a mechanism for institutional allocation and legitimacy.

⁸²⁸ Impact Assessment Report, 21.

and furnish arguments for federally greater or lesser degrees of centralization of legal determination. The interpretation that must be given to the Commission's policy choice should be based in considerations of procedural subsidiarity rather than signs of procedural autonomy. It first identified the weaknesses of the remedies at the time, in a problemistic fashion, in its impact assessment report of 2006 (which was at the basis for the amendments made by Directive 2007/66). When contemplating the amendment to the Remedies Directives, a policy choice was made that "among the two types of Remedies [pre- and post-contractual], pre-contractual remedies are the more effective remedies in the context of public procurement".⁸²⁹ This is sustained by the heading of section 4.9, entitled "Is the EU best Suited to Act". The Commission's assessment postulated that in an area such as public procurement, other remedies - such as the ineffectiveness of contracts and injunctions - are better suited to ensuring the protection of EU rights.

However, different considerations are at stake here. One is a principled consideration as regards the protection of EU rights in general, in the sense of what is a constitutional justice type of consideration. While the EU legislator is free to make policy choices in favor of pursuing or not pursuing the strengthening of specific remedies, the EU courts are bound by considerations of supranational justice, i.e. of guaranteeing the (secondary in the case of damages) protection of rights and also in its capacity as courts to guarantee the rule of law. The CJEU therefore has qualitatively different duties with regards to the protection of existing EU rights than the legislature.

Implications deriving from the CJEU's institutional capacity

Dougan⁸³⁰ advanced the question of whether secondary law, in effect, actually restricts the Court's likelihood to interfere in procedural matters more strictly than the Court would accept on the basis of a pure primary law analysis. To quote, he speculates as to whether it leads "the Court to respect a national autonomy extrapolated from the legislative text which

⁸²⁹ Impact Assessment Report, 23.

⁸³⁰ M. DOUGAN, *National remedies before the Court of Justice : issues of harmonisation and differentiation* (Hart, 2004) 65, examining the effect of Directive 64/221 on remedies and movement for residence of foreign nationals.

it would not otherwise tolerate under the general principles of the Treaty legal order.”⁸³¹ Micklitz distinguishes between the effectiveness of primary and secondary law, conceptualizing primary law as striking down, whereas secondary law is itself interpreted and thereby creates rights.⁸³² This concern for the underlying *text* can be couched in institutional terms. Is there greater judicial lawmaking legitimacy due to the *exercise* of legislative competencies in the legislative process?

There is a difference between the legislative and adjudicative competencies conferred. In a horizontal relation, namely between the Court and the legislative, the legitimacy of the Court as law maker could additionally use an indicator of whether the legislative has exercised its competence. The reason is that the more legislative competency has been exercised, the more interpretative the enterprise of the Court becomes, rather than one of ‘activist’ law making. In the public procurement context, the fact that a damages provision is contained in a legislative instruments (although a bare postulate) shifts court judgments on damages slightly more in the direction of interpretation than if there was simply no damages provision foreseen.

One often disregarded factor is the *national* institutional allocation of formulating requirements for enforcement rules.

Specifically regarding damages, the country studies raise the question of whether the institution of ‘damages’ is traditionally, and also under legitimacy considerations, defined by the legislature. The country studies show that the extent to which damages and claimable damages are actually codified varies greatly. Within general liability clauses, the hard core of damages claims is often developed by the judiciary, not always by the legislative. The tendency towards broad liability principles which are then expanded on and concretized through judge made case law is omnipresent. Even in cases such as Germany, where the legislator has chosen to implement specific – because deviating from general liability

⁸³¹ M. DOUGAN, *National remedies before the Court of Justice : issues of harmonisation and differentiation* (Hart, 2004), 65.

⁸³² H.-W. MICKLITZ, *The ECJ between the individual citizen and the member states : a plea for a judge-made European law on remedies* (European University Institute, 2011).

doctrine – statutory damages provisions for public procurement, the criteria only get defined in detail by the judge.

The argument can be supported by the expertise of courts and their specific role in the legal process. According to this point, first of all, courts are confronted with underlying life situations differently than would be the case for the legislature. The legislature makes *ex-ante* rules, and the courts - through their accumulation of experience - can use procedural law in order to *better* effectuate the substantive will of the legislator, i.e. its intention. The legislature creates uniform rules. The ECJ also creates law, at least as we have characterized the institution so far. However, this law is much more open to interpretation, and secondly, it is connected to specific cases. The lawmaking function of course can only arise through applicability beyond a particular case to other cases in the future. However, courts are confronting the laws they apply always within the specific factual framework of a specific case. In this respect courts as institutions have an advantage over the legislative: the legislative has to fix the rules *a priori* in the abstract and in such a way that they are uniform for all. The courts can differentiate and modulate by relying to a greater or lesser extent on the factual circumstances.

At EU level, the fact that the legislature has not enacted damages provisions, or details thereof, should not be regarded in itself as precluding scrutiny by the Court of Justice. The question may be turned around, and it could be argued that the legislature is not normally required to draw up statutory damages regimes for all areas of law, and that therefore, in cases of the absence thereof, it is a duty (as opposed to a legitimate possibility) for the Court of Justice to act in order to grant secondary protection to EU rights.

16.5 CONCLUSION

In the foregoing part, I presented three demarcation lines which are incorporated by the procedural autonomy doctrine. The first is material and informs the degree of scrutiny exercised by the Court based on the nature of the rule itself. Secondly, systemic limits can be balanced through considerations of subsidiarity and proportionality. The last element derived from the different role of the Court in relation to particular proceedings. Within the

preliminary reference procedure, restraint is inherent as a result of the task division based on the distinction between law and fact. This is on the one hand the role of the Court in relation to the political process and is thus connected to its legitimacy.

By means of the procedural autonomy doctrine, I have explored the ways in which the CJEU will be called upon and is able to address the issue of damages. In particular, the examination concerned the extent to which the Court would be constrained in terms of substance, but also between vertical and horizontal levels. If we accept that, in some respects, the horizontal level of institutional balance between the legislator and the Court presents a structural constraint, then some lessons are still to be learned for the EU legislator with regards to damages.

What has emerged is that the CJEU has some discretion and scope to move into damages claims adjudication. It could be argued that it even has an obligation to do so under the duty to guarantee the secondary protection of EU law rights against violations thereof. In terms of institutional balance, the comparative law overview has brought to the fore the fact that general damages regimes are usually designed by the judiciary, and not by the legislative.

It is therefore a fundamental question for the EU legal system, whether the CJEU will rise to the challenge of designing the secondary protection of rights through damages or whether it awaits EU legislative action to provide specific damages provisions.

Afterword: the way forward

On 11 June 2013 the Commission tabled an antitrust damages actions legislative package, including a *proposal for a directive* on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, a *Communication* from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union and a *Commission Staff Working Document – Practical*

Guide on Quantifying Harm in Actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union.⁸³³

The package is of significance also for the procurement sector. From a political point of view it seems clear that the Competition legislation package is a pilot test case with regards to the political acceptance of Member states for enhanced legislative in damages enforcement. The Commission damages initiative, and more so the upcoming reaction by Member States, will have an important signaling effect: to the legislator as to whether other sectors can be harmonized by legislative measures, public procurement seemingly being the next in line. The Court is also likely to be influenced. Initially the proposal may in stall any effort on behalf of the CJEU to develop damages further. Those Member States afraid of judicial activism strategically do well to accept the legislative proposal; it shifts the perception of institutional responsibility onto the legislature and will most likely limit the further intrusion of the Court in the area of enforcement rules. However, in case of political rejection of the proposal the CJEU may once again become the institutional alternative to take matter in its own hands, and be the motor of legal integration – this time on the road to harmonised enforcement.

⁸³³ Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404, 11.6.2013; Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, C(2013) 3440, 1.6.2013; Commission Staff Working Document – Practical Guide on Quantifying Harm in Actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union SWD(2013) 205, 11.6.2013; Impact Assessment Report, SWD(2013) 203 final, 11.6.2013.

17.1 SUMMARY

While the law is often highly harmonized at EU level, the ways in which it is realized in the various national courts are not. This thesis looks at enforcement through damages claims for violations of EU public procurement rules. Despite important recent amendments to the procurement remedies regime, the damages provision remains indeterminate. The legislative inertia pressures the CJEU to give an interpretation and raises the question as to how the Court should deal with damages.

The requirements on damages claims are clarified under both general and public procurement EU law. The action for damages is conceived as a legal process which incorporates the national realm. Therefore, a comparative law part (covering England, France, Germany and the Netherlands) examines national damages litigation in public procurement law.

A horizontal discussion of the legal issues which structurally frame damages claims is provided. The remedy of damages is analyzed as a bundle of rules and its constitutive and quantification criteria are studied, thereby refining the the Member States' common conceptual base of damages claims. Functionally, the lost chance emerges as a compromise capable of mitigating the typically problematic nature of causation and uncertainty in public procurement constellations.

An adjudicative approach to damages in EU law is developed through Member State liability and the procedural autonomy doctrine. Member State liability is construed as a form of constitutional liability which is distinct from damages arising under the 'effectiveness' postulate of procedural autonomy. Procedural autonomy as currently used is legally indeterminate and inadequate from the point of view of procedural theory. The thesis proposes to sharpen the effectiveness test in three dimensions: material, based on the intrinsic connection between enforcement rules and substantive law; vertical, in delimiting

the spheres of influence of national and EU courts; and in terms of institutional balance vis-à-vis the EU legislator.

17.2 FINDINGS

The legislative inertia with regards to damages in procurement forces the CJEU to come to terms with the open question of damages. (Chapter 2)

(1) Directive 2007/66 greatly strengthened the overall private enforcement of procurement law by amending the existing remedies regime. Except where the ineffectiveness of contracts is now required under the Directive, the potential role of damages actions remains important as the only available post-contractual remedy.

(2) The damages provision has been left unchanged and is still but a vague obligation. Despite the known difficulties of damages claims in procurement, the Commission does not seem inclined to take legislative action. This legislative inertia results in the CJEU coming under increasing institutional pressure.

The general EU law on damages is indeterminate. (Chapter 3)

(3) The two main doctrines formulating general EU law requirements on damages are the doctrines of procedural autonomy and Member State liability, both of which are characterized by significant legal uncertainty.

(4) The doctrine of procedural autonomy has developed over time and is currently unstable. While initially it served only to describe effectiveness and equivalence, it has become increasingly normative, with the potential to shield national law from EU influence.

(5) Three uses of 'effectiveness' under procedural autonomy can be distinguished: effectiveness as a standard, a balancing exercise, and judicial protection as a fundamental right.

(6) Member State liability, equally, has emerged as an indeterminate doctrine: there is *internal uncertainty* concerning the scope and constitution of its liability. In addition, there is *external or structural uncertainty* resulting from the fact that the relation to *parallel* remedies granted by EU law is ambiguous, as is its relation to other domestic remedies at the national level.

The damages obligation under the EU procurement law on damages is also indeterminate.

(7) There are several gateways for further interpretation of the damages provision. Overall, remedies in procurement became more closely regulated through Directive 2007/66. As an integral part of that remedial system, this can also be a reason for determining procurement damages at EU level. A systemic interpretation must consider the diverging wording of the damages provisions in the general and the Utilities Remedies Directives.

(8) The legislator could consider giving some clarification as to the meaning of the lost chance in the Utilities Remedies Directive and aligning the general and utilities directives by including the lost chance provision for both regimes. A systemic interpretation by the CJEU may reach the same results.

(9) The CJEU has consistently subjected cases on enforcement rules in procurement to the procedural autonomy test; however, even in a confined area of law, the use of this doctrine is extremely divergent. In *Symvoulia*, the CJEU went so far as to speak (for the first time) of the procedural independence of the Member States, while in *Strabag*, procedural autonomy did not preclude the Court from striking down a fault requirement. In *Combinatie Spijker*, the Court took a deferent attitude to procurement damages under the effectiveness and equivalence test (without calling it procedural autonomy), only to hold that the damages provision is an expression of Member State liability. The doctrine does not constrain the Court in predictable ways and the effect of applying procedural autonomy in the legal reasoning of the Court, even in one specific area of law, is highly uncertain.

(10) Damages are subject to a conflationary trend of interpretation ('conflation thesis'). The *Combinatie Spijker* ruling imported the case law of general Member State liability into the field of procurement. This transcendence is aggravated by the extension of the institutional liability of the EU and by spill-over effects from the interpretation of other secondary legislation and Competition law.

(11) The resulting indeterminacy opens up a wide judicial policy making space, forcing the CJEU to position itself with an active or deferent attitude towards damages.

In the EU context, an adjudicative theory must implicitly rely on a theory of comparative law.

(Chapter 5)

(12) Next to the ‘traditional’ functions of comparative law, in the EU adjudication context, comparative law has a conceptual value in seeking to refine the *common conceptual base of legal concepts* such as damages claims, and a discursive function whereby it acts as an interface between ‘EU law’ understanding and the national legal orders in the plural.

The action for damages is a legal process that incorporates the national realm.

(13) In order to understand damages actions for the purposes of EU law, one must also examine national damages litigation. The thesis examined four jurisdictions in a comparative law part: the Netherlands (Chapter 6), Germany (Chapter 7), France (Chapter 8) and the United Kingdom (Chapter 9). The findings of the country studies are presented in Chapter 10.

The frayed nature of national damages actions calls the viability of treating damages actions at the national level as unitary into question. (Chapter 11)

(14) Member States’ enforcement attitudes depend to some extent on how high up procurement policy is on the national public agenda. In addition, the implementation by Member States is contingent on the strength of the specific obligation at EU level. The structural implementation mechanisms of the damages article vary between specific legislative implementation, case law developed procurement liability actions and the applicability of general tort law clauses. In a field that is closely regulated, such as that of EU public procurement remedies, vagueness at EU level leads to equally vague implementation at Member State level. (Section 1)

(15) At the institutional level, damages claims are brought in different types of procedures. The generally uneasy relationship between EU law and alternative dispute settlement mechanisms is a shared concern in the procurement sector. However, requirements on the organization of tribunals are defined in the procurement directives, so that as a *lex specialis*, the requirements set in the Remedies Directives prevail. (Section 2)

(16) The Rome II Regulation is pertinent to the determination of the applicable law for damages claims under international private law. (Section 3)

(17) The causes of actions exhibit the broadest divergence between Member States. Statutory liability, tort and contract coexist, and have diverging implications at the level of quantification. Member State liability, from the national points of view, is an identical action (NL), a parallel action (UK), interpreted by national State liability and hardly of significance

(D), and not discussed (FR). Conceptually, the unitary damages action from an EU point of view actually emerges as a plurality of possible actions, which exhibit different liability rationales and raise questions as to their accumulability. (Section 4)

(18) Under the influence of EU law, procurement law moved from an administrative towards a competition rationale and strengthened bidders' rights considerably. The personal scope of EU law instruments is defined at EU level. In public procurement, a specific interpretation prevails as the Remedies Directives extend to 'any person with an interest'. (Section 5)

(19) Time limits in Member States cover a broad range - from 30 days to 6 years. The CJEU has set a standard on the beginning point of a time limit in *Uniplex*. (Section 6)

(20) According to *Strabag*, fault criteria are not permissible. Germany has one action without fault, but the remaining ones do refer to fault criteria. (Section 7)

(21) The frayed nature of national damages actions, coupled with the close interplay between different constitutive rules, call the viability of treating damages actions at the national level as unitary into question. Damages actions conceptually emerge as a bundle of rules.

The quantification stage of procurement damages particularly needs conceptual and methodological refinement. (Chapter 12)

(22) Positive and negative contractual interest are not congruent with lost profits and bid costs sustained. The causes of action influence the available compensation as some jurisdictions conceive of procurement damages in tort, while others resort to (pre)contractual considerations. Where bid costs and lost profits or *damnum emergens* and *lucrum cessans* are claimed in parallel, an appropriate method of evaluation must be used in order to avoid double counting. Bid costs do not necessarily correspond to *damnum emergens*; the concept of bid costs can be split between the cost of preparation and the cost of participation, or also costs relating to the performance of a contract. The jurisdictions all hold divergent views as to what exactly bid costs are, as well as to whether they are claimable and in parallel to lost profit. The mixed terminology used in relation to heads of damages is highly problematic in light of the CJEU's standard use of *damnum emergens* and *lucrum cessans*, which translate badly into the national legal orders.

(23) The availability of interest is a requirement of EU law; the context indicates that the ECJ regards interest as a head of damage.

(24) The degree of formal and doctrinal separation between the categories of constitutional and quantification criteria varies significantly between jurisdictions. Quantification can occur in the same or a separate legal procedure as the finding of liability. These factors shape the discretion accorded to the judge, which impacts significantly on the ultimate damage award.

(25) The amount of damages received varies with the kind of computation chosen. In pursuing the aim of approximating the actual losses as closely as possible, the pragmatic approach of choosing the valuation methodology according to the available data is well accepted.

(26) Due to the low number of cases and the rarity of explicit treatment of quantification, it is hardly possible to generalize based on the country studies' conclusions. There is considerable room and need for theoretical and methodological refinement regarding the quantification of damages overall, and especially in public procurement.

(27) The available heads of damages and quantification methods are significant in determining the outcomes of legal procedures in monetary terms and are therefore not negligible when it comes to assessing the effectiveness of damages.

The lost chance emerges as a compromise capable of mitigating the typically problematic nature of causation and uncertainty in public procurement constellations. (Chapter 13)

(28) In all of the selected jurisdictions, causality emerged as one of the prime doctrinal issues for successful damages claims. Damages actions in public procurement are most successful where there is acceptance of the lost chance doctrine, independent of the type of lost chance doctrine followed.

(29) The concept of the 'lost chance' takes on three theoretically different forms: the proportional lost chance, lost chance as an autonomous head of damage, and as an alleviation of the burden of proof.

(30) The lost chance theory is debated on a theoretical level in all jurisdictions, but different understandings of the lost chance theory persist alongside one another. Not all countries accept the lost chance at the general level, for example it meets with doctrinal resistance in Germany.

(31) The surveyed countries diverge largely in terms of their recognition of the lost chance, but all of them provide an idiosyncratic solution particular to the field of public procurement. These are, with the partial exception of the German statute on the lost

chance, judge made solutions. In procurement cases, Germany accepts the lost chance in terms of the narrow statutory provision, the Netherlands has applied it in only two judgments, the UK in *Harmon* followed a proportional liability approach, and France exhibits special forms of categorized lost chances.

(32) The consensus across jurisdictions falls shy of constituting a ‘common tradition of the Member States’ regarding a doctrine of lost chance in general or in public procurement specifically.

(33) The lost chance is more easily accepted in special areas of law. Procurement is characterized by factual patterns with typically hypothetical causal relations. To these, the lost chance is a particularly appealing solution which mitigates the interest of aggrieved bidders and contracting authorities at the level of outcome.

(34) At a functional level, the present thesis suggests the adoption of the lost chance approach as it is followed in the French legal system. It has a unique system of categorization of lost chances which connects categories of chances with specific heads of damages. The categories align the causality to the claimable damage, thereby introducing a moderate element of proportionality. This makes a better compromise between adherence to the full compensation principle and the *conditio sine qua non* on the one hand, while at the same time providing an effective solution to accommodate the inherent uncertainty of the typical factual procurement situations.

Member State liability is construed as a form of constitutional liability which is distinct from damages arising under the ‘effectiveness’ postulate of procedural autonomy (Chapter 14)

(35) By analyzing the EU legal system through the lens of legal processes, Member State liability and effectiveness under procedural autonomy can be endowed with diverse damages and liability rationales. Member State Liability damages are a constitutional remedy securing the *systemic and structural functioning* of the EU legal order, while ‘effectiveness’ ensures the *performative function* of EU law.

(36) Member State liability has been vested with a normative framework based on considerations of supranational justice, within which it provides ‘tertiary protection’ of EU integration through the protection of EU rights. Thus conceived, damages awarded under the doctrine of Member state liability are distinct from other types of damages awarded under EU law (‘separation thesis’).

Procedural autonomy as currently used is legally indeterminate and inadequate from the point of view of procedural theory (Chapter 15)

(37) Procedural autonomy was characterized as an indeterminate doctrine in development. Based on procedural theory insights, the thesis formulated three critiques:

(38) The doctrine's inadequate and under-theorized reliance on a distinction between substance and procedure is a problem.

(39) Accepting the separability of procedure and substance gives rise to a trend of trans-substantivity in EU law ('trans-substantivity thesis'), which is reinforced by three mechanisms, namely: the conflation of interpretations rendered in different legal process actions, inter-instrumental spill-over interpretations and the proliferation of taxonomies of rights. The trans-substantive trend results in a procedural law creep, through which the case law on enforcement rules covers increasingly more substantive law.

(40) In public procurement specifically, trans-substantive arguments could have undesirable consequences. For example, the application of the Competition law requirement that lost profit must usually be available would arguably lead to considerable overcompensation in public procurement contexts.

(41) EU law was analyzed as largely articulating an 'accuracy' vision of EU law whereby procedural law is regarded as devoid of intrinsic value. Procedural law always incorporates a balancing of different functions, such as concerns for accuracy and process economy. It is therefore not neutral. This balance ought to be struck according to the specific underlying substantive values at stake, and be interpreted – contrary to trans-substantivity – in a particular fashion that is based on the factual nature of different areas of law ('particularization').

Constructing an adjudicative approach to damages through 'effectiveness' under procedural autonomy (Chapter 16)

(42) The effectiveness criterion of procedural autonomy has been clarified with regards to three dimensions: material, based on the intrinsic connection between enforcement rules and substantive law; vertical, in delimiting the spheres of influence of national and EU courts; and in terms of institutional balance vis-à-vis the EU legislator.

(43) Procedural autonomy is not a competence based argument which precludes the CJEU from entering procedural matters; rather it pursues an institutional allocation akin to proportionality and subsidiarity principles.

(44) Limits to the procedural autonomy doctrine were established on grounds of the material impact of enforcement rules on substantive law. Where rules are 'more' procedural, the intensity of review of the Court lessens. By contrast, the substantive connection of enforcement rules has been shown to necessitate the inclusion of a value balancing exercise. The latter has law-making character, which can be performed by applying proportionality and subsidiarity to the judiciary. The thesis suggests that these principles can be operationalized through emphasis on particularization and the use of comparative law.

(45) Particularization can be achieved through the intrinsic connection between procedure and substance, which results in an interpretation of effectiveness based on the factual interpretations of the underlying EU law, expressing a *commensurability between regulation of violations of EU law and enforcement, substance specific balancing through effectiveness* and interpretation of the remedial landscape, taking into account the relative *contextualized secondary protection surrounding a right*.

(46) Comparative law can be used by the Court in a problemistic fashion - as a tool for problem discovery, as a standard to influence the degree of review, in order to find functional solutions, and in a discursive fashion by acting as an interface between the EU level and the national legal orders in their plurality.

(47) The institutional limits to procedural autonomy derive from the distinct roles a court is allocated as an actor in diverging legal processes. In a vertical direction, the spheres of influence of national and EU courts can be delimited in the preliminary reference procedure based on the separation of law and fact – here, the CJEU's role is confined to interpreting EU law, and does not extend to its application to facts.

(48) In a horizontal direction, the limit is based on institutional allocations vis-à-vis the EU legislator. Procedural autonomy is an adjudicative doctrine and is thus not applicable in the legislative sphere. By contrast, the Court's law-making can be supported by legitimacy considerations pertaining to the expertise of courts and their specific role in the legal process of adjudicating damages. Based on their specific institutional capacities, an argument can be made that the law of damages is 'traditionally' developed by courts.

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