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Debriefing in EU Public Procurement Law: A Critical Enquiry

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DEBRIEFING IN EU PUBLIC PROCUREMENT LAW

A Critical Enquiry

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'Yr wyf drwy hyn yn datgan mai canlyniad fy ymchwil fy hun yw'r thesis hwn, ac eithrio lle nodir yn wahanol. Caiff ffynonellau eraill eu cydnabod gan droednodiadau yn rhoi cyfeiriadau eglur. Nid yw sylwedd y gwaith hwn wedi cael ei dderbyn o'r blaen ar gyfer unrhyw radd, ac nid yw'n cael ei gyflwyno ar yr un pryd mewn ymgeisiaeth am unrhyw radd oni bai ei fod, fel y cytunwyd gan y Brifysgol, am gymwysterau deuol cymeradwy.'

Rwy'n cadarnhau fy mod yn cyflwyno'r gwaith gyda chytundeb fy Ngrichwyliwr (Goruchwylwyr)'

'I hereby declare that this thesis is the results of my own investigations, except where otherwise stated. All other sources are acknowledged by bibliographic references. This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree unless, as agreed by the University, for approved dual awards.'

I confirm that I am submitting the work with the agreement of my Supervisor(s)'

ABSTRACT

The thesis analyses transparency and competition in the procurement process using interdisciplinary studies in diverse fields of the European Union (EU) legal framework for systematic coherence and economic theories and models. The thesis views debriefing as an ideal device for observing those tensions. The main question that this thesis addresses is *whether debriefing enhances the effectiveness of the EU public procurement system?* The EU Parliament and Council's 2014 public procurement package devoted to increasing transparency throughout procedures for higher efficiency and effectiveness and accordingly debriefing is a process meant to lead towards a fair, transparent, and efficient public procurement system. Debriefing is a procurement process designed to provide participants with access to a review of the contract award decision or the way to apply for effective remedies before a contract concludes. There is, however, a consensus that the EU Parliament and Council's 2014 public procurement package has endorsed debriefing with *overload* transparency compliance by the PSD while producing adverse effects on fairness competition. In view of that, this thesis provides a critical enquiry into debriefing by investigating EU public procurement, administrative procedure, competition, and data protection law.

In the dealing with those tensions, thesis takes an objective-oriented approach by designing a specialised *coordinate system* to observe three objectives for regulating debriefing − integrity, fairness, and economic efficiency. This thesis identifies these objectives by exploring the legal effectiveness of the PSD and the RD where debriefing placed in and explains their *concept* by breaking them down into elements, components, and criteria for measurement for further discussion. Align to these objectives, its investigation into economic theories behind debriefing, such as the game, social welfare, auction, and oligopoly, is necessary to develop a combination of economic positivism and legal positivism analysis. In view of this, the thesis explains the principal-agency problem *a priori* detrimental to integrity for a public procurement system, measures the social cost of the procedure in reducing the cost of error and in enforcing substantive rules and, furthermore, forewarns the risk of collusive oligopoly when market players strategically use debriefing for repeated coordination. In addition, this thesis provides that coordinate system by empowering interdisciplinary studies, including the regulatory debriefing integrating the integrity tools of transparency and a monitoring system, a uniform judgement system for developing procedural rights such as of the rights to good administration

and effective remedies in debriefing, the role of the principle of fairness connecting and formulating the data subject rights, confidentiality and trade secrets, the drawbacks of the principle of competition in controlling debriefing and the effectiveness of behavioural competition instruments. These are the main areas of focus for this thesis, which explores how they have and should been managed by using EU legal instruments, such as general principles, fundamental rights, and the Court of Justice of the European Union (CJEU)'s precedents.

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[1] University of London and School of Oriental and African Studies.

GLOSSARY OF ABBREVIATIONS

CJEU	The Court of Justice of the European Union
CFR	The Charter of Fundamental Rights of the European Union[2]
DPS	Dynamic Purchasing System
EU	The European Union
ECHR	The European Convention on Human Rights[3]
EHRC	The Equality and Human Rights Commission
ECtHR	European Court of Human Rights
FA	Framework Agreement
FOIA	The Freedom of Information Act[4]
GPA	The WTO Agreement on Government Procurement[5]
RD	The Review Directive[6]
OECD	Organization for Economic Cooperation and Development
PSD	The Public Sector Directive[7]
UNCITRAL	United Nations Commission International Trade Law
WTO	World Trade Organization

[2] Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.
[3] Formally, the Convention for the Protection of Human Rights and Fundamental Freedoms.
[4] Freedom of Information Act.
[5] Agreement on Government Procurement (as amended 30 March 2012) GPA/113 <https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm#articleXVIII>
[6] Remedies Directives includes Council Directive (EEC) 89/665 that regulates procurement procedures applicable to public supply, public works, and public services (Public Sector Services) and Council Directive (EEC) 92/13 that regulates comparable procedures for entities operating in the water, energy, transport and telecommunications sector (Utilities). These two legal instruments are collectively amended by Council Directive (EC) 2007/66 in a very similar manner. Since this research mainly discusses the review procedures of public sector services, term of RD, hereinafter refers to the amend Council Directive (EEC) 89/665 for the sake of simplicity.
[7] Council Directive (EU) 2014/24 of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65.

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CHAPTER 1

Introduction and Background of the Research

1. Statement of the Issue

The tailored EU procurement directives had been expected for a long time in the EU market integration process and finally came into force in the 1970s by a series of increasingly detailed harmonising procurement directives. Since the principle of transparency has been observed as an approach to directly promoting competition,[8] the Parliament and the Council released a new public procurement package in 2014 to enforce procedures in a more *flexible*, *transparent*, and *efficient* way. This new package of procurement directives includes the PSD, the Utilities Directive,[9] and a new Concession Directive.[10] The EU procurement directives, mainly the PSD, arise from the approximation procedure of Articles 114,[11] 53(1), and 62 under the TFEU.

Meanwhile, the legislative reform for higher transparency of public procurement has caused several concerns, especially anticompetitive effects on the EU single market due to a lack of administrative discretion control and requirements for unlimited disclosure. The *tension* between transparency and competition in the procurement process becomes gradually evident and intense.[12] In order to address that concern, transparency compliance shall consider the dimension of the procurement process that is proportional to the devised *objectives* for a specific stage thereof.

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[8] See Carmen Estevan de Quesada, 'Competition and Transparency in Public Procurement Markets' (2014) 23 Public Procurement Law Review 229, 229.

[9] Council Directive (EU) 2014/25 of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services and repealing Directive 2004/17/EC [2014] OJ L94/243.

[10] Council Directive (EU) 2014/23 of 26 February 2014 on the award for concession contracts [2014] OJ L94/1.

[11] According to Article 114 TFEU, these approximation measures are adopted by the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee. Had the harmonisation measure been adopted, differentiated national provisions which are maintained on grounds of major needs (or relating to the protection of the environment or the working environment) or new rules that should be adopted at domestic level on the same grounds, should be notified by the Member State to the Commission as well as the grounds for maintaining them. The latter has the power to approve them explicitly or tacitly, after a time limit of six months has elapsed without any response. See Chryssoula P Moukiou, 'The Principles of Transparency and Anti-Bribery in Public Procurement: A Slow Engagement with the Letter and Spirit of the EU Public Procurement Directives' (2016) 11 European Procurement & Public Private Partnership Law Review 72, 81.

[12] See detailed literature review in Section 5 of this chapter.

Debriefing is designed to give participants access to a review of the contract award decision or to apply for effective remedies by the provision of information required for their assessment of the problem of legality if worth a complaint before the award of a contract. It is a particular stage with a unique position that overlaps the procurement and the review procedures regulated by the PSD and the RD, respectively. Its unique position entrusts debriefing with the performance of combined regulatory requirements attributed to the PSD and the RD. For that reason, this thesis considers debriefing an ideal device for observing the *tension* between transparency and competition.

Article 55 PSD enshrines debriefing in its employment of transparency obligations to promptly inform those candidates and tenderers of the contract award decision once made. For feasible enforcement, Article 55 PSD purposely outlines the *timings* and *types* of information the candidates and tenderers are entitled to receive by the *end* of their participation in procurement, particularly those participants and candidates who competed in but have failed to win the public contract. For this first moment, those unsuccessful participants are more apt to detect a latent abuse of power by public servants for their own interests according to Article 55(1) PSD (i.e., general notification), [13] as to whether they took those decisions for *public welfare*.[14] Should they require more details for review they can request the contracting authority to reveal certain information based on Article 55(2) PSD (i.e., on request debrief).[15] Considering the need to protect other interests in the procurement competition subject to the *qualified* exemptions,[16]

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[13] Article 55(1) PSD of general notification obligation provides that: '[c]ontracting authorities shall as soon as possible inform *each* candidate and tenderer of *decisions* reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the *grounds for any decision* not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure or implement a dynamic purchasing system' (emphasis added).

[14] Robert D. Anderson, William E. Kovacic and Anna Caroline Müller, 'Ensuring Integrity and Competition in Public Procurement Markets: A Dual Challenge for Good Governance' in Sue Arrowsmith and Robert D Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press 2011), 685. See also Christopher R. Yukins, 'A Versatile Prism: Assessing Procurement Law through the Principal-Agent Model' (2010) 40 Public Contract Law Journal 63, 65-68. Frédéric Jenny, 'Competition and Anti-Corruption Considerations in Public Procurement' in OECD (ed), *Fighting Corruption and Promoting Integrity in Public Procurement* (OECD Publishing 2005), 31. See the discussion in Section 2.1 of Chapter 2.

[15] Article 55(2) PSD provides that: [o]n request from the candidate or tenderer concerned, the contracting authority shall as quickly as possible, and in any event within 15 days from receipt of a written request, inform:

(a) any unsuccessful candidate of the reasons for the rejection of its request to participate,

(b) any unsuccessful tenderer of the reasons for the rejection of its tender, including, for the cases referred to in Article 42(5) and (6), the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements,

(c) any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement,

(d) any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.

[16] Sue Arrowsmith, *The Law of Public and Utilities Procurement*, vol 1 (3rd edn, Sweet & Maxwell 2014), para 13-07.

Article 55(3) PSD,[17] accordingly, provides a broad scope of discretion conferred on the contracting authority to interpret what should be withheld in debriefing.[18]

Article 2a(2) RD sets out debriefing as automatic debrief, which is an obligation *collateral* to the standstill period, also termed the standstill obligation[19] or award notification before the standstill period.[20] The standstill period was created by the CJEU's decision in *Alcatel* case,[21] which established the need for public contracting authorities must leave a period of at least 10 calendar days following notification of a contract award decision and the formal award of contract. With that due announcement, the standstill period takes effect by allowing the unsuccessful participants limited but necessary time to file complaints. Further, the RD develops this announcement into an obligation that also provides unsuccessful participants with 'a summary of relevant reasons' and 'a precise statement of the exact standstill period' applicable.[22] These provisions ensure that unsuccessful participants in the procurement process can apply for interim measures or to set aside unlawful award decisions at the *earliest* moment. In addition, where appropriate, they can seek review for a declaration of ineffectiveness of the contract award or for alternative penalties.[23]

The first and foremost concern is to clarify the EU's regulated objectives for debriefing already recognised by the PSD and the RD that directly govern the award procedure and the review procedure, respectively. These objectives shall direct the debriefing as a critical stage consistent with others throughout the process. A wealth of literature specified in Section 4.1 of this chapter

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[17] Article 55(3) PSD provides that 'contracting authority may decide to withhold certain information (…), regarding the contract award, the conclusion of framework agreements or admittance to a dynamic purchasing system, where the release of such information would impede law enforcement or would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or might prejudice fair competition between economic operators.'

[18] Albert Sánchez-Graells, 'Confidentiality under Reg. 21 Public Contracts Regulations 2015' (*How to Crack a Nut: A Blog on EU Economic Law*, 17 March 2015) <http://www.howtocrackanut.com/blog/2015/03/confidentiality-under-reg-21-public.html> accessed 03 February 2018.

[19] Sue Arrowsmith, para 7-297.

[20] ibid, para 13-41.

[21] The CJEU ruled that the Court ruled that 'Member States are required to ensure that the contracting authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure with which it will conclude the contract is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of obtaining an award of damages'. See Case C-81/98 *Alcatel Austria AG and Others, Siemens AG Österreich and Sag-Schrack Anlagentechnik AG v Bundesministerium für Wissenschaft und Verkehr* EU:C:1999:534, [1998] ECR I-07671, para 43.

[22] Council Directive (EC) 2007/66 of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] OJ L 335/31, Article 1(2a)(2).

[23] See discussion in Chapter 4, Section 3.

reveals that these objectives initially arise from the legal instruments in diverse fields of the EU legal system (e.g., *fairness* from the CFR specified in Chapter 2, Section 3), or were 'borrowed' from the comparable public procurement systems (e.g., *integrity* from the OECD and the WTO specified in Chapter 2, Section 2), or employ the notions from economic theories for understanding (e.g., *efficiency* from the social cost and Pareto-optimality specified in Chapter 2, Section 4).

Integrity is not a typical objective for the EU's procurement procedures, which has been borrowed from the legal systems of US,[24] WTO,[25] and OECD[26] for regulating procurement activities but increasingly affects the EU's counterpart nowadays. In OECD's legal system, integrity signifies a functional compliance framework of the institution, helpful review and accountability, adequate oversight, capacity, resources, and necessary political will for a procurement purpose.[27] For the WTO[28] and US,[29] less integrity otherwise causes enormous economic costs of corruption[30] and violates fundamental rights in running the procurement procedures.[31] In this global trend, the EU's lawmakers have placed importance on integrity,[32]

[24] Omer Dekel, 'The Legal Theory of Competitive Bidding for Government Contracts' (2008) 37 Public Contract Law Journal 237, 241–242. Steven L. Schooner, 'Desiderata: Objectives for A System of Government Contract Law' (2002) Public Procurement Law Review 103, 107.
[25] Robert D. Anderson, William E. Kovacic and Anna Caroline Müller.
[26] OECD, *OECD Recommendation of the Council on Public Integrity* (2017). OECD, 'OECD Principles for Integrity in Public Procurement' <https://www.oecd.org/gov/ethics/48994520.pdf > accessed 28 August 2018. OECD, *Integrity in Public Procurement: Good Practice from A to Z* (2007).
[27] OECD, 'OECD Recommendation on Enhancing Integrity in Public Procurement' in *Implementing the OECD Principles for Integrity in Public Procurement, Progress since 2008* (OECD Publishing 2013) <https://read.oecd-ilibrary.org/governance/implementing-the-oecd-principles-for-integrity-in-public-procurement/oecd-recommendation-on-enhancing-integrity-in-public-procurement_9789264201385-8-en#page1> .
[28] Robert D. Anderson, William E. Kovacic and Anna Caroline Müller.
[29] OECD, *OECD Recommendation of the Council on Public Integrity*. OECD, 'OECD Principles for Integrity in Public Procurement'. OECD, *Integrity in Public Procurement: Good Practice from A to Z*.
[30] As EC estimates EU MEMBER STATES lost around 120 billion and up to 20–25% of the value of public contracts each year to corruption. See OECD, 'Are Governments Capable of Mitigating Risks of Waste and Corruption?', 78.
[31] Corruption and its consequences could be a violation of human rights, especially, socio-economic rights as concluded by international human rights instruments. See Sope Williams-Elegbe, 'Integrity and Efficiency in Sustainable Public Contracts: Balancing Corruption Concerns in Public Procurement Internationally (Book Review)' (2016) 25 Public Procurement Law Review 114, 115. See also, Gabriella M. Racca and Roberto Cavallo Perin, 'Corruption as a Violation of Fundamental Rights: Reputation Risk as a Deterrent Against the Lack of Loyalty' in Gabriella M. Racca and Christopher R. Yukins (eds), *Integrity and Efficiency in Sustainable Public Contracts* (Bruylant 2014) <https://ssrn.com/abstract=2461594> .
[32] Gabriella M. Racca and Daniel Gordon, 'Integrity Challenges in the EU and US Procurement Systems' in Gabriella M. Racca and Christopher R. Yukins (eds), *Integrity and Efficiency in Sustainable Public Contracts: Balancing Corruption Concerns in Public Procurement Internationally* (Bruylant 2014). Gabriella M. Racca and Christopher R. Yukins, 'Steps for Integrity in Public Contracts' in Gabriella M. Racca and Christopher R. Yukins (eds), *Integrity and Efficiency in Sustainable Public Contracts: Balancing Corruption Concerns in Public Procurement Internationally* (Bruylant 2014). Gian Luigi Albano and Roberto Zampino, 'Strengthening the Level of Integrity of Public Procurement at the Execution Phase: Evidence from the Italian National Frame Contracts' in Gustavo Piga and Steen Treumer

such as the Integrity Pacts, expecting this to be critical in avoiding fraudulent practices and promoting a transparent procurement process.[33]

Fairness, especially procedural fairness, [34] is deemed an objective for procurement procedures other than integrity by most academic commentary.[35] Simultaneously, fairness underlines the EU legal rules for administrative procedure, including the general principles settled by the CJEU's case-law, and CFR fundamental rights related to administrative procedures. This linkage turns to be a leverage to obtain a reinstated substantive protection for the procedural rights owed to procurement players from the broader EU framework. In the words, those procedural rights endowed by the PSD and the RD can trace their legal source to the general principles of EU administrative procedural law, [36] particularly the principles of good administration,[37] the right to an effective remedy[38] and the duty to state reasons.[39]

The tailored EU procurement directives had been in development for a while in the EU market integration process and finally came into force in the 1970s through a series of increasingly detailed harmonising procurement directives. That process also unveils a phenomenon that EU

(eds), *The Applied Law and Economics of Public Procurement* (Taylor and Francis 2012). European Commission, 'Fighting Corruption in the EU (Communication)' COM/2011/0308 final.

[33] An Integrity Pact is a contract between a contracting authority and economic operators bidding for public contracts, aiming at improving transparency and accountability in the field of public procurement, in cooperation with Transparency International on selected projects. See European Commission, 'Integrity Pacts' <https://ec.europa.eu/regional_policy/en/policy/how/improving-investment/integrity-pacts/> accessed 12 March 2020.

[34] Formal or procedural equality refers to the identical treatment to everyone according to, for example, rules, criteria, and processes. Any different treatment for any purpose will be considered as a discrimination that runs against the principle of equality. For instance, each lottery ticket endorses an equal chance of winning. The winner is selected by drawing lots but treated in a same procedure or process with other buyers. See also Omer Dekel (n 23), 250.

[35] ibid (n 23), 253-56.

[36] Diana-Urania Galetta and others, *The General Principles of EU Administrative Procedural Law* (Directorate General For Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, European Parliament, 2017), 16-19.

[37] As one of the first documents dealing with the principles of good administration, Resolution 77(31) on the Protection of the Individual in Relation to the Acts of Administrative Authorities. The Resolution contains *five* fundamental principles: the right to be heard; the right of access to information; the right to assistance and representation; the obligation to provide reasons for decisions; and finally, the obligation to notify affected parties of remedies available against an act of the administration. However, the Resolution did not use the term 'good administration'.

[38] Case 85/76 *Hoffmann-La Roche v Commission* [1979] EU:C:1979:36 ECR 1979-00461, para 9. See also, Case C-450/06 *Varec SA v Belgian State* EU:C:2008:91 [2008] ECR I-00581 (Case C-450/06 *Varec*), where the CJEU confirms Article 6(1) of the ECHR as it provides that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal (…)'.

[39] The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the public authority which adopted the measure in such a way as enable the persons concerned to decide if they want to defend their rights by an application for judicial review. See Case C-269/90 *TU München v Hauptzollamt München Mitte* [1991] ECR I-5469, paras 14, 26.

procurement law has potentially embraced the mandate of the EU internal market – economic efficiency – as its own objective for regulation in the regime. Generally, economic efficiency can properly manifest itself in economic notions, such as *Pareto optimality* and *social costs of the procedure* (see discussion in Section 4, Chapter 2). The EU competition and procurement rules evolve from that integration process contribute to the economy and society by constructing a long-term market competition from economists' viewpoint.[40] To be precise, the EU competition rules aim to realise the economist's prospect for competition to maximise *consumer* welfare by encouraging competitive behaviours of market players across the EU single market.[41] In comparison, the EU procurement rules maximise social welfare by ensuring the public fund is *wisely* spent and adequately accountable by the contracting authority on behalf of society.[42] From this viewpoint, the EU's procurement law and competition law take the similar roles in deterring tacit collusion and coordination that demolishes the welfare-maximising allocation.

The thesis thus requires evaluations of those legal notions by employing a *doctrinal method* and a *normative approach*. To be specific, the *doctrinal* evaluation of those legal instruments includes the general principles of EU law (e.g., principles of good administration, adversarial and effectiveness), the fundamental rights of the CFR (i.e., Articles 8, 41 and 47), the data subject rights of the GDPR as well as the EU procurement (i.e., Article 55 PSD), remedies (i.e., Article 2a(2) RD) and competition rules (e.g., Article 101 TFEU). The *economic theories*, *models*, and *approaches* supplement a legal study as a premise when necessary for describing the public procurement market structure, principal-agent problem, the social cost of the procedure, the maximum social welfare, and the risk of tacit collusion. To conclude, this research explores the enforcement effectiveness of debriefing using doctrinal research and law and economics from the standpoint of *objectives-achievement* in a dynamic balance.

[40] Catriona Munro, 'Competition Law and Public Procurement: Two Sides of the Same Coin?' (2006) Public Procurement Law Review 352, 352.
[41] Competition rules normally embrace the views of economists on competition in respect of performance, that is, whether or not they have advanced the main objective of consumer welfare-maximising by encouraging competitive behaviours of market players. Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, vol 3 (4th edn, Wolters Kluwer Law & Business 2015) 100a.
[42] Robert D. Anderson, William E. Kovacic and Anna Caroline Müller 685. See also Christopher R. Yukins, 65-68. Frédéric Jenny, 31.

2. Research Questions and Structure of the Thesis

This research proposes a critical enquiry about the design of debriefing under the EU legal framework for public procurement: '*whether debriefing has been designed to enhance the effectiveness of the EU public procurement system?*' In doing so, the thesis provides six chapters. This introductory chapter lays the foundation for the thesis, introducing the issue, the main research questions, the structure of the thesis and its research methodology, and a literature review. The thesis identifies four research questions that are explored in the subsequent chapters, respectively.

Research Question 1: *what should be the debriefing objectives under the EU public procurement system, and are they justifiable in economic theories?*

Chapter 2 advocates for objectives of integrity, efficiency, and fairness, which enhance debriefing's effectiveness among the procurement process. Because the EU's public procurement and remedies rules both govern debriefing, there remains a lack of *legal certainty* about its objectives. This chapter thus clarifies the *definition*, *elements*, and *components* of the regulatory objectives for debriefing set out by the EU's legislation and policies, especially those concerning the public procurement and remedies fields. The chapter reviews the regulated goals of those fields and selects three objectives that should serve as the enforcement of debriefing. For comprehensive justification, this chapter also examines the objectives that have already been defined for comparable public procurement systems, such as the OECD and the WTO. The thesis employs a *doctrinal method* and *normative approach* to interpret the legal notions in relation to debriefing with essential *economic* theories and models for justification, including the principal-agent problem, Pareto-optimality model, social costs of procedure and auction theory. In response to those objectives, subsequent chapters evaluate legal methods to analyse debriefing under the EU's public procurement system through interdisciplinary research on diverse fields of the EU legal framework.

Research Question 2: *has debriefing ensured the integrity of the EU public procurement system by properly using applicable mechanisms in compliance with the general principles of EU law, such as promoting greater transparency or formulating effective access to a monitoring system?*

Chapter 3 studies integrity tools, especially the *transparency*, *sanctions*, and *monitoring mechanisms* that *economists* would advise to address the principal-agent problem enshrined in EU public

procurement law.[43] Nonetheless, those tools for preventing integrity violations, especially the primary one, *corruption*, are somewhat restricted to some features that harm their potential functions,[44] and therefore it needs to be explored in the setting of debriefing. The chapter then reviews the *procedural requirements* for debriefing, Article 55 PSD on transparency obligations[45] and Article 2a(2) RD on automatic debrief collateral to the standstill period that provides unsuccessful bidders with access to effective remedies. Those mechanisms have been considered as mainly devoted to preventing corruption within the EU public procurement system.[46] This chapter aims to address whether those integrity tools have *de facto* enforced in a manner consistent with the general principles of the EU law, principles in Article 18(1) PSD (e.g., see the principles of transparency and proportionality in Section 2.1), and in Article 1 RD (e.g., see the principle of effectiveness in Section 3.1).[47] To bolster arguments, the chapter compares equivalent provisions under other public procurement systems, such as the GPA, the UNCITRAL Model Law on Public Procurement, and the OECD.

Research Question 3: *has debriefing respected the rights of unsuccessful bidders in the public procurement process, particularly the rights of defence and the right to review and effective remedies entitled by the fundamental rights and general principles at the EU level? accordingly, how have those rights been balanced with the rights of confidentiality?*

Chapter 4 reveals that transparency shall serve the requirement for *due process* that entails respecting the rights of economic operators in procurement procedures and *balancing* those rights with *confidentiality* rights owed to the third parties.[48] Under the EU legal framework, those procedural rights are codified by EU case-law and the CFR that acquired the same legal status

[43] OECD, *Integrity in Public Procurement: Good Practice from A to Z*, 29 and 89.
[44] Gabriella M. Racca and Christopher R. Yukins 6-8.
[45] Sue Arrowsmith, see ch13.
[46] Transparency is considered as essential to ensuring the integrity of the public procurement system as it prevents or at least reduces the risk of corruption in public procurement markets and helps to verify the effectiveness of the principle of equal treatment. See Carmen Estevan de Quesada, 240.
[47] The terminology of 'effectiveness' within the scope of this thesis refers to a functioning monitoring system within which the procedural rules must be rendered practically and timely (see Section 3, Chapter 3) or to the protection of the ability to exercise the rights conferred by EU law from any challenges (see Section 3, Chapter 4). These requirements somehow indicate the level of legal effectiveness in respect of their applicability to various situations and coherence with the EU legal framework. To distinguish, the term of 'effectiveness' alone does not refer to the cost-effectiveness in this thesis, which is a criterion for estimating economic efficiency, as discussed in Section 4.1, Chapter 2.
[48] D. Daniel Sokol, 'The New Procedural Fairness in Competition Law: Global Developments' (2019) 10 Journal of European Competition Law & Practice 197, 197.

as the Treaties and entered into force as a part of the Treaty of Lisbon.[49] This chapter reviews the transposed procedural rights under the PSD and the RD, such as the right to be heard, the right to review the award decisions and the right to effective remedies concerning their *interaction* with Articles 41 and 47 CFR for the *coherence* of the EU legal system. For that concern, this chapter suggests those transposed procedural rights for procurement participants could be interpreted into more specific aspects of the rights to good administration and to effective review and remedies under the CFR from the viewpoint of the CJEU. In this regard, the administrative acts towards the substantive protection of those procedural rights at the EU level can improve the procedural fairness 0f the procurement procedure where they are applicable. In addition, this chapter discusses the method to balance the procedural rights with those confidentiality rights when considering fairness as a connecting factor to employ the enforcement mechanisms from the different regimes of the EU's law. Those fields include fundamental rights, public procurement, and competition and data protection rules. Those rights of confidentiality include the right to the trade and business secrets set as a general principle of the EU case-law, the right to designate information as confidential arising from the common law before being introduced into the EU's law and the rights of data subjects owing its origin from the CFR and TFEU.

Research Question 4: *has debriefing unduly disadvantaged certain tenderers under Article 18(1) PSD by allowing tacit collusion or improper behaviours among tenderers in public procurement markets, which otherwise breach the EU's competition rules, such as Article 101 TFEU?*

Chapter 5 continues to review the EU's legal instruments arising from public procurement and competition law, considering their roles in deterring tacit collusion and coordination that demolishes the welfare-maximising allocation. That study follows a discussion about economic efficiency as an objective for regulating the debriefing design in the regime of EU public procurement, which can properly manifest itself in notions, such as *Pareto optimality* and *social costs of the procedure*. This chapter reclaims the concern that such practice for unlimited transparency tends to increase the tension between competition and transparency in the EU's

[49] Treaty of Lisbon is noted for including the Charter of Fundamental Rights of the Union (CFR) as binding primary law. The Charter of Fundamental Rights is not incorporated directly into the Lisbon Treaty but acquires a legally binding character through Article 6(1) TEU, which gives the Charter the same legal value as the Treaties. See Ottavio Marzocchi, 'The protection of fundamental rights in the EU' (*European Parliament: Fact Sheets on the European Union*, May 2019) <https://www.europarl.europa.eu/factsheets/en/sheet/146/the-protection-of-fundamental-rights-in-the-eu> accessed 28 December 2019.

public procurement law regime.[50] To be precise, this chapter initially provides an economic study that interprets the occurrence of *tacit collusion* due to the *oligopolistic* public procurement markets, a behavioural model of tacit collusion and a long-term model of the *repeated interactions* in the similar *auction allocation mechanism*. The chapter then offers a legal analysis to discuss the approaches to preventing tacit collusion or improper practices for coordination by comparing the procurement with competition rules. The PSD imposes higher transparency on debriefing to stimulate open competition across the EU single market considering Article 18(1) PSD and TFEU fundamental principle of free movement.[51] However, that legal instrument has failed in capturing coordination, collusion or improper practices among the bidders in the *oligopolistic-featured* public procurement markets, whereas those are debarred by EU competition law.[52] Therefore, the research considers the EU's competition tools to supplement the EU's procurement tools for tracking collusive behaviours in the public procurement markets.[53]

3. Research Methodology

In this thesis, the author has chosen to adopt the research methodology of doctrinal research and law and economics for a specialised design of a coordinate system for debriefing in achieving integrity, fairness, and economic efficiency. Doctrinal research is explained to minimise *inconsistencies* in explaining different sources of EU law that regulate debriefing in Subsections 3.1. Law and economics are explained to elaborate on *how* the notions of economic efficiency, Pareto-optimality, and social costs of procedure have related to debriefing and *why* that should be designed as a proxy for maximising social welfare in Subsection 3.2.

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[50] David Lewis and Reena Das Nair, *Fighting Corruption and Promoting Competition* (OECD, DAF/COMP/GF(2014)1, 2014). OECD, 'Collusion and Corruption in Public Procurement (Policy Roundtable)' <http://www.oecd.org/competition/cartels/46235399.pdf> , 4-6; OECD, 'Public Procurement: The Role of Competition Authorities In Promoting Competition (Policy Roundtable)' <http://www.oecd.org/competition/cartels/39891049.pdf> , 188-91.

[51] It is admitted that some transparency rules set out in the PSD, despite their pro-competition purpose, allow increasing risk of tacit collusion in oligopolistic public procurement markets. See Carmen Estevan de Quesada, 229.

[52] The Guidelines for the application of Article 101 of the TFEU have identified the characteristics of the oligopolistic markets essential for acting in tacit collusion in markets. Those characteristics include transparency, concentration, non-complexity, symmetry, and stability. See Commission, 'Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements' (Communication) [2011] OJ C11/01, para 77. Hereinafter referred to as Article 101 TFEU Guidelines.

[53] Tacit collusion is sometimes referred to as 'tacit co-ordination'. This thesis uses the expression 'tacit collusion', given that it is generally adopted both in economic and legal literature. Richard Whish and David Bailey, *Competition Law* (9th edn, Oxford University Press 2018).

3.1. Doctrinal Research

Doctrinal research is still necessary for most legal research projects, although this claim is countered by scholarship that calls for a challenge to the traditional approach to legal research.[54] Doctrinal research is claimed to be qualitative as it does not involve statistical analysis of the data. In contrast, the social-legal study employs methods taken from other disciplines to generate empirical data to answer research questions. Thus, it can adopt either qualitative or quantitative research approaches.[55] The doctrinal approach prominently features an accurate and coherent description of the law rather than scientific theories about it.[56] The doctrinal method has a place in ensuring that the researcher's analysis is technically sound from a legal perspective, and legal scholars shall be encouraged to broaden their views and to consider such analysis in economic dimensions. Carrying out legal research without assessing its economic implications and without incorporating the insights of economic theory is unsatisfactory.[57]

In addition, Terry Hutchinson observes that doctrinal research has been gradually absorbing interdisciplinary methods for its transition of law enforcement, especially in common law jurisdictions.[58] Legal professionals have realised its limited scope and vague concepts even within the discipline of law.[59] Thus, they are inclined to introduce statistics, comparative perspectives, social science evidence and methods and theoretical analysis from other disciplines into their reasoning to strengthen their recommendations for law reform. Despite that, legal academia has been measured within a doctrinal methodology framework, which includes the tracing of legal precedent and legislative interpretation. The essential features of doctrinal scholarship involve 'a critical conceptual analysis of all relevant legislation and case-law to reveal a statement of the law relevant to the matter under investigation'.[60]

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[54] Fiona Cownie and Anthony Bradney, 'A Challenge to the Doctrinal Research' in Dawn Watkins and Mandy Burton (eds), Research Methods in Law (2nd edn, Routledge 2018) 40

[55] Wing Hong Chui, 'Quantitative Legal Research' in McConville Mike and Hong Chui Wing (eds), Research Methods for Law (Edinburgh University Press 2007) 46-47.

[56] Khadijah Mohamed, 'Combining Methods in Legal Research' (2016) 11 The Social Sciences 5191, 5193.

[57] Albert Sanchez-Graells, 'Economic Analysis of Law, or Economically Informed Legal Research' in Dawn Watkins and Mandy Burton (eds), Research Methods in Law (2nd edn, Routledge 2018) 173.

[58] Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law'8 Erasmus law review 130, 130-33.

[59] William Twining, Taylor Lectures 1975 Academic Law and Legal Development (1976) (Lagos: University of Lagos Faculty of Law).

[60] Terry Hutchinson, 'Valé Bunny Watson? Law Librarians, Law Libraries and Legal Research in the Post-Internet Era' (2014) 106 Law Library Journal, 584.

The doctrinal research method, to be more specific, seeks to establish the state of the law, highlight the legal uncertainty, and *minimise* the sort of irregularities within the EU legal system in terms of the regulation of public procurement. The EU's law comprises three sources under the *legal hierarchy* – the EU's primary legislation (e.g., Treaties), secondary legislation (e.g., directives) and general principles of EU case-law.[61] The EU's primary legislation directly and entirely binds on the Member States. In contrast, the secondary legislation indirectly binds the Member States by allowing them to transpose such into their national law with absolute discretion.

Chapter 3 provides a detailed discussion about the legislative history of debriefing from the TFEU, the PSD and the RD and the CJEU's precedents, according to that legal hierarchy, which seeks to minimise *inconsistencies* in explaining different sources of EU law. Chapter 3 also conducts a comparative analysis with those enshrined under other public procurement systems, including the OECD, WTO law and the UNCITRAL Model Law. In addition, Chapter 4 introduces the interplay between the transposed procedural rights ensured by debriefing rules in the PSD and the RD with the fundamental rights under the CFR and the general principles of the EU's administrative law, where those procedural rights originally arose from the coherence in those regimes.

3.2. Law and Economics

As Guido Calabresi distinguishes, law and economics 'begin with an agnostic acceptance of the world as its is' and 'looks to *whether* the economic theory can explain that world'.[62] In contrast, Economic Analysis of Law uses economic theory to analyse the legal world. As a result of that examination, it confirms cases doubt upon and often seeks to reform the legal reality.[63] As Calabresi suggests, researchers of Economic Analysis of Law ignored 'real-world' data while reaching out for conclusions on social desirability. Instead, he prefers the law and economics that does not view the law as a stranger and attempts to understand the law, or the legal system, as it is.

[61] EUR-Lex, 'Sources of European Union law' (*EUR-Lex*, 2017) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al14534> accessed 23 December 2019.
[62] Guido Calabresi (ed) *The Future of Law and Economics: Essays in Reform and Recollection* (Yale University Press 2016) 2.
[63] ibid, 3-5.

Keith N. Hylton further divides economic analysis[64] and legal analysis into two separate camps, the former into economic positivism and economic normativism, and the latter into legal positivism and legal non-positivism.[65] *Distinctions* between these models generate *four* categories in the sequence they are combined: first, economic positivism and legal positivism; second, economic normativism and legal positivism; third, economic positivism and legal non-positivism and fourth, economic normativism and legal non-positivism. For Hylton, this thesis focuses on the *first* category in his application – a *combination* of economic positivism and legal positivism. In this category, legal positivism starts with certain principles of the law that only consist of rules in the statute book and case reports based on legal positivism.[66] Then this thesis comes to the positivist economic approach to test whether the existing modules of the law fit in a legal setting in a manner otherwise economically justifiable,[67] particularly regarding the incentives to comply with the law.[68]

Chapters 2 interprets the notion of economic efficiency in both *normative* and *narrative* dimensions. The normative dimension for the economic analysis of law rests on the pursuit of economic efficiency as a *proxy* for *maximising* social welfare.[69] Welfare economics is usually divided into two parts relating to production and distribution.[70] Production is far more critical for developing social welfare and includes all pertinent proposals to aggregate production.[71] The welfare economic analysis of a legal rule assesses the aggregated benefits (i.e., the

[64] Economic analysis has generally been divided into two approaches, first is to explain the legal system as it is and second is to recommend changes that might improve it. Economists also denote two approaches respectively as positive economics and normative economics. See A Mitchell Polinsky, An Introduction to Law and Economics (Aspen Casebook) (5th edn, Aspen Publisher 2018) xix.

[65] Keith N. Hylton, 'Law and Economics versus Economic Analysis of Law' (2018) European Journal of Law and Economics 1, section 2.

[66] In the positivist model of legal analysis, religious norms, conventions of behaviour, and moral system cannot be viewed as sources of law. Therefore, as Hylton defined, legal positivism assumes that the only source of law is provided by the state (though statute books), case reports, and administrative agencies. Hylton also considers Posner as an obvious legal positivist who takes the relevant law as that enshrined in case reports and statutes instead of that 'discovered' as Leoni described. See ibid, section 2.

[67] This positive economic approach starting with the law is fundamentally different from normative economic approach that, by contrast, seeks to design optimal institutions or to reform existing institutions towards optimality as defined by the researcher. For example, it may set out an objective function for the tort system and attempts to provide rules that may satisfy the objective function. See ibid, section 2.

[68] Hylton elaborates that the positive economic approach to law seeks to determine if actors comply with the law in equilibrium, and whether the compliance equilibrium is efficient. It is also noted that economically efficiency and legal compliance are distinct concepts. Also, Hylton suggests that the efficiency hypothesis is better viewed as secondary to the analysis of incentives to comply. See ibid., section 2.

[69] Peter Bohm, *Social Efficiency: A Concise Introduction to Welfare Economics* (2nd ed, London: Macmillan 1987).

[70] A. C. Pigou, *The Economics of Welfare* (3d ed. edn, London, Macmillan and co., limited 1929).

[71] These proposals include, for example, the stimulation of employment, the equalisation of social net products, and the equalisation of prices with marginal costs. See Kaldor Nicholas, 'Welfare Propositions of Economics and Interpersonal Comparisons of Utility' (1939) 49 The Economic Journal 549-51.

'production') of the law enforcement that shall exceed the potential costs of that. That concept is also the idea behind the EU's single market to promote free movement of goods and services and the human resources and capital required.[72]

Law and economics also have much to say about a proper design of a procedural system. From a normative standpoint, an ideal procedure is to fashion rules that efficiently enforce substantive law in the sense of minimising social costs (i.e., cost of error and the cost of procedures used to reduce error) associated with enforcement. A procedure shall be devoted to reducing the risk of error by enabling the discovery of relevant facts and evidence, testing the accuracy of factual and legal propositions, preventing undesirable settlements, etc.[73]

Chapter 2 also uses the narrative dimension of economic analysis of law to explain the economic efficiency, which considers public procurement as a working tool of the public sector subject to a competition appraisal. In this respect, public procurement acts as a market-like mechanism oriented towards the operation of the previously defined projects in the most efficient way.[74] After the economic crisis, the increasingly budgetary constraints demand more efficiency than before due to the sheer government expenditure on goods, services and works.[75] The EU's regulations require the principles of economy and efficiency. As a result, the last reform of the EU's legal framework for public procurement focused on promoting economic efficiency.[76] Transparency is also necessary to fight corruption for economic efficiency in the public procurement setting.[77] However, transparency levels need to be measured depending on specific features of the procurement procedure, such as debriefing, and the desirable objectives concerned.

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[72] For example, where an economic regulator is seeking specific information on the operations of a regulatory framework, an environmental regulator may also be seeking similar information. The quality-price ratio best for municipal public contracts may not be best or cost-effective for rural or dispersed public contracts with fewer customers and higher costs. To that regard, welfare economic analysis is to increase overall economic welfare both for the country of origin and of receiving. See Abby Semple, A Practical Guide to Public Procurement (Mark Cook ed, Oxford University Press 2015), para 2.08.

[73] Robert G Bone, 'Economics of Civil Procedure' in Francesco Parisi (ed), *The Oxford Handbook of Law and Economics*, vol 3: Public Law and Legal Institutions (Oxford University Press 2017) 143.

[74] Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules* (2nd edn, Hart Publishing 2015) 77.

[75] The figure indicates that public procurement accounts for more than 15% of the Gross Domestic Product (GDP) in OECD countries. OECD, 'Competition in Bidding Markets' Policy Roundtables <http://www.oecd.org/competition/cartels/38773965.pdf> accessed 20 August 2018 23. As for the Member States of European Union, the corresponding figure of EU GDP has decreased slightly since 2009, when it was estimated at 20%; in 2010 the percentage fell to 19.7% and in 2011 it fell still further to 19%. See Commission, 'Annual Public Procurement Implementation Review 2013' SWD(2014) 262 final, 5.

[76] Commission, 'Single Market Act Twelve levers to boost growth and strengthen confidence 'Working together to create new growth" COM/2011/0206 final, 19.

[77] David Lewis and Reena Das Nair, 4-6.

4. Literature Review

The literature review is premised on discussions, covering *two* principal concerns: ambiguous objectives for debriefing as discussed in Subsection 4.1 and tensions between transparency and competition in debriefing as discussed in Subsection 4.2.

4.1. Ambiguous Objectives for Debriefing

Academia has identified several objectives for the entire public procurement system, such as integrity, equality, efficiency, competition, and transparency.[78] A discussion concerning the objectives of public procurement rarely relates to their implications for the design of debriefing and its enforcement. Despite that, there remains a debate about the objectives of debriefing in some respects that fits in the regime of EU public procurement. For instance, Albert Sanchez-Graells notes the need to ensure that unsuccessful tenderers receive information *necessary* to review the contracting authority's decisions and defend their rights (particularly within the review procedure).[79] According to this, Sanchez-Graells considers such disclosure should be given to the *minimum* extent required to ensure the adequate protection of economic operators' rights to review the responsible authority's decisions.[80] Following this argument, he referred to the fundamental rights of the CFR, in particular, Article 41 on the right to good administration in his later research as a way to manage the intent of the public authority as regards the disclosure of information for the effectiveness of debriefing.[81]

Sue Arrowsmith stresses that requirements for debriefing should enable unsuccessful tenderers to monitor the procurement process,[82] such as deciding whether to make a legal challenge, and

[78] Albert Sanchez-Graells discusses competition (value for money, or best value), efficiency (of public procurement itself), transparency (oversight, anti-fraud objectives) and market integrity (a purely European goal), and then argues that public procurement should have competition, transparency, and efficiency as its main goals. See Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules*, 101-13. Omer Dekel indicates that the public tender mechanism is meant to serve three objectives: (1) to ensure integrity in the awarding of contracts and to prevent contracting tainted with favouritism, conflicts of interest, or corruption; (2) to allow Government to engage in economically efficient contracting; and (3) to provide an equal opportunity to all members of society to compete for the economic advantage inherent in contracting with the Government. See Omer Dekel, 241-55. Steven L. Schooner addresses nine goals frequently identified for government procurement systems: (1) competition; (2) integrity; (3) transparency; (4) efficiency; (5) customer satisfaction; (6) best value; (7) wealth distribution; (8) risk avoidance; and (9) uniformity. See Steven L. Schooner, 103.

[79] Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules* 444.

[80] ibid 444.

[81] Albert Sanchez-Graells, 'Assessing the Public Administration's Intention in EU Economic Law: Chasing Ghosts or Dressing Windows?' (2016) 18 Cambridge Yearbook of European Legal Studies 93, 114–16. See also, for more detailed discussion in Subsection 4.

[82] Sue Arrowsmith, para 13-20.

the relevant provisions must be interpreted in line with this aim.[83] However, that statement is ambiguous considering its implications on the degree of disclosure throughout debriefing. On the one hand, it is far *less* demanding to provide economic operators with more performance feedback while ensuring confidentiality in Article 21 PSD. In this way, economic operators can exercise oversight in a transparent procurement process for integrity.[84] On the other hand, it is not necessary to give economic operators more information beyond what is essential to understand whether there could be the sorts of infringements and whether they should make a complaint with the possibility of success.

4.2. Tensions Between Transparency and Competition in Debriefing

Carmen Estevan de Quesada restated that when applied to the oligopoly problem,[85] game theory shows that tacit collusion (i.e., non-cooperative oligopolies) can only occur in markets with specific characteristics.[86] In such oligopolistic public procurement markets, that means suppliers realise sooner or later the economic interdependence, not necessarily employing express agreements but simply by rationally adapting their actions to these of others. Those oligopolists (i.e., suppliers) as a group could behave like a monopolist and create the well-known effect of *supra-competitive prices* to the detriment of consumers (i.e., public buyers).

Furthermore, Quesada argued that despite the pro-competition design of procurement procedures, this risk of tacit collusion was increased by some transparency rules under the PSD, such as Articles 55(2) on the on-request debrief. Indent (c) thereof entitles unsuccessful tenderers to request the successful tenderers' name and the selected tender's characteristics. However, Quesada considers that such regulation provides these tenderers, oligopolists in public procurement markets, with a strategic tool to monitor *deviances* from coordinated conduct among them, and therefore helped implement *sanctions*.[87] Despite that, Quesada did not in

[83] ibid, para 13-20.
[84] Gabriella M. Racca and Christopher R. Yukins 2–5. For more detailed discussion about the integrity as an objective for debriefing, concerning its concepts, elements and requirements concerning public procurement and debriefing, see Section 2, Chapter 2. For a further examination about the integrity tools used to prevent integrity violations, especially corruption concerns for optimal debriefing design, see Chapter 3.
[85] Oligopoly fits conceptually between the extremes of monopoly and perfect competition, but its study requires a rather different set of tools of game theory. Oligopoly presents strategic interactions among rival firms, a subject well suited for game-theoretic analysis. See Carl Shapiro, 'Chapter 6 Theories of Oligopoly Behavior' in *Handbook of Industrial Organization*, vol 1 (Elsevier 1989) 329-414. For a general presentation, see also James W. Friedman, *Oligopoly Theory* (Cambridge University Press 1983) 207-26.
[86] Economic literature has identified specific market characteristics essential for tacit collusion to appear in a market: transparency, concentration, non-complexity, stability, and symmetry. For the detailed discussion, see Carmen Estevan de Quesada, 232-34. See also, Article 101 TFEU Guidelines, para 77.
[87] See Carmen Estevan de Quesada, 243.

additional discuss indent (d) that entitles *any* tenderer to request the disclosure of 'conduct and progress of negotiations and dialogue with tenderers' to an extreme extent in terms of indent (c).

Sanchez-Graells put forwarded the issues to be dealt with concerning the risk for strategic use of bid protest mechanism (i.e., review procedures),[88] which particularly distressed the design of debriefing in this thesis. On the one hand, tenderers would attempt to acquire business secrets or other sensitive information forwarded by its rivals to unfairly compete with the affected tenderer in later tenders,[89] which was already in breach of Article 21 PSD on confidentiality.[90] On the other hand, excessive disclosure would increase transparency and, therefore, facilitate or strengthen collusion between tenderers. [91] To resolve the issues, Sanchez-Graells recommended that the competent contracting authority *limit* the disclosure to the *minimum* extent required to ensure the adequate protection of the rights of the applicants for a balance of interests.[92]

To be specific, Sanchez-Graells devoted several solutions to settling the above issues in his continuous research. First, Sanchez-Graells claimed that the contracting authority should consider the potential restrictions or distortions of competition of the disclosure.[93] Article 55 PSD on debriefing obligations already contains this issue under its indent (3), which allows the contracting authority to withdraw certain information at its discretion 'where the release of such information (…) might prejudice fair competition between economic operators'. Despite that, in the exercise of such discretion, Sanchez-Graells advised that the contracting authority should be responsible for justifying the *adverse effects* that the withholding of information seeks to

[88] Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules* 445.
[89] Andy Bertron, 'Conflicts Between the Sunshine Law and Trade Secret Protection in Public Procurement' (2002) LXXVI The Florida Bar Journal 36, 36.
[90] Sue Arrowsmith, John Linarelli and Don Wallace, *Regulating Public Procurement: National and International Perspectives* (Kluwer Law International 2000) 453-57. Sue Arrowsmith, 634-36.
[91] Giancarlo Spagnolo and others, 'Preventing Collusion in Procurement: A Primer' in Nicola Dimitri, Gustavo Piga and Giancarlo Spagnolo (eds), *Handbook of Procurement* (Cambridge University Press 2006) 352-53. See also, William E. Kovacic and others, 'Bidding Rings and the Design of Anti-collusive Measures for Auctions and Procurement' in Nicola Dimitri, Gustavo Piga and Giancarlo Spagnolo (eds), *Handbook of Procurement* (Cambridge University Press 2006) 402.
[92] Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules* 445.
[93] See also, Albert Sánchez-Graells, *Three Recent Cases on EU Institutions' Procurement and One Common Theme: Good Administration and Confidential Information (T-498/11, T-91/12 & T-199/12)* (How to Crack a Nut: A Blog on EU Economic Law 2 October 2014). Albert Sanchez-Graells, *The Difficult Balance between Transparency and Competition in Public Procurement: Some recent trends in the case law of the European Courts and a look at the new Directives* (University of Leicester School of Law Research Paper No 13-11, 2013).

avoid based on the duty to give reasons in the case-law.[94] Second, Sanchez-Graells considers that obligation can be underlined by general rules within the national legislation relating to the widespread application of business secrets and other commercially sensitive information. Third, Sanchez-Graells further argued for the respect of self-standing rights under Article 41(2) CFR on the right to good administration, specifically, the obligation to give reasons in indent (c),[95] which arises from the general principle of good administration.[96]

Compared with Quesada's standpoint, Sanchez-Graells's first approach is arguable as it overlooked the fact that the PSD is a procedural law in nature, which focuses on the activities of the contracting authority in the design of procurement, not relating to the market behaviours of suppliers. Specifically, Article 55(3) PSD stresses that the need to ensure fair competition between tenderers during debriefing cannot effectively discourage suppliers from colluding or reinforcing collusion tacitly with little costs or risks. By strategic use of Article 55(2) PSD, these suppliers are more likely to, at least, acquire tender information, those even not necessary to be *commercially sensitive*, to observe the concerned oligopolistic markets for future opportunities of tacit collusion. That is the same situation as for Article 18(2) PSD. In this respect, it is admitted that EU competition rules should be examined as to whether they can be applied to contain or at least detect coordinated behaviours in oligopolistic public procurement markets.

In conclusion, this chapter elucidates the statement of the issue: the tension between transparency and competition in the procurement process, typically arising from debriefing enforcement since 2014's legislative reform on the public procurement package. This viewpoint then presents four research questions concerning '*whether debriefing has been designed to enhance the effectiveness of the EU public procurement system?'* In terms of those research questions, it outlines the thesis and its structure. This chapter lays out the research methodology, comprised of doctrinal, historical, and interdisciplinary research. It concludes the chapter with a review of academic work among current scholarship, focusing on the uncertain objectives for debriefing practitioners to be clarified in Chapter 2 and the potential tension between transparency and competition to be considered in the rest of the thesis.

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[94] Case T-89/07 *VIP Car Solutions SARL v European Parliament* EU:T:2009:163 [2009] ECR II-01403, paras 86-94.
[95] Albert Sanchez-Graells, 'Assessing the Public Administration's Intention in EU Economic Law: Chasing Ghosts or Dressing Windows?', 114-16. Albert Sánchez-Graells, *Three Recent Cases on EU Institutions' Procurement and One Common Theme: Good Administration and Confidential Information (T-498/11, T-91/12 & T-199/12).*
[96] Hanns Peter Nehl, 'Good Administration as Procedural Right and/or General Principle?' in Herwig C.H. Hofmann and Alexander H. Türk (eds), *Legal Challenges in EU Administrative Law* (Edward Elgar Publishing 2013).

CHAPTER 2

Objectives for Debriefing

1. Introduction

Academia has identified several objectives for the entire public procurement system, such as integrity, equality, efficiency, competition, and transparency.[97] A discussion concerning the objectives of public procurement rarely relates to their implications for the design of debriefing and its enforcement. Despite that, there remains a debate about the objectives of debriefing in some respects that fits in the regime of EU public procurement. For instance, Albert Sanchez-Graells notes the need to ensure unsuccessful tenderers receive information *necessary* to review the contracting authority's decisions and defend their rights (particularly within the review procedure).[98] According to this, Sanchez-Graells considers such disclosure should be given to a *minimum* extent required to ensure the adequate protection of economic operators' rights to review the responsible authority's decisions.[99] Following this argument, he referred to the fundamental rights of the CFR, in particular, Article 41 on the right to good administration, in his later research as a way to manage the public authority's intent as regards the disclosure of information for the debriefing's *effectiveness*.[100]

Sue Arrowsmith stresses that requirements for debriefing should enable unsuccessful tenderers to monitor the procurement process,[101] such as deciding whether to make a legal challenge, and the relevant provisions must be interpreted in line with this aim.[102] However, that statement is

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[98] Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules* 444.

[99] ibid 444.

[100] Albert Sanchez-Graells, 'Assessing the Public Administration's Intention in EU Economic Law: Chasing Ghosts or Dressing Windows?', 114-16. See also, for more detailed discussion in Section 4 of this chapter.

[101] Sue Arrowsmith, para 13-20.

[102] ibid, para 13-20.

ambiguous considering its implications on the degree of disclosure throughout debriefing. On the one hand, it is far less demanding to provide economic operators with more performance feedback while ensuring confidentiality as set out in Article 21 PSD. In this way, economic operators can exercise oversight in a transparent procurement process for integrity.[103] On the other hand, it is not necessary to give economic operators more information beyond what is essential to understand whether there could be these sorts of infringements and whether they should make a complaint with the possibility of success.

Since the PSD is a procedural instrument, Article 55 on debriefing, specifically general notification and on-request debrief, shall be designed to contribute to the integrity and economic efficiency of the entire award procedure. Meanwhile, Article 2a(2) RD requires that automatic debrief (that is, general notification under Article 55(1) PSD) shall neither decrease the economic efficiency of the review procedure nor impede the applicant's access to effective review or remedies for fairness. However, there remains *legal uncertainty* about what implications those PSD or RD objectives could have for regulating debriefing for coherence. In other words, that is the concern regarding the explicit objectives debriefing's regulation in EU public procurement. In response to that concern, this chapter examines three objectives: integrity, fairness, and economic efficiency. Specifically, this chapter elucidates explicit *concepts* and *scope* of each norm and, accordingly, explores their *relationship* with debriefing obligations. Further enquiry about the *pathway to objective-attainment* in terms of debriefing in specific chapters is prepared based on this examination.

The following section, Section Two, considers integrity a principal objective for stipulating debriefing in the PSD, focusing on significant integrity violations, that is, corruption and its linkage to debriefing. In this section, corruption is examined through *three* lenses – the *appearance of favouritism*, the *conflict of interests* and the *principal-agent problem*. While the appearance of favouritism and the conflict of interests reveal the thought of legislation for developing debriefing obligations for higher integrity, the principal-agent problem explores the functional position of debriefing in deterring corrupting activities based on an economic pattern. As noted above, the second norm that will be examined is fairness, which will be explained from two

[103] Gabriella M. Racca and Christopher R. Yukins 2-5. For more detailed discussion about the integrity as an objective for debriefing, concerning its concepts, elements and requirements concerning public procurement and debriefing, see Section Two as below. For a further examination about the integrity tools used to prevent integrity violations, especially corruption concerns for optimal debriefing design, see Chapter 3.

perspectives – substantive fairness and procedural fairness – in Section 3. Regarding debriefing obligations, the inspection of fairness relies on an appraisal of procedural fairness to align the EU's legal framework for public procurement with *enforcement*. While substantive fairness requires a value judgement of the criteria or characteristics related to circumstances,[104] procedural fairness can be assured by *transparency* and *due process*.[105] In terms of the third norm, economic efficiency, the chapter provides two economic concepts for understanding – *cost-effectiveness* and *Pareto-optimality* – and a review of compliance requirements for debriefing obligations in Section 4. The final section concludes this chapter and introduces the issues addressed in Chapter 3.

2. Integrity

Researchers have acclaimed the significance of integrity for each public procurement system, such as the EU,[106] US,[107] WTO,[108] and OECD,[109] which may otherwise cause enormous economic costs of corruption[110] and a violation of fundamental rights.[111] Taking OECD as an example, integrity requires a common compliance framework of the institution, helpful review and accountability, adequate oversight, capacity, resources and necessary political will.[112] Likewise, the EU Commission provides an Integrity Pact to avoid fraudulent practices, promote

[104] Substantive equality additionally considers of different effects of the regulation in implementation or different treatments for interested parties subject to different circumstances. Unlike the formal equality substantive equality otherwise requires a value judgement regarding the criteria or characteristics that are ought to be used to identify or distinguish between circumstances. Such distinctive treatments or effects can be accepted or ruled out once the characteristics or criteria that relevant to discriminatory circumstances can be justified. See *Stanford Encyclopedia of Philosophy* (2019); Westen Peter, 'The Empty Idea of Equality' (1982) 95 Harvard Law Review 537.

[105] Formal or procedural equality refers to the identical treatment to everyone according to, for example, rules, criteria, and processes. Any different treatment for any other purpose will be considered as a discrimination that runs against the principle of equality. For instance, each lottery ticket endorses an equal chance of winning. The winner is selected by drawing lots but treated in a same procedure or process with other buyers. See also Omer Dekel 250. For discussion about this concept in public procurement, in together with the other aspect of equality – substantive equality, see Section 3, Chapter 2.

[106] Gabriella M. Racca and Daniel Gordon. Gabriella M. Racca and Christopher R. Yukins. Gian Luigi Albano and Roberto Zampino. European Commission, 'Fighting Corruption in the EU (Communication)' COM/2011/0308 final.

[107] Omer Dekel, 241–242· Steven L. Schooner, 107.

[108] Robert D. Anderson, William E. Kovacic and Anna Caroline Müller.

[109] OECD, *OECD Recommendation of the Council on Public Integrity*. OECD, 'OECD Principles for Integrity in Public Procurement'. OECD, *Integrity in Public Procurement: Good Practice from A to Z*.

[110] As EC estimates EU MEMBER STATES lost around 120 billion and up to 20–25% of the value of public contracts each year to corruption. See OECD, 'Are Governments Capable of Mitigating Risks of Waste and Corruption?'78.

[111] Corruption and its consequences could be a violation of human rights, especially socio-economic rights as concluded by international human rights instruments. See Sope Williams-Elegbe, 115. See also, Gabriella M. Racca and Roberto Cavallo Perin.

[112] OECD, 'OECD Recommendation on Enhancing Integrity in Public Procurement'.

a transparent procurement process[113] and conduct a study on administrative capacity with country-specific recommendations.[114] The PSD also, as an effort to create a culture of integrity and fair play in EU public procurement reform, attempts to create 'the proper framework for prior publication of tenders, transparent and unbiased technical specifications (…)'.[115] In this regard, debriefing can be comprehended as an effective strategy for improving integrity as it provides a transparent procurement process with an oversight system,[116] which gives explicitly unsuccessful applicants reasons to contend with the award decision. This section interprets integrity as a primary objective for directing debriefing practices, including conceptions and requirements based on the relevant literature, provisions, and policies in the EU's public procurement.

Integrity can be generally defined in public procurement both *positively* and *negatively*. In the OECD public procurement structure, for example, it can simply refer to 'the use of funds, resources, assets and authority, according to the intended official purpose and in line with the public interest' or defined otherwise as 'an effective strategy' to avoid 'violations'. Although it does not provide an explicit definition, the EU Commission accepts the *positive* explanation of integrity in its new policies on public procurement, such as applauding sound tender procedures for the EU-funded projects for the best impact of the EU's investment. The Commission frequently explains integrity in policymaking by underlining analogous legal terms, such as transparency, accountability, anti-corruption, and good governance in public contracting. Nevertheless, such an approach is sometimes disputable when other legal terms, especially transparency,[117] have different implications in other regimes.[118] This creates ambiguous

[113] An Integrity Pact is a contract between a contracting authority and economic operators bidding for public contracts, aiming at improving transparency and accountability in the field of public procurement, in cooperation with Transparency International on selected projects. See European Commission, 'Integrity Pacts'.

[114] The study assesses strengths and weakness of public procurement systems in 28 MEMBER STATES, identifies good practices and lessons for a further improvement of administrative capacity and provides country specific recommendations based on desk research. See Commission, 'Public Procurement – A Study on Administrative Capacity in the EU' <https://ec.europa.eu/regional_policy/en/policy/how/improving-investment/public-procurement/study/> .

[115] For more examples under the new EU procurement and concession rules released in 2016 which devotes to create a culture of integrity and fair play in all stages and aspects of the tender procedure, see also Commission, 'EU Public Procurement Reform: Less Bureaucracy, Higher Efficiency' <https://ec.europa.eu/growth/content/new-eu-public-procurement-rules-less-bureaucracy-higher-efficiency-0_en> accessed March 21 2020 9.

[116] Since many more stakeholders can exercise oversight in a transparent procurement system. More transparency a procurement system is, far less problems with integrity it is likely to meet. See Gabriella M. Racca and Christopher R. Yukins 2-3. See also, Christopher R. Yukins, 71-79.

[117] The Commission specifies three objectives for the award procedures – transparency, fairness, and openness of the award procedure – when it comes to the legal effectiveness of the RD. See Commission Remedies Evaluation 33.

[118] D. Daniel Sokol, 197-98.

requirements for integrity, for instance, whether the integrity of public procurement necessitates transparency to a general level in debriefing, which may lead to some common errors in practice.[119] Regarding concern, this section selects the *primary integrity violation* for discussion: the corruption that directly threatens public interest in the EU's procurement process.[120] In the subsequent sections, corruption will be examined through three lenses – the appearance of favouritism, the conflict of interests and the principal-agent problem theory.

2.1. Appearance of Favouritism

Generally, corruption can be defined as an abuse of entrusted power for private gains in forms such as public servants demanding or taking money or favours in exchange for services; politicians misusing public money or granting public jobs or contracts to their sponsors, friends and families; and corporations bribing officials to obtain lucrative deals.[121] In public procurement markets, corrupt practices could be actual behaviours like the award of contracts or the selection of candidates or other administrative misconducts that are taken not for the public's interests but by an unlawful individual or for reciprocal benefits.[122] However, the Commission's Integrity Pacts indicate that actual corrupt practices have not necessarily tainted the conduct of public servants in public procurement activities. Instead, the appearance of favouritism demonstrates a seeming relationship between the awardees and the public servants that harms their credibility.[123]

Anti-favouritism has been recognised as a significant objective of EU public procurement law.[124] The evidence for the appearance of favouritism, such as the proven personal – friend, colleague

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[119] Commission, 'Guidance for Practitioners on the Avoidance of the Most Common Errors in Public Procurement of Projects Funded by the European Structural and Investment Funds' <https://ec.europa.eu/regional_policy/en/policy/how/improving-investment/public-procurement/guide/> 8–10.

[120] Integrity violations also include those misconducts that affect the achievement other objectives stressed in this thesis, such as the abuse and manipulation of information as well as discriminatory treatments. These violations will be addressed in discussions about economic efficiency and fairness, respectively, depending on their relevance to the certain objective in public procurement. For instance, it *directly* erodes trust, weakens democracy, hampers economic development, and further exacerbates inequality, poverty, social division, and the environmental crisis (emphasis added). See Transparency International, 'What is Corruption?' (*Transparency International*) <https://www.transparency.org/en/what-is-corruptionh> accessed 31 May 2020.

[121] ibid.

[122] In public procurement markets, such abuses refer to conduct such as the awarding of contracts, the placing of suppliers on relevant lists or other administrative actions taken not for objective public interest reasons, but for improper compensation or other reciprocal benefits (i.e., bribes). See Robert D. Anderson, William E. Kovacic and Anna Caroline Müller 685.

[123] Omer Dekel, 242.

[124] 'The purpose of that directive is to avoid the risk of the public authorities indulging in favouritism'. See Case C-213/07 *Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias* EU:C:2008:731, [2008] ECR I-09999, para 53.

or relative – or business relationship, would be a sufficient civil control mechanism to annul a specific decision created by the public servant. In this respect, there seems no need to give evidence for direct causation of that decision to be annulled. Such a relationship, which could stand in place of the civil servant's personal interest (i.e., the fear of being challenged for such), or his or her friend's, colleague's or family's interest, or through business ties (i.e., a potential awardee is a business partner or political supporter related with that civil servant), weakens public trust (i.e., a fair and transparent procurement process).[125] As a result, the appearance of favouritism presents a moral hazard to the community's confidence in the public administration and will undermine long-term competition.[126]

2.2. Conflict of Interests

In the legislature's viewpoint, procedures for checking conflicts of interests confer fraudulent activities effectively.[127] Among these activities, conflict of interests becomes a repetitive and common concern in public procurement, especially for structural actions that diminish the public budget and detrimental to the reputation of the EU and the Member States.[128] Conflict of interests usually results in violations of the principles of transparency, equal treatment and non-discrimination in the regime of public procurement.[129] In EU public procurement law, Article 24 PSD provides a more accessible measure to manage fraud in procurement procedures, and it creates an atmosphere of integrity and fair play at the EU level, accordingly.[130]

As the OECD defines, a conflict of interest occurs in the government concerned.[131] The Commission interprets conflict of interest as 'a conflict between a public servant official's public duty and private interests'. The public servant official has private-capacity interests that could

[125] Omer Dekel, 242.
[126] To save the use and the efficiency of public spending, Member States could attempt ensuring procedures for preventing and sanctioning corruption or those indicative of corruption such as collusion, favouritism and conflicts of interests, see Chryssoula P Moukiou, 78. See also, Omer Dekel, 242.
[127] European Commission, 'Integrity Pacts'.
[128] OLAF European Commission, 'Identifying conflicts of interests in public procurement procedures for structural actions: A practical guide for managers' <https://www.esfondi.lv/upload/02-kohezijas_fonds/Lielie_projekti/EK_vadl_par_interesu_konflikta_identif_publ_iepirk_EN.pdf> accessed March 20 2020, 7.
[129] ibid, 9-10.
[130] Europe Economics and Milieu, 'Economic Efficiency and Legal Effectiveness of Review and Remedies Procedures for Public Contracts' <https://publications.europa.eu/en/publication-detail/-/publication/e07de115-c72a-4bd8-9844-daed732da34f> .
[131] OLAF European Commission 7.

improperly influence the performance of their official duties and responsibilities.[132] The OECD also identifies three forms of conflicts of interest – actual, apparent or potential.[133] Article 24 PSD describes 'situations' as covering those where the staff members involved in the procurement may influence the outcome thereof to have a financial, economic, or other personal interest that might reduce their credibility.[134]

Illegitimate influence on the procurement outcome could be transformed into illegality when recognised as additional grounds of illicitness in the award of the contract or as a part of exclusion grounds, albeit not set out in award criteria.[135] As Article 24 PSD provides, the contracting authority's decisions could be tainted by the appearance of favouritism – 'a financial, economic or other personal interest which might be *perceived* to compromise their impartiality and independence' a staff member have thereunder. However, Article 24 PSD is yet to be precise considering the necessity to legitimate Member States' discretion to implement different measures for exclusion grounds,[136] such as to ascertain that 'a conflict of interests cannot be effectively remedied by other less intrusive measures' according to Article 57(4)(e) PSD. By contrast, its counterpart, Articles 9(1)(e) of the United Nations Convention against Corruption, has provided specific measures to regulate personnel matters,[137] and Article 12(2)(e) imposes restrictions.[138] Nonetheless, the EU Commission has released some practical guides

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[132] OECD, 'Managing Conflict of Interest in the Public Service' <https://www.oecd.org/gov/ethics/49107986.pdf> 24-25.

[133] 'An **actual** conflict of interests involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of his/her official duties and responsibilities. An **apparent** conflict of interests can be said to exist where it appears that a public official's private interests could improperly influence the performance of his/her duties, but this is not in fact the case. A **potential** conflict of interests arises where a public official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant (i.e., conflicting) official responsibilities in the future (emphasis added)'. See ibid 24-25.

[134] The second paragraph of Article 24 provides: '[t]he concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority or of a procurement service provide acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartially and independence in the context of the procurement procedure.'

[135] Chryssoula P Moukiou, 73-74, 82-83.

[136] The conflicts of interests can be disguised in many different forms in the frame of public procurement. The outcome of this situation is to be proven, as the facts are usually based on presumptions. See ibid 82.

[137] Article 9. Public procurement and management of public finances

2. Each State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, inter alia:

(e) Where appropriate, corrective action in the case of failure to comply with the requirements established in this paragraph. See United Nations Convention against Corruption.

[138] Article 12. Private sector

2. Measures to achieve these ends may include, inter alia:

despite being non-binding, such as providing a common approach to identifying conflicts of interests for the contracting authority without prejudice to national legislation.[139]

Apart from the procedures for identifying conflicts of interests, the Commission also suggests strict 'complaints-handling procedures' for checking a declaration of the conflicts of interests. More public contracts would have been arbitrarily drafted, amended or modified, poorly implemented or monitored where conflicts of interest arise.[140] The OECD suggests ten principles to enhance integrity in public procurement based on good governance elements, especially complaints-handling procedures in a fair and timely manner that include the elements of accountability and control.[141] This obliges public buyers to provide potential suppliers with *effective* and *timely* access to review procedures for procurement decisions and that these complaints are promptly resolved.[142] As an essential trigger for complaint-handling procedures, strict compliance with debriefing obligations should be ensured.

In addition, debriefing helps tenderers ascertain whether there could be a conflict of interests, what sort of complaints should be filed or whether a review or remedies should be pursued. For this purpose, the contracting authorities need to notify the tender winner of the elements concerning the contract award decisions in the debriefing phase. A sound notification practice can reveal whether the officer considers any irrelevant concerns in an award decision, which significantly proves the risk of favouritism's appearance, such as an *actual*, *apparent* or *potential* conflict of interest.[143]

(e) Preventing conflicts of interest by imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure; See ibid.

[139] OLAF European Commission, 3.

[140] ibid, 25.

[141] OECD, 'OECD Principles for Integrity in Public Procurement', 127.

[142] ibid, 127.

[143] OECD has also identified three types of conflict of interests as below, see OECD, 'Managing Conflict of Interest in the Public Service' 24-25.

a) An *actual* conflict of interests involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of his/her official duties and responsibilities.
b) An *apparent* conflict of interests can be said to exist where it appears that a public official's private interests could improperly influence the performance of his/her duties, but this is *not* in fact the case.
c) A *potential* conflict of interests arises where a public official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant (i.e., conflicting) official responsibilities in the future.

2.3. Principal-agent Problem

The principal-agent problem provides an economic model to understand the conflict of interests[144] essential to regulating public procurement.[145] The principal-agent problem describes a situation where an agent would like to exploit his or her information asymmetry to take advantage of a chance that may rarely be in the principal's interest.[146] Concerning public procurement activities, the end-users of public goods and public services have to entrust an agent with the operation of the procurement procedure in a way such as to *maximise* public welfare.[147] In other words, the public servants assigned to decide on behalf of a procurement service provider or a contracting authority act as intermediaries between the beneficiaries and the potential services or goods tenderers.[148]

Due to *information asymmetry*, it is difficult for the public to be fully aware of the increased possibility of corruption as the public has less control over agents' behaviours acting as a proxy of the principal,[149] not to mention to give evidence against its legal effectiveness. Despite the regulation of corrupt practices, a public servant would prefer to try some strategic behaviours that maximise their welfare while the objects of a contract have been designed with complex or definite welfare behind their decision.[150] To ensure the agent acts in the principal's interest, economists advise two methods: establishing a monitoring system through increased transparency or enforcing sanctions or discipline.[151]

3. Fairness

Fairness somewhat overlaps with integrity but becomes an *independent* objective for procurement activities.[152] On the one hand, either fairness or integrity requires avoiding *irrelevant* elements in the design of procurement activities, particularly in creating award decisions. On the other hand, their violations could have distinctive motivations and solutions in practice.

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[144] See Gabriella M. Racca and Christopher R. Yukins 5-6.
[145] ibid, 681-85.
[146] Peter Trepte, 'Transparency and Accountability as Tools for Promoting Integrity and Preventing Corruption in Procurement: Possibilities and Limitations' (2006) 5 OECD Papers 6.
[147] Frédéric Jenny, 31.
[148] ibid, 31.
[149] Omer Dekel, 242.
[150] There is a possibility for procurement officers or the members of the procurement commission to behave strategically, that is to design the contract, to select the bidders and award the contract in such a way that the winning bidder will not necessarily be the one which maximises the social benefits but the bidder who will maximise their own welfare (by offering the largest bribe) without this strategic behaviour being easily detected. For more discussion about such strategic behaviours, see Frédéric Jenny, 31.
[151] OECD, *Integrity in Public Procurement: Good Practice from A to Z*, 29 and 89.
[152] Omer Dekel, 253-56.

Discrimination in breach of fairness could be taken in good faith, such as for cost-effectiveness, which seems to generate less harm than integrity violations taken in the *evil* will, such as favouritism or corruption. Regardless of the outcome,[153] neither good nor bad will can be easily captured by the evidence in the real world and thus it is signalled as a 'flawed' administrative decision or measure.

Despite being deemed an objective for procurement procedures other than integrity,[154] it is *uncertain* what fairness implies as an objective for the enforcement of debriefing and whether the design and practice thereof suit fairness. Since the notion of fairness underlines the EU legal regimes of administrative procedure and public procurement law, it can act as a factor to associate the substantive protections and enforcement mechanisms on those grounds. The general principles of EU administrative procedural law and the CFR fundamental rights for administrative procedures can be integrated into debriefing design for procedural fairness.

3.1. Substantive or Procedural Fairness

The concept of procedural fairness, alternatively called formal equality,[155] seems to be a valuable tool to address fairness violations. However, it is likely to lead to excessive disclosure and leaves tedious administrative duties on the contracting authority in practice if substantive equality is used to interpret procedural fairness as an objective. It should be noted that the CJEU adopts the elements of *substantive equality*[156] for the operation of equal treatment as a principle – 'comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified.'[157] A further

[153] For example, a discriminatory decision of the contracting authority could be made in good faith for the sake of economic efficiency, but the cost of this decision (e.g., administrative fees, legal services fees, etc.) is more than benefits it brings based on a judicial or administrative review. It is almost impossible for the contracting authority in this case to justify its decision or measure with a good will in legal proceedings.

[154] See Commission Remedies Evaluation, 33.

[155] Formal or procedural equality refers to the identical treatment to everyone according to, for example, rules, criteria, and processes. Any different treatment for any purpose will be considered as a discrimination that runs against the principle of equality. For instance, each lottery ticket endorses an equal chance of winning. The winner is selected by drawing lots but treated in a same procedure or process with other buyers. See also Omer Dekel, 250.

[156] Substantive equality additionally considers different effects of the regulation in implementation or different treatments for interested parties subject to different circumstances. Unlike the formal equality substantive equality otherwise requires a value judgement regarding the criteria or characteristics that are ought to be used to identify or distinguish between circumstances. Such distinctive treatments or effects can be accepted or ruled out once the characteristics or criteria that relevant to discriminatory circumstances can be justified. See, *Stanford Encyclopedia of Philosophy*.

[157] Joined Cases C-21/03 and C-34/03 *Fabricom SA v Belgian State* EU:C:2005:127, [2005] ECR I-01559, para 27. ibid, para 27.

discussion about the *implications* of procedural fairness and administrative errors in debriefing follows in Chapter 4.

One component of procedural fairness is transparency, which the author prefers to regard as an instrument used to guarantee the substantial rights endowed by the PSD and RD to economic operators, such as the right to effective review and remedies.[158] For that purpose, the scope of the disclosure in debriefing must be *proportional* to the requests for acquiring specific effective remedies, such as interim measures and the ineffectiveness assessment. Despite a *lack* of clarity, the CJEU has confirmed in its precedents concerning EU institutions' procurement that *full* disclosure of either of the procurement documents is unacceptable in terms of the debriefing request.[159] As far as the application for seeking review, the *scope* of the disclosure may be *strictly* subject to the conditions for declaring ineffectiveness set out in Article 2d RD. Once ineffectiveness is affirmed, there will be an independent review for the award of damages subject to the domestic legal system.

Procedural fairness has another significant component of *due process*, which focuses on respecting the rights owed to economic operators and a balance between those rights with the right of *confidentiality* of third parties.[160] When the contracting authority harms an economic operator without following the exact course of the law, which constitutes a due process violation, these features of due process also run through the procurement process, precisely, the operation of debriefing obligations. In this respect, due process requires a set of mechanisms that enable the economic operators to defend their rights in procurement procedures.

Debriefing, therefore, is a procedural guarantee endorsed by the PSD and the RD for *due process*, the design of which shall ensure the rights of economic operators in procurement activities. For instance, automatic debrief entitles the potential tenderers to 'have sufficient time for the effective review of the contract award decisions' and the right to obtain effective pre-contractual remedies. For that purpose, Article 2a(2) RD also requires the communication of the relevant

[158] Chapter 4 on due process will further this opinion with measures and approaches adopted by the CJEU to properly balance the procedural rights with the rights of confidentiality by limit the scope of disclosure for due process of debriefing in accordance with general principles of public procurement.
[159] Charles Clarke, 'The ECJ Sets Precedent on What Should Be Considered Sufficient Examination of Rejected Bidders' (2012) 7 European Procurement & Public Private Partnership Law Review 284. See also Case C-235/11 P *Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Commission* EU:C:2011:791, [2011] ECR I-00183*.
[160] D. Daniel Sokol, 197.

rejected reasons and the exact duration of the standstill period together with the award decision. Suppose an infringement of Article 2a(2) RD has either deprived tenderers applying for a review of the *possibility* of pursuing effective remedies or affected the chances of obtaining the contract, the contract at issue becomes *ineffective* in Article 2d. In other words, failure to fulfil an automatic debrief directly results in ineffectiveness with the same effect of a depriving of standstill period since, without the completion of the former duty, the latter cannot be initiated. In that respect, the right to effective review or remedies owed by the aggrieved parties is deprived of, leading to a violation of due process.

3.2. Adversarial Nature of the Procedure

The design of debriefing among the whole remedies systems is imperative for the effectiveness of any procurement system[161] since it protects aggrieved economic operators to exercise their procedural rights endorsed by the EU legal system. Those procedural rights owed to economic operators can trace their legal source to the general principles of EU administrative procedural law,[162] such as the principles of good administration,[163] the right to an effective remedy,[164] and the duty to state reasons.[165] The ECtHR has consistently held that 'the *adversarial nature* of proceedings is one of the factors which enables their fairness to be assessed, but it may be balanced against other rights and interests'.[166]

The CJEU has interpreted the principle of good administration in case-law to ensure procedural fairness, since that principle imposes the duty to state unsuccessful reasons and protect their business secrets.[167] The duty to state unsuccessful reasons ensures that potential

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[161] Daniel I. Gordon, 'Constructing A Bid Protest Process: the Choices that Every Procurement Challenge System Must Make' (2006) 35 Public Contract Law Journal 427, 427-45.
[162] Diana-Urania Galetta and others, 16-19.
[163] As one of the first documents dealing with the principles of good administration, Resolution 77(31) on the Protection of the Individual in Relation to the Acts of Administrative Authorities. The Resolution contains *five* fundamental principles: the right to be heard; the right of access to information; the right to assistance and representation; the obligation to provide reasons for decisions; and finally, the obligation to notify affected parties of remedies available against an act of the administration. However, the Resolution did not use the term 'good administration'.
[164] Case 85/76 *Hoffmann-La Roche v Commission*, para 9. See also, Case C-450/06 *Varec* (Case C-450/06 *Varec*), where the CJEU confirms Article 6(1) of the ECHR as it provides that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal (…)'.
[165] The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the public authority which adopted the measure in such a way as enable the persons concerned to decide if they want to defend their rights by an application for judicial review. See Case C-269/90 *TU München v Hauptzollamt München Mitte* [1991] ECR I-5469, paras 14, 26.
[166] Case C-450/06 *Varec*, para 46.
[167] The CJEU has referred to good administration principles since the very early case-law: Joined Cases 7/56, 3/57 to 7/57 *Algera and Others v Common Assembly of the ECSC* [1957] ECR 0039; Case 32/62 *Alvis* [1963] ECR 49,

aggrieved economic operators have the *necessary* information to access an adequate legal remedy under the adversarial principle. The duty to protect business secrets is enforced as a general principle, as the release of such secrets could be used to favour or disfavour the specific economic operator. The exercise of discretion in complying with those duties is expected to be *less* legally uncertain[168] by considering other general principles for EU public procurement law, such as transparency and competition.[169] Whether the application of procedural guarantees for good administration should comply with Article 41 CFR is yet to be sufficiently identified.[170]

Despite not enforcing direct effectiveness to the review procedure, the CJEU lately clearly requires mandatory compliance of fundamental rights under the CFR in its case-law when interpreting the provisions of the RD concerning that procedure.[171] In its view, regarding Article 1 RD, the CJEU held that it 'must be interpreted in the light of the fundamental rights set out in the CFR, in particular the right to an effective remedy before a court or tribunal, laid down in Article 47 thereof'.[172] As the CJEU states, Article 1 sets out the principles of effectiveness, expediency, non-discrimination and availability applicable to main proceedings within the scope of the PSD.[173] Accordingly, the author considers that the right to an effective remedy set out in the CFR, to some extent, defines the principle of effectiveness set out in Article 1 RD.[174]

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para 1A; Joined Cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299; Case 64/82 *Tradax v Commission* [1984] ECR 1359.

[168] Albert Sánchez-Graells, *Three Recent Cases on EU Institutions' Procurement and One Common Theme: Good Administration and Confidential Information (T-498/11, T-91/12 & T-199/12)* ibid.

[169] Albert Sanchez-Graells, *The Difficult Balance between Transparency and Competition in Public Procurement: Some recent trends in the case law of the European Courts and a look at the new Directives*.

[170] Pedro Telles, 'Regulation 55 – Informing Candidates and Tenderers: Commentary' <http://pcr2015.uk/regulations/regulation-55-informing-candidates-and-tenderers/> .

[171] It means that all fundamental rights set out in the CFR, including those covered in this sub-section, must be observed when interpreting EU Directives, including those concerning public procurement procedures. To that effect, see Case C-212/13 *František Ryneš v Úřad pro ochranu osobních údajů* EU:C:2014:2428, [2014] Digital reports (Court Reports - general), para 29.

[172] Case C-61/14 *Orizzonte Salute - Studio Infermieristico Associato v Azienda Pubblica di Servizi alla persona San Valentino – Città di Levico Terme and Others* EU:C:2015:655, [2015] Digital reports, para 49.

[173] ibid, para 27.

[174] Generally, the principle of effectiveness is admitted as a fundamental principle governing the RD. Other fundamental principles could be that of non-discrimination and that of procedural autonomy. See Christopher H. Bovis, *The Law of EU Public Procurement* (2nd edn, Oxford University Press 2015), paras 12.150—12.151. The RD and case-law collectively establish these principles applicable to review procedures. For more discussion based on their relevance to debriefing provisions, see Section 3.1, Chapter 3.

Those concepts have been codified in two documents that are not legally binding[175] – the Charter and the European Code of Good Administrative Behaviour (Code).[176] The Code has created a substantive contribution to putting the principles of good administration and the right to an effective remedy into practice and restates them as fundamental rights of EU citizens enshrined in Articles 41 and 47 CFR accordingly.[177] Whether the CFR applies to procurement procedures at the *national level* is laid down by Article 51(1) CFR that 'the provisions of this Charter are addressed to […] the Member States only when they are implementing EU law'.[178] The case-law further clarifies the expression of 'implementing EU law' by launching an assessment on the application of domestic legislation in terms of its *intention*, *nature*, *objectives*, *effectiveness*, and the *relevance* to EU law.

Simply put, the CFR could be applicable in most cases if the Member States' transposition intended to give effect to the EU's substantive procurement rules and if the CFR will be built as having objectives other than those covered by those EU rules.[179] EU case-law has covered

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[175] Despite not being legally binding, all Member States of the Union are furthermore members of the Council and should thus have been influenced by the recommendations and resolutions that have been issued by the Council. The Council has recommended its members to 'be guided by' a few principles that has been set out in recommendations and resolutions. The following principles were stated: I) Right to be heard; II) Access to information; III) Assistance and representation; IV) Statement of reasons; V) Indication of remedies. See Council Resolution (EC) 31/1977 on the protection of the individual in relation to the acts of administrative authorities.

[176] The European Parliament approved the European Code of Good Administrative Behaviour (the Code) in 2001. It helps individual citizens to understand and obtain their fundamental rights and promotes the public interest in an open, efficient, and independent European administration. It also inspired similar texts in the Member States of the European Union, candidate states and third countries. The Code explains the reasons and meaning of the link between the Code and Article 41 CFR, analyses the complexity and uncertainty of the concept of good administration', and characterises its different legal and non-legal facets highlighting the interconnections between them. See The European Ombudsman, *The European Code of Good Administrative Behaviour* (2001), art 1.

[177] Article 41(1) provides the right of every person 'to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union'. The 41(2) specifies the right including:

a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
c) the obligation of the administration to give reasons for its decisions.

[178] Elise Muir, 'The Fundamental Rights Implications of EU legislation: Some Constitutional Challenges' (2015) 51 Common Market Law Review 219, 219.

[179] Albert Sanchez-Graells provides an argument for the applicability of the CFR to procurement review procedures: 'it seems clear to me that the CFR is engaged structurally because the domestic rules that transpose the Remedies Directive and set up a procurement review system (be it administrative or judicial) aim to give effectiveness to the EU and domestic substantive public procurement rules – which, for the same reasons, engage the application of the CFR themselves – and cannot be reasonably constructed as having any other objective than ensuring the integrity and probity of the procurement process and strengthening the rights of tenderers to participate in fair an undistorted competition for public contracts.' Albert Sanchez-Graells, "If It Ain't Broke, Don't Fix It'? EU Requirements of Administrative Oversight and Judicial Protection for Public Contracts' in S Torricelli and F Folliot Lalliot (eds), *Administrative Oversight And Judicial Protection For Public Contracts* (Larcier 2017) <https://ssrn.com/abstract=2821828 or http://dx.doi.org/10.2139/ssrn.2821828> , 8-9.

public contracts that are *not* covered or *fully* covered by the PSD as there is a potential cross border interest that engages primary EU law.[180] Nevertheless, the CJEU rules that the CFR is *inapplicable* to '*purely internal situation'* outside the scope of the EU law concerned,[181] such as the obligation to give reasons, unless *renvoi* is made directly and unconditionally by the national law to the EU's rules.[182]

3.3. Fairness Principle in Data Protection

Fairness is an *overarching* principle applicable to *data protection* and *competition* regime,[183] which can act as a *factor* to associate *substantive protections* in those fields for improving debriefing fairness in the regulated public procurement. The competition enforcement favours sharing or merging data sets for economic efficiency reasons against the spirit of the data protection rules,[184] especially core principles, such as fairness.[185] It is likely to raise data protection issues because, for instance, further processing personal data for the integration or combination thereof from previously separate entities can benefit economic efficiency.[186] For that concern, both Article 8 CFR and Article 16(1) TFEU entitle everyone to a fundamental right to personal data protection as primary legislation at the EU level.

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[180] Case C-388/12 *Comune di Ancona v Regione Marche* EU:C:2013:734, [2013]. See also, Carina Risvig Hansen, *Contract Not Covered or Not Fully Covered by the Public Sector Directive* (Djøf Publishing 2012). It is suggested that 'from a normative point of view and to increase legal certainty, it would seem preferable to afford full CFR protection in all public procurement challenges, to avoid the risk of cross-border interest being declared during litigation. See Albert Sanchez-Graells, 'If It Ain't Broke, Don't Fix It'? EU Requirements of Administrative Oversight and Judicial Protection for Public Contracts', 9-10.

[181] According to settled case-law, the CJEU has jurisdiction to give preliminary rulings on questions concerning EU provisions in situations where the facts of the cases being considered by the national courts are outside the scope of EU law, but in which domestic law refers to the content of those provisions of EU to determine the rules applicable to a situation which is purely internal to the Member States concerned. Considering the *renvoi* to EU law in Article 1(1) of Law No 241/1990, the request for a preliminary ruling is justified by the need to ensure that the principle that reasons must be given for administrative measures is applied uniformly to all administrative acts as a principle of European administrative law. See Case C-482/10 *Teresa Cicala v Regione Siciliana* EU:C:2011:868, [2011] ECR 2011-00000, paras 17-19.

[182] The CJEU states that 'it does not appear that the Italian legislature intended, as regards the obligation to state reasons, purely internal situations to be subject to the second paragraph of Article 296 TFEU and Article 41(2)(c) of the Charter rather than the specific rules of Italian law relating to the obligation to state reasons and the consequences of a breach of that obligation. See Case C-313/12 *Giuseppa Romeo v Regione Siciliana* EU:C:2013:718, [2013] Court Reports - general, para 35.

[183] Inge Graef, Damian Clifford and Peggy Valcke, 'Fairness and Enforcement: Bridging Competition, Data Protection, and Consumer law' (2018) 8 International Data Privacy Law 200, 202–05.

[184] ibid, 200.

[185] The European Data Protection Supervisor (EDPS) has confirmed the core principles in data protection regime, including fairness, lawfulness, and transparency. European Data Protection Supervisor, 'Opinion 8/2016 of 23 September 2016 on coherent enforcement of fundamental rights in the age of big data' <https://edps.europa.eu/sites/edp/files/publication/16-09-23_bigdata_opinion_en.pdf> 8.

[186] Inge Graef, Damian Clifford and Peggy Valcke, 220-23.

This section introduces the *elements* of fairness when placed as a core principle of EU data protection law and its legal foundations owed to the CFR. As generally suggested, the principle of fairness comprises elements of *procedural fairness* and *fair balancing* in relation to applying the EU data protection rules, such as GDPR.[187] Those fairness elements owe their foundations to a fundamental right to personal data protection under the CFR.[188]

The *procedural fairness* element comprises *three* components (i.e., transparency, timeliness, and burden of care) and refers to the formal requirements enforcing, for example, the right to a fair administrative procedure in Article 42 CFR. Article 42 requires that persons' affairs are handled 'impartially, fairly and within a reasonable time'.[189] Since the controllers decide the purpose and means of the processing of personal data, it is almost impossible to realise the *impartiality* in personal data processing.[190] To ensure procedural fairness in enforcement, the contracting authorities must essentially bear the burden of proof and justify that their actions follow the fairness principle. [191]

Fair balancing comprises two elements, i.e., proportionality and necessity, owing their origins to the fundamental rights under the CFR and freedoms balancing at the core of data protection law.[192] Article 8 CFR requires that personal data be processed fairly for specified purposes and on the *consent of the person* concerned or on some other legitimate basis. That provision otherwise entitles the individual to the *right of access to data* collected concerning him or her and *the right to have it rectified*. Fair balancing demonstrates itself in both the *conditions* for the *lawfulness* of personal data processing and the protection of data subject rights.[193]

Furthermore, the proper design of a procedure is to fashion rules that *efficiently* enforce the substantive law, in the sense of minimising the social costs (i.e., cost of *error* and the cost of *procedures* used to reduce error) of enforcement.[194] The procedural fairness also compels the contracting authority as a *controller* or as a *processor* to secure those data subject rights under

[187] Damian Clifford and Jef Ausloos, 'Data Protection and the Role of Fairness' in Yearbook of European Law' <https:// papers.ssrn.com/abstract1/43013139> .
[188] Inge Graef, Damian Clifford and Peggy Valcke, 202-03.
[189] Damian Clifford and Jef Ausloos.
[190] Inge Graef, Damian Clifford and Peggy Valcke, 204.
[191] ibid, 204.
[192] ibid, 202–03.
[193] ibid, 204.
[194] Robert G Bone, 143.

substantive protection.[195] For that concern, debriefing review shall ensure that the contracting authorities' compliance with accountability and fairness principles will focus on the enforcement of those data subject rights for fair balancing. Accordingly, Chapter 4 will examine the operation of *substantive protections* of personal data under the GDPR as regards debriefing fairness in procurement activities.

4. Economic Efficiency

After the economic crisis in 2008, increasing budgetary constraints demand more *efficiency* than before due to the *sheer* amount of government expenditure on goods, services, and works.[196] Abuse of public funds, such as excessive amounts paid for works, supplies and services contracts, means less finance for essential state business, more significant budget deficits and a greater demand on borrowing. That trend threatens financial stability and undermines recovery efforts.

The Europe 2020 strategy[197] considers public procurement as 'one of the market-based instruments to be used to achieve intelligent, sustainable,[198] and inclusive growth while ensuring the *most* efficient use of public funds'. Since the total outflow of the public is significant and extensive, the economic efficiency of procurement activities significantly affects that of administration.[199] For that concern, EU public procurement rules remark the principle of *competition* as a legal instrument for the contracting authority to realise higher economic efficiency in using public funds.[200]

The latest legislative reform for EU public procurement focused on promoting its economic efficiency.[201] The Commission has called for higher efficiency and less bureaucracy to prevent 'buy national' policies and to promote the free movement of goods and services.[202] The new

[195] The PPN suggests that in most procurement contracts both the contracting and the economic operator are qualified as a data processor.
[196] The figure indicates that public procurement accounts for more than 15% of the Gross Domestic Product (GDP) in OECD countries. OECD, 'Competition in Bidding Markets' 23. As for the Member States of European Union, the corresponding figure of EU GDP has decreased slightly since 2009, when it was estimated at 20%; in 2010 the percentage fell to 19.7% and in 2011 it fell still further to 19%. Commission, 'Annual Public Procurement Implementation Review 2013' SWD(2014) 262 final, 5.
[197] Commission, 'Europe 2020 A Strategy for Smart, Sustainable and Inclusive Growth' COM/2010/2020 final <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52010DC2020> .
[198] Integrating resource-efficiency, energy-efficiency, and economic considerations. See Commission, 'Making Public Procurement Work in and for Europe' (Communication) COM(2017) 572 final, 2.
[199] Carol Harlow and Richard Rawlings, Law and Administration (3rd edn, Cambridge University Press 2009).
[200] Carmen Estevan de Quesada 239-43.
[201] Commission, 'Single Market Act Twelve levers to boost growth and strengthen confidence 'Working together to create new growth" COM/2011/0206 final, 19.
[202] Commission, 'EU Public Procurement Reform: Less Bureaucracy, Higher Efficiency'.

EU procurement directives, [203] particularly the PSD, robustly encourage greater use of electronic tools in the public procurement process by introducing new rules on *e-procurement*.[204] Since adopted, those new rules enforce contracting authorities to move to complete and mandatory electronic means of communication as to its timetables,[205] such as e-submission; ESPD; [206] e-invoicing; e-notification; e-auctions; e-catalogues; electronic access to tender opportunities and tender documents.[207]

Since e-procurement applies to all public procurement processes covering debriefing, this meaningfully signifies that reform by simplifying the process, improving the value for money and stimulating *open competition* across the EU single market.[208] In terms of *debriefing*, the use of e-procurement may create substantial benefits such as cost savings for all participants, simplified procedures, shortened minimum time limits and reductions in red-tape and administrative burdens. [209] The enforcement of e-procurement also aims to provide new opportunities for SMEs and encourage their participation by taking advantage of the *single digital market*.[210] Those ongoing legislative changes remark economic efficiency as a leading objective for EU legislative reform on public procurement.

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[203] As it is said in Chapter 2, new EU procurement directives refer to three directives on public procurement and concessions released in 2014, including Council Directive 2014/24/EU on public procurement (i.e., the PSD), Council Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors (hereinafter referred to as the Utilities Directive) and Council Directive 2014/23/EU on the award of concession contracts (hereinafter referred to as the Concession Directive). For more introduction about the current legal framework, rules, thresholds and guidelines in EU public procurement regime, see also Commission, 'Public Procurement: Legal Rules and Implementation' (29 November 2018) <http://ec.europa.eu/growth/single-market/public-procurement/rules-implementation_en> accessed 29 November 2018

[204] The EU has devoted to the digitalisation of public procurement process, i.e., the transition to e-procurement. This transition is not simply involving electronic tools as it also allows for the integration of data-based approaches at various stages of the procurement procedure. For more details about e-procurement, see also Commission, 'E-procurement' <https://ec.europa.eu/growth/single-market/public-procurement/e-procurement_en > accessed 30 April 2019.

[205] Commission, 'Timetable for the Rollout of E-procurement in the EU' (14 April 2016) <http://ec.europa.eu/DocsRoom/documents/16332/attachments/1/translations > accessed 30 April 2019.

[206] That refers to 'European Single Procurement Document' (hereinafter referred to as ESPD).

[207] On those instruments see the PSD, arts 22, 33, 34, 35, 36, 37.

[208] Public authorities that have already made the transition to e-procurement report savings between 5% and 20%, correspondingly, around between €100 and €400 billion return to public purse given the size of EU procurement market size (about €1.9 trillion spent each year). See also Commission, 'EU Public Procurement Reform: Less Bureaucracy, Higher Efficiency'.

[209] ibid Council Directive (EU) 2014/24 of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65, recital 52.

[210] Commission, 'New Opportunities for SMEs under the Reform of Public Procurement Legislation' (2016) <https://ec.europa.eu/growth/content/8707-new-opportunities-smes-under-reform-public-procurement-legislation_en> accessed 18 March 2020.

The Commission has also attempted to assess the legal effectiveness and economic efficiency of the EU's *remedies system* for public procurement since the release of the RD in 2007. These appraisal results have been published in the name of the Commission or its internal units, including the Final Study Executive Summary in 2015,[211] the Commission Effectiveness Report and the incidental Commission Remedies Evaluation in 2017. The Commission has introduced the concepts of the main costs and benefits of the RD for contracting authority and economic operators when it mentions efficiency in its official documents. The Commission has similarly specified the significance of economic efficiency when reviewing procedures for awarding public contracts. However, the Commission has not explicitly explained the concept of efficiency in such paperwork.

Debriefing design shall consider how to *define* economic efficiency and what *criterion* to adopt to minimise the risk of public procurement market failure.[212] Generally speaking, 'economy' refers to the satisfaction of the conditions related to appropriate timing, quantity and quality at the *best price*; 'efficiency' requires the satisfaction of the *best relationship* between resources employed and results achieved.[213] *Two* possible significant *criteria* are contracting with the tenderer with the best tender and contracting with the most efficient tenderer with the *maximum* society welfare.[214] The first concerns maximum utility for the contracting authority in a specific public procurement procedure,[215] which significantly rests on *game theory*. An ideal *tender* should satisfy the *best value for money*. The second respects the traditional economic measurement of a *tenderer* for welfare-maximising allocation of the whole economy.[216] In this position, an optimal tender shall be submitted by the tenderer who *minimise* its own utility.[217]

[211] Europe Economics and Milieu, 'Economic Efficiency and Legal Effectiveness of Review and Remedies Procedures for Public Contracts' <https://publications.europa.eu/en/publication-detail/-/publication/e07de115-c72a-4bd8-9844-daed732da34f>.
[212] R. Preston McAfee and John McMillan, 'Auctions and Bidding' (1987) 25 Journal of Economic Literature 699, 708.
[213] Carlo Maria Cantore and Sübidey Togan, 'Public Procurement in the EU' in Aris Georgopoulos, Bernard M. Hoekman and Petros C. Mavroidis (eds), *The Internationalization of Government Procurement Regulation* (1st edn, Corby: Oxford University Press 2017) 152.
[214] Omer Dekel, 243-44.
[215] Panos L. Lorentziadis, 'Optimal Bidding in Auctions from A Game Theory Perspective' (2016) 248 European Journal of Operational Research 347, 352-53· Paul Klemperer, *Auctions: Theory and Practice* (Princeton University Press 2004) 75-81.
[216] Richard A. Posner, *Economic Analysis of Law* (3rd edn, Boston : Little, Brown 1986), 13-14.
[217] ibid, 13-14.

One statement synthesises two criteria of economic efficiency into an evaluation based on *Coase's theorem*.[218] It could be assumed that the most efficient tenderer, who satisfies the first criterion of economic efficiency, satisfies the second criterion.[219] In other words, a tender of the best value for money from a contracting authority's point of view also qualifies as a tender that would realise the maximum economic utility for the society's welfare. That statement argues that in a perfect competition market,[220] there would be no difference in separating the diverse economic efficiency criteria.

However, that is not a picture of the market reality. *Opportunists* indicate that absolute efficiency is not realistic even under perfect competition since the relationship between the competition and efficiency is subject to the definition of competition.[221] Given the *unavoidable market failure*, it is an idealistic argument that those two criteria could coincide in evaluating the economic efficiency of debriefing. Accordingly, debriefing review in this thesis adopts the *maximation* of social welfare for interpreting those EU legal instruments in terms of their role in preventing collusions, such as competition, procurement rules and general principles of EU law.

4.1. Social Costs of Procedure

From a normative standpoint, a proper procedure design shall fashion rules that *efficiently* enforce the *substantive* law, *minimising* the social costs (i.e., cost of *error* and the cost of *procedures* used to reduce error) associated with enforcement.[222] An *ideal* procedure shall reduce the risk of *error* by enabling the discovery of relevant facts and evidence, testing the accuracy of factual and legal propositions and preventing undesirable settlements.[223] All of those observations stress the crucial role of *debriefing* in managing the risk of error, such as ineffectiveness and

[218] The Coase's theorem considers that in a perfect market with no externalities the most efficient transaction with maximum economic utility is the best offer the offeror has submitted. See Ronald H. Coase, 'The Problem of Social Cost' (2013) 56 The Journal of Law and Economics 837, 866-75.
[219] Richard A. Posner, 13-14.
[220] The perfect competition is a theoretical market model formatted by Léon Walras and developed by Austrian School, the neoclassical followers of Carl Menger, and general equilibrium theorists. See Louis Makowski and Joseph M. Ostroy, 'Perfect Competition and the Creativity of the Market' (2001) 39 Journal of Economic Literature 479, 479-80. Despite some controversy around the standard model, a perfect competition basically occurs in a market where neither buyers nor sellers can influence prices, which leads to an equilibrium of supply and demand. Such a market always featured with i) a variety of small buyers and sellers, ii) no barriers to entry, iii) a state of perfect information and, iv) goods offered by various sellers would have to be identical or homogeneous. See Jonathan Law, A Dictionary of Finance and Banking (6 edn, Oxford University Press 2018).
[221] Louis Makowski and Joseph M. Ostroy, 511-24.
[222] Robert G Bone, 143.
[223] ibid, 143.

infringement, considering its linkage to the EU remedies system. Debriefing design requires more caution about the characteristics that closely concern its social costs.

Apart from error cost, the debriefing design should *compare* with other costs used to *reduce* error, such as legal costs, administrative burdens and compliance costs related to that procedure under a cost-benefit analysis.[224] The Commission asks whether the costs of enforcement outweigh its benefits and create extra legal costs and administrative burdens.[225] Some remedies could entail additional operational and legal costs despite a high satisfaction of legal effectiveness.[226] Increasing legal costs, such as administrative/court fees and the costs of legal services, could deter an aggrieved applicant from bringing a damage action.[227] For instance, a late submitted tender could be accepted or rejected because it can be justified as a best efficient tender.[228]

The debriefing seems essential to public procurement as a starting stage of the remedies system since that proceeding can effectively deter opportunists from exerting restrictions or distortions to *fair competition* in public procurement. For that concern, debriefing offers sufficient pre-contractual remedies at the first instance and, at least, ensures efficient access to the review of the contract award decision timely.[229] Moreover, if that decision is declared ineffective by the review, sufficient correction of the restrictions and distortions on competition eventually occurs at a post-contractual stage.[230] Those abovementioned subsequent proceedings for irregularities correction and compensations cannot be ensured without debriefing.

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[224] Administrative burdens refer to the costs incurred by business, the voluntary sector, public authorities, and citizens in meeting legal obligations to provide information on their action or production, either to public authorities or to private parties. Compliance costs are different from administrative costs, which comes from the generic requirements of the legislation instead of from a legal obligation. See also Commission, 'Commission Staff Working Document Evaluation of the Modifications Introduced by Directive 2007/66/EC to Directives 89/665/EEC and 92/13/ECC concerning the European framework for remedies in the area of public procurement/ refit evaluation' SWD(2017) 13 final (Commission Remedies Evaluation), 46-49.
[225] ibid, 46.
[226] ibid, 46.
[227] ibid, 46.
[228] Omer Dekel, 247.
[229] Case C-161/13 *Idrodinamica Spurgo Velox srl and Others v Acquedotto Pugliese SpA.* EU:C:2014:307, [2014] Digital reports, paras 44-47; Case C-19/13 *Ministero dell'Interno v Fastweb SpA* EU:C:2014:2194, [2014] Digital reports, para 58.
[230] Paul Henty, 'Is the Standstill A Step Forward? The Proposed Revision to the EC Remedies Directive' (2006) Public Procurement Law Review 253, 254.

Administrative burden and costs also signify the costs of procedure and comment on the economic efficiency.[231] As partly argued above, administrative burdens can be observed from several factors, like minimum time limits of procedures, award criteria of quality-price ratio, cost and bureaucracy and exclusion criteria.[232] The potential costs typically include, but are not limited to, those spent on monitoring activities, data collection and audits required by *all* regulatory bodies responsible for regulating the sectors.[233] That evaluation may ask whether the procedural rules have created *more* of an administrative burden for the administration to make efficient decisions.

Considering the above social costs, the *author* believes the debriefing design should put more effort to improving the relevant factors of the automatic debrief,[234] such as risks of error, *minimum* time limits, cost, and bureaucracy. Suppose automatic debrief ideally enables *goodwill* economic operators to appreciate whether a violation of procurement rules on-request debrief is saved, since economic operators would also be less likely to take on more administrative burden and costs of the procedure when they believe they have obtained substantive rights, remedies, or interests in their expectation through that procedure. The effectiveness of resolutions adopted in public procurement also concerns the costs of debriefing, especially debriefing due before the conclusion of the contract, which is a requirement clearly emphasised by consistent EU case-law.[235]

4.2. Pareto-optimality

Economic efficiency is a comprehensive economic concept interpreted in various methods[236] and introduced to interpret and evaluate legal instruments – *whether most society members are better off by applying specific legal instruments*.[237] Pareto-optimality depicts the conditions for efficiency in

[231] Commission Remedies Evaluation, 46-50.
[232] ibid 49; Commission, 'EU Public Procurement Reform: Less Bureaucracy, Higher Efficiency', 5-6.
[233] Commission Remedies Evaluation, 49; Commission, 'EU Public Procurement Reform: Less Bureaucracy, Higher Efficiency', 5-6.
[234] Section 3 of Chapter 4 explains in its legal analysis of Article 2a(2) RD in which the communication of information through automatic debrief is required by the said legal proceeding that aims to signify whether the rejected economic operators are qualified for pre-contractual remedies or an ineffectiveness review (if conditions are met under Article 2(d) RD there is a review body which is obliged to consider ineffectiveness of contract as a result of contract award decision). The review procedure for ineffectiveness is regulated under national domestic law.
[235] Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules* 438.
[236] Richard A. Posner 13. Douglas Baird, Robert Gertner and Randall Picker, Game Theory and the Law (Harvard University Press 1994) 311. Stephen Josiah Spurr, Economic Foundations of Law (2nd edn, Routledge 2010) 68.
[237] Albert Sanchez-Graells, 'Economic Analysis of Law, or Economically Informed Legal Research' 172.

an allocation: i) there is *no* way to make any individual better off without making someone else worse off; or ii) it is *impossible* to make *everyone* better off, or iii) there is *no* way to make *any* trade mutually advantageous. Otherwise, it is possible to make each individual better off if the allocation is not efficient or, in a state of inefficient allocation, one individual is better off without making anyone else worse off.[238]

However, Pareto-efficiency is not typical in real life as the conditions are often *impracticable*. For that reason, alternative definitions of economic efficiency with a potential Pareto improvement are put forward instead of the strict standards of Pareto-efficiency. In other words, criteria for 'efficiency' asks whether there could be an improvement in *social welfare*, if those who benefit from a transaction gain enough to fully compensate those who lose, even if that compensation never occurs.[239] Pareto-optimality describes the *situation* in which it is impossible to make one person better off *without* making at least someone else worse off.[240]

Pareto-optimality is practical for describing and ensuring efficiency in allocative mechanisms, such as *auction mechanisms* and public procurement. The auction is a prevalent allocation mechanism used in economic exchanges in both public and private sectors partially because it can provide Pareto-optimal allocation by devising its rules to benefit bidders.[241] In that situation, auction theory rests on aggregating social welfare in a long-term model that observes anticompetitive effects of tacit collusion (i.e., choosing the most efficient tender maximizing social welfare). Compared with the auction, debriefing can be understood as a set of rules tailored to authenticate and compensate for the loss of economic operators by procedural and remedies rules for efficient allocation.[242] For instance, if the contracting authority behaves deliberately to design the contract, select the tenderers and award the contract so that the winning tenderer does not maximise social welfare by offering an enormous bribe, that procurement mechanism is not efficient allocation.[243]

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[238] Stephen Josiah Spurr 68.
[239] Kaldor Nicholas, 550-51.
[240] Stefan E. Weishaar, *Cartels, Competition and Public Procurement: Law and Economics Approaches to Bid Rigging* (New Horizons in Competition Law and Economics series, Edgar Elgar 2013) 37.
[241] ibid 36-41.
[242] Chapter 5 provides a detailed discussion about oligopoly theory, game theory and auction theory applied in appreciating the risks of tacit collusion during debriefing. That chapter also provides a legal review of EU competition and procurement approaches to preventing collusion risks.
[243] Frédéric Jenny, 31.

5. Conclusion

This chapter selects three objectives to examine formulated by the EU legal framework on public procurement in terms of debriefing design: integrity, fairness and economic efficiency as provided in the PSD, the RD, and the relevant case-law of CJEU, together with literature and policies. To be specific, Chapter 2 interprets the *concepts* of three objectives in relation to EU public procurement regime and the design of debriefing, respectively. Then, Chapter 2 then identifies legal uncertainty about their main *elements* and *factors*, based on which subsequent chapters further explore tactics for debriefing objective-achievement by conducting the *interdisciplinary* research.

There are specific insights resulting from analysis. First, integrity is a principal objective for regulating debriefing formatted by the EU legislators and policymakers when stipulating and interpreting the PSD. Compared with other ambiguous definitions, Section 2 selects for analysis the foremost integrity violation when adopting a *negative* approach to defining integrity, that is, *corruption*. It should be noted that transparency is preferred to fashion specific objectives as a strategic legal instrument (e.g., an integrity tool) or a *component* of procedural fairness at micro dimension instead of a specific objective for regulating debriefing. Since scholars have suggested enhanced transparency and monitoring mechanisms as two functional integrity tools to address corruption, which can best secure the integrity of public procurement. To this, the design of debriefing shall pay attention to improving greater integrity since it can detect corrupt practices and, to some extent, can more effectively contain them amongst the entire procurement process. Chapter 3 considers debriefing as procedural requirement for higher transparency that exposes how the public body reached its contract award decision in terms of the PSD and a monitoring mechanism that ensures aggrieved applicants with access to a review for that decision and remedies for damages if applicable.

Second, fairness is an objective separated from integrity and can be divided into notions of substantive and procedural fairness as discussed in Section 3. The procedural fairness for debriefing shall focus on due process, which requires respect for unsuccessful participant's procedural rights and a balance between those rights with confidentiality due to the *adversarial nature* of the procedure in EU law.[244] In that regard, the awardee of the tender shall not be

[244] Chapter 4 presents those EU fundamental rights under the CFR and general principles of EU law which apply to the regime of public procurement, specifically, the right to good administration under Article 41 CFR (that is referred to self-standing rights under the PSD and the RD, such as the right to designate information as

entitled to an on-request debrief. Furthermore, fairness is an overarching principle of the EU data protection law,[245] which can act as a *factor* to associate *substantive protections* in those fields for improving debriefing fairness in the regulated public procurement. For this concern, Chapter 4 assesses *whether* fairness has been ensured in the enforcement of debriefing when there requires an appraisal of the relevant procurement rules, mainly the Article 55 PSD and Article 2a(2) RD. That appraisal also provides interdisciplinary research on their interaction with CFR (e.g., Articles 8, 41, 42 and 47) and GDPR for the coherence of the EU legal system concerning the different regimes.

Third, both the PSD and the RD have emphasised the significance of economic efficiency in the public procurement setting as an objective for regulating a specific procedure or obligation, such as debriefing. Section 4 mainly discussed two *criteria* of economic efficiency to *minimise* the risk of public procurement market failure, including social costs of procedure weighing up the potential costs and benefits and Pareto-optimality describing the maximum social welfare. Considering the auction theory that adopts aggregating social welfare in a long-term model, debriefing design shall also observe anticompetitive effects of tacit collusion from a single market perspective, outside the procedure *per se*, accordingly. Moreover, debriefing can be understood as a set of rules tailored to authenticate and compensate for the loss of economic operators by procedural and remedy rules for efficient allocation. Chapter 5 provides a detailed discussion about *oligopoly*, *game*, and *auction* theories as applied in appreciating the risks of tacit collusion during debriefing, as well as a legal review of EU competition and procurement approaches to preventing *collusive oligopoly* risks.

confidential and duty to state unsuccessful reasons), as well as the right to a review or an effective remedy under Article 47 CFR (that is referred to an independent review body or the award of pre-contractual remedies under the RD).

[245] Inge Graef, Damian Clifford and Peggy Valcke, 202-05.

CHAPTER 3

Integrity Tools Analysis

1. Introduction

Chapter 2 provides three definite objectives for conducting a critical enquiry about the regulation of debriefing in the present EU public procurement law, combined with a look at comparable procurement structures in other jurisdictions, such as the OECD. It acutely elucidates legal norms that contribute to a better understanding of the objectives at the EU level and provides an economic perception of those norms to contemplate their broader implications on examination. Therefore, this chapter studies integrity tools that economists advise to address the principal-agent problem in EU public procurement law, such as monitoring, transparency, or sanctions.[246] Yet, the tools for preventing a *typical* integrity violation – *corruption* – are somewhat restricted to some features that harm their potential functions,[247] and, therefore, this needs to be explored in the setting of debriefing.

To be more specific, this chapter examines the debriefing provisions, Article 55 PSD and Article 2a(2) RD, in terms of their effectiveness and limitations in fighting corruption from the perspective of each legal instrument, respectively. Section 2 considers Article 55 PSD on informing candidates and tenderers, which seemingly sets up debriefing obligations for *transparency* compliance of the procurement procedure. In this way, those unsuccessful economic operators are more apt to detect a latent abuse of power by public servants for their own interests from the *first* moment of the decisions reached in Article 55(1) PSD, as to whether they took those decisions for *public welfare*.[248] Such decisions made thereunder refer to the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system. In addition, the decision to award a contract triggers the enforcement of the standstill period from the date on which it is sent to economic operators under Article 2a(2) RD. Sections 3 studies Article 2a(2) RD, which, by contrast, sets out automatic debrief as obligation *collateral* to standstill period to provide unsuccessful tenderers or candidates with *procedural guarantees*, at

[246] OECD, *Integrity in Public Procurement: Good Practice from A to Z*, 29 and 89.
[247] Gabriella M. Racca and Christopher R. Yukins, 6-8.
[248] Robert D. Anderson, William E. Kovacic and Anna Caroline Müller, 685. See also Christopher R. Yukins, 65-68. Frédéric Jenny, 31.

least, for the access to a *monitoring* system. Those guarantees entitle the applicants to apply for interim measures or set aside *unlawful* decisions at the *earliest* moment or for review of the contract award decision after the conclusion of public contracts. The standstill period and the automatic debrief are well-placed to guarantee the option to pursue pre-contractual remedies and the chances to obtain the contract in line with Article 2d(b) RD, if there is an infringement of the PSD because of corrupt practices. Section 4 concludes the chapter.

2. Reflecting the Enhanced Transparency Compliance – A PSD Perspective

Considering there are diminutive '*incentives*' in public procurement for public authority, transparency seems to be a better choice than 'disciplinary measures' for integrity since it makes the procurement process more accessible and corruption less possible.[249] In general, transparency provisions are set out to promote fair practices and prevent corruption in public procurement across jurisdictions, such as the WTO.[250] Transparency is essential to ensuring the integrity of the public procurement system across jurisdictions as it prevents[251] or, at least, reduces the risk of corruption in public procurement markets.[252] For instance, the revised text of the GPA requires procurement activities within the WTO regime be conducted to avoid conflicts of interest and prevent corrupt practices.[253]

The OECD stresses ten principles for enhancing integrity throughout the public procurement process, including transparency, good management, prevention of misconduct, and

[249] Gabriella M. Racca and Christopher R. Yukins, 4-5.

[250] Robert Anderson and Anna Caroline Müller, 'The Revised WTO Agreement on Government Procurement (GPA): Key Design Features and Significance for Global Trade and Development' (2017) 48 Georgetown Journal of International Law 949, 993. Sue Arrowsmith, 'The Revised Agreement on Government Procurement: Changes to the Procedural Rules and Other Transparency Provisions' in Sue Arrowsmith and Robert D Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press 2011) 288–91. See also, Sue Arrowsmith, *Government Procurement in the WTO* (Kluwer Law International 2003) 167–79.

[251] Transparency as one of the most effective methods of anti-corruption requires Member States to report violations of rules to national authority, publish the monitoring results and submit a report to the Commission every three years on the most common sources of misapplication or legal uncertainty. For more examples of transparency requirements that encourage integrity and fair play under new EU procurement and concession rules released in 2016, see also Commission, 'EU Public Procurement Reform: Less Bureaucracy, Higher Efficiency', 9-10, 13-14.

[252] Carmen Estevan de Quesada, 240.

[253] Article IV – General Principles
Conduct of Procurement
4. A procuring entity shall conduct covered procurement in a transparent and impartial manner that:
(...)
(b) avoids conflicts of interest; and
(c) prevents corrupt practices.

accountability and control.[254] In EU public procurement, Section 2 of 'publication and transparency' Chapter III PSD enhances transparency for anti-bribery. Article 55, accordingly, stipulates debriefing obligations by the contracting authority to provide the rejected economic operators with feedback for transparency compliance in Section 2. Sub-provision (1) requires a *primary*, *prompt*, and *proactive* disclosure duty – the general notification of unsuccessful reasons – and (2) permits a *supplementary* disclosure duty – on-request debrief – if general notification is *insufficient*.

2.1. Transparency Overview

The tailored EU procurement directives had been in development for a while in the EU market integration process and finally came into force in the 1970s by a series of increasingly detailed harmonising procurement directives. Afterwards, the EU Parliament and the Council utilised various directives to coordinate the award of regulated contracts. In 2014, the Parliament and the Council released a new public procurement package that simplified procedures and made them more flexible, transparent, and efficient. This new package included the PSD,[255] the Utilities Directive[256] and a new Concession Directive.[257] These EU procurement directives, mainly the PSD, arose from the approximation procedure of Article 114 TFEU,[258] 53(1) and 62 TFEU. Despite reform for higher transparency, the enforcement of transparency, to a certain *extent* shall consider the objective, characteristics, and requirements for a specific stage or procedure of the procurement process and the exercise of the public servant who becomes a *proxy* for the principal.

Compared with other transparency provisions set out in Section 2 PSD on publication and transparency, the EU legislature limits the disclosure scope of debriefing. Specifically, Articles 48, 49 and 50 PSD have specified an *incredible* amount of information related to procurement

[254] OECD, 'OECD Recommendation on Enhancing Integrity in Public Procurement'. See also, OECD, 'OECD Principles for Integrity in Public Procurement'.
[255] Council Directive (EU) 2014/24 of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65.
[256] Utilities Directive 2014/25.
[257] Concessions Directive.
[258] According to Article 114 TFEU, these approximation measures are adopted by the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee. Had the harmonisation measure been adopted, differentiated national provisions which are maintained on grounds of major needs (or relating to the protection of the environment or the working environment) or new rules that should be adopted at domestic level on the same grounds, should be notified by the Member State to the Commission as well as the grounds for maintaining them. The latter has the power to approve them explicitly or tacitly, after a time limit of six months has elapsed without any response. See Chryssoula P Moukiou, 81.

that can increase transparency,[259] which is sufficient for the compliance of anti-corruption concerns. In contrast to other transparency provisions, debriefing increases transparency by disclosing unsuccessful reasons essential to make a challenge against the contract award decision that is fitting for the review procedure. It should be noted that those disclosures should by no means violate the general rules of the PSD, significantly Articles 18 on principles and 21 on confidentiality. Exceptions to Article 21 PSD are embedded as an indent of provisions, such as Articles 50(4) and 55(3) PSD. Article 18(1) PSD endorses EU case-law by identifying those general principles for the award of public contracts within the scope of a legal instrument, which applies to all aspects of the procurement process.[260] For that concern, the CJEU's interpretation of those principles is significant for an enquiry into the contracting authority's debriefing considering the *legal coherence* of the EU legal system.

Article 18(1) PSD consolidates the general principles for the award of public contracts within the *scope* of an application, 'contracting authorities shall treat economic operators equally and without discrimination and shall act transparently and proportionately'. This provision sets out the principles of equal treatment, transparency, and proportionality in the public procurement regime in line with the TFEU principles as stated. Nevertheless, Article 18(1) PSD enshrines the principle of transparency as a secondary principle for non-discrimination and equal treatment according to the CJEU's interpretation.[261] The Commission has also affirmed that the principle of non-discrimination on nationality imposed an obligation on the contracting authority to ensure transparency.[262] Before that, EU procurement rules and their enforcement merely prohibited positive measures imposed by the contracting authority, which may have restricted access to contact information for a long period of time. [263] When transparency affirmatively serves as a collateral obligation in EU public procurement law, discussing its 'supporting' role in a specific circumstance is unavoidable.

In Case C-203/08 *Betfair*, for instance, *transparency* obligation actively serves as the *ground* for *equal treatment* by publishing the relative weightings of selection and award criteria in advance.[264]

[259] Articles 48, 49 and 50 PSD provide prior information notices, contract notices and contract award notices, respectively. Carmen Estevan de Quesada, 241.
[260] Case 16/98 *Commission v French Republic* EU:C:2000:541, [2000] ECR I-8315, paras 103-09.
[261] Sue Arrowsmith, *The Law of Public and Utilities Procurement*, para 7-05.
[262] European Commission, Commission Interpretative Communication on Concessions under Community Law [2000] OJ C 121/02 3.1.2.
[263] Abby Semple, para 2.51.
[264] ibid, para 2.58.

Based on Article 67(5) PSD, the CJEU provides a *strict* standard for applying *exceptions* to that transparency compliance only when a public contract is to be awarded based on price *only*[265] or where weighting is *not* possible for objective reasons.[266] Furthermore, the CJEU believes that the principle of transparency *per se* does not require prior publication of the weightings of criteria unless an awareness of them could have made a *difference* to what those involved would have offered.[267]

In Case C-231/03 *Coname*, the CJEU confirms that 'the obligation of transparency applies where the service *concession* in question may be of interest to an undertaking located in a Member States other than that in which the concession is awarded'.[268] The public authority must comply with transparency requirements to ensure the said undertaking can 'have access to appropriate information regarding that concession before it is awarded'.[269] Furthermore, in Case C-91/08 *Wall*, such obligation of transparency requires the concession-granting authority to ensure that an *amendment* to a service concession contract was proposed, which would result in the contract being *materially* different from the original. The negotiations had to be *reopened* to competition.[270] With those precedents, the CJEU confirmed that the obligation of transparency, implied from TFEU principles, such as equal treatment and non-discrimination based on nationality, applies where a contract or concession falls *outside* the EU procurement directives.[271]

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[265] Case C-470/99 *Universale-Bau AG and others v Entsorgungsbetriebe Simmering GmbH* EU:C:2002:746, [2002] ECR I-11617, para 98; Case C-324/98 *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG* EU:C:2000:669, [2000] ECR I-10745, paras 22-24.

[266] EU Focus, 'Obligations Attaching to Service Concession Contract Examined' (2010) EU Focus Case C-206/08 *Wasser- und Abwasserzweckverband Gotha und Landkreisgemeinden (WAZV Gotha) v Eurawasser Aufbereitungs- und Entsorgungsgesellschaft mbH,* EU:C:2009:540, [2009] ECR I-8377, para 47.

[267] Case C-203/08 *Sporting Exchange Ltd v Minister van Justitie* EU:C:2010:307, [2010] ECR I-04695, paras 40–48.

[268] The CJEU noted that in absence of any transparency in the award of service concession contract 'amounts to a difference in the treatment to the detriment of the undertaking located in the other Member States'. See Case C-231/03 *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti* EU:C:2005:487, [2005] ECR I-07287, para 17. See also Case C-203/08 *Betfair*, para 40; Case C-91/08 *Wall AG v La ville de Francfort-sur-le-Main and Frankfurter Entsorgungs- und Service (FES) GmbH* EU:C:2010:182, [2010] ECR I-2815, para 34.

[269] Case C-231/03 *Coname*, para 21.

[270] EU Focus, 21. See also Case C-91/08 *Wall*.

[271] It should be noted that before 2014 service concession contracts were not governed by any of the EU procurement directives. To enforce the TFEU principles, it must be aware that the procuring entity should be equated to a public authority bound by the said principles. An appropriate approach was provided to take the definition of a 'contracting authority' under the Council Directive 2004/17 and Council Directive 2004/18 as guidance. Because the TFEU principles pursue the same objectives as those directives, *inter alia*, free movement of services and their opening up to undistorted competition. However, two conditions must be satisfied: first, that the undertaking in question is effectively controlled by the State; and secondly, that the undertaking does not compete in the market. See Adrian Brown, 'Changing a Sub-Contractor under a Public Services Concession: Wall AG v Stadt Frankfurt am Main (C-91/08)' (2010) Public Procurement Law Review, NA162; See Case C-203/08 *Betfair*, para 39; Case C-91/08 *Wall*, para 33.

The said precedents by the CJEU otherwise demonstrated the connection between the principle of transparency and equal treatment. The Commission has emphasised that both principles contribute to guaranteeing the 'undistorted competition conditions'.[272] This point of view suggests that principles of equal treatment and transparency should be applied as a set of instruments for the achievement of fair competition in public procurement, which is aligned with *pro-competition* purposes in the single market.[273] Alternatively, if these principles have been treated as the public procurement aims to obtain, there is a problem that *excessive* disclosure breaks the balance between the competing legal interests.

2.2. General Notification

Article 55 PSD defines the *timings* and *types* of information tenderers are entitled to receive by the *end* of their participation in procurement procedures, mainly if they are unsuccessful. Article 55(1) PSD defines an automatic obligation to provide general reasons for the rejection of the intended award decision, and this obligation is derived from automatic debrief as provided in the RD. Article 55(2) PSD defines an on-request obligation at a specific level, which acts as a supplementary information obligation if the said automatic obligation is inadequate. This provision is a perfect example of the underlying tensions between the principles of transparency and competition in public procurement.[274]

2.2.1. Legislation of general notification

Articles 55(1) and (2) PSD provide the contracting authority with two progressive debriefing obligations requirements. Under Article 55(1) PSD, the *first* debriefing obligation is the general notification of contract-award decisions (see Table 1).[275]

Table 1: Requirements of General Notification[276]

[272] European Commission, Commission Interpretative Communication on Concessions under Community Law [2000] OJ C 121/02 3.1.2. Case C-87/94 *Commission of the European Communities v Kingdom of Belgium* EU:C:1996:161, [1996] ECR I-02043, para 54.
[273] For the detailed discussion about the principle of competition transposed from the general single market to public procurement markets, see Subsection 3.2, Chapter 5.
[274] Pedro Telles.
[275] Article 55(1) PSD of general notification obligation provides that: '[c]ontracting authorities shall as soon as possible inform *each* candidate and tenderer of *decisions* reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the *grounds for any decision* not to conclude a framework agreement or award a contract for which there has been a call for competition or to recommence the procedure or implement a dynamic purchasing system' (emphasis added).
[276] Table 1 was created by the author based on the Article 55 PSD and EU case-law.

Debriefing Obligations	General notification
Time to Debrief	As soon as the Notification of the Award Decisions
Whom to Debrief	Each Candidate or Tenderer
What to Debrief	Grounds for the Contract Award Decision (Article 55(1))
Manners of Communication	N/A
What to Withhold	Exceptions Subject to Public Interests, Legitimate Commercial Interests, Fair Competition (Article 55(3))

Article 41(1) of Directive 2004/18/EC previously provided the contracting authority with an obligation to inform unsuccessful tenderers and candidates of the contract award result only upon request.[277] Article 55(1) PSD consolidates a new obligation to provide the general notification of contract award decisions under the PSD. This obligation has already been *de facto* introduced as automatic debrief set out in the fourth paragraph of Article 2a(2) Directive 2007/66/EC amending the RD.[278] Also, Article 55(1) PSD set a flexible time limit for regulating such general notification by stipulating terms such as 'as soon as possible'. Therefore, Article 55(1) PSD and Article 2a(2) RD *collectively* provide an automatic obligation, either termed as general nonfiction in the PSD or automatic debrief in the RD.

Regarding legal coherence, Article 55(1) fails to reduce legal uncertainty because it has not sufficiently detailed implementation of that obligation. The same paragraph provides the need to state rejection reasons for any termination decision on procurement procedures, but now using the new expression 'grounds'. It is confusing that the provision has changed the terminology from the 'reasons' by Article 2a(2) RD to 'grounds' by Article 55(1) PSD when the CJEU have not developed *innovative* judgements on the requirements for notification following the new terminology. In contrast, 'a summary of relevant reasons' in Article 2a(2) RD is more explicit regarding the information needed for the automatic debrief. However, the same indent of Article 2a(2) RD provides the same information available for such 'a summary of relevant reasons' with that available for a debriefing on request as previously set out in Article 49(2) of the repealed Directive 2004/17/EC. In this regard, automatic debrief shall provide the exact information on request under the RD and the Directive 2004/17/EC.

[277] Council Directive (EC) 2004/18 of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114, art 41.
[278] Sue Arrowsmith, *The Law of Public and Utilities Procurement*, para 7-297.

Accordingly, if only based on Article 55(1) PSD, it is very likely that information scope released with the contract award decisions and the 'grounds' for termination decisions in the general notification should be interpreted as *full* as possible.[279] As stated above, before the PSD was enacted, debriefing provisions in the RD repealed Directive 2004/17/EC, which required notification of identical contents either automatically or by request.[280] Another reasonable interpretation based on the principle of effectiveness under the RD is that information to be communicated should be relatively *proportional* to the procedural purpose at the standstill period.[281] The author prefers the latter that debriefing should essentially ensure tenderers obtain the *necessary* rather than *complete* information for the need to acquire effective review and remedies on a *proportional* basis.

As far as this thesis advocates, debriefing comes from a collateral obligation to the general principles of equal treatment and non-discrimination in EU law. From the viewpoint of legislative history, those debriefing rules must be interpreted in line with those general principles toward specific procedural objectives. Furthermore, Article 55(1) PSD is expected to consolidate previously enforced automatic debriefs into the regulatory procurement process.[282] However, Article 55(1) within the procurement system improves very *little* about its coherence with Article 2a(2) RD within the remedies system. In response to this concern, it is noted that general notification shall serve the aim of awarding public contracts transparently and fairly under Article 55(1) PSD and, in addition, provide the aggrieved tenderers with opportunities for effective and efficient pre-contractual remedies according to Article 2a(2) RD.

2.2.2. Availability of framework agreements and dynamic purchasing systems

Another uncertainty relating to Article 55(1) PSD concerns the availability of instruments, such as a framework agreement (FA) and a dynamic purchasing system (DPS). As Article 55(1) provides, the contracting authority shall as quickly as possible 'inform each candidate and

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[279] ibid, para 7-304 (emphasis added).

[280] Automatic debrief, as set out in Article 2a(2) RD, additionally requires the communication of 'a precise statement of the exact standstill period applicable' with decisions.

[281] For example, a brief statement of the main award criteria under which the potential awardee scored more highly than the tenderer to whom the notification is sent. Sue Arrowsmith, *The Law of Public and Utilities Procurement*, para 7-303.

[282] For instance, the UK's PCR 2015, as stated in Regulation 86, only requires a standstill notice to notify intended award decisions for pre-contractual remedies purposes. In PCR 2015, the standstill period ends at midnight at the end of the tenth day after sending the notice if the authority sends the notice by electronic means or by fax, or the fifth day after the notice is sent by other means, or the tenth day after the date on which the last supplier receives it, whichever occurs first. This notice sent before the standstill period can be termed the 'standstill notice'.

tenderer of decisions reached concerning the conclusion of a [FA], (…) or admittance to a [DPS], including the grounds for any decision not to conclude a framework agreement, (…) or not to implement a dynamic purchasing system'. Thus, a FA, which has been widely used as an efficient procurement technique,[283] or a DPS, which has its advantage with affording probabilities,[284] additionally affect the implementation of debriefing, regarding *timing* and *contents*, where those instruments are used.

Noticeably, a public contract using a FA or DPS in Articles 33 and 34 PSD, respectively, could invoke the derogation from the standstill period in Article 2b(b) RD while without using a FA or DPS would be recognised as ineffective under Articles 2d and 2f RD. That derogation setting is confusing and precarious since the standstill period under Article 2a RD closely relates to effective observance of debriefing obligations (i.e., general notification or automatic debrief, or debrief on request).[285] In terms of general notification or automatic debrief, it is confusing that using a FA or DPS does not exempt the contracting authority from obligations for general notification or automatic debrief according to Article 55(1) PSD.[286] It is also precarious that *without* the elapse of the standstill period, those unsuccessful applicants have *not* been given sufficient time for applying for on-request debrief for which is supposed to occur during the standstill period according to Article 55(2) PSD and Article 2a RD. When transposing those debriefing provisions into the national legislation, Member States may need to adapt those them to the relatively accurate and precise rules or guidance for practices, closely combining the regulation of the standstill period's elapse considering the effectiveness of debriefing provisions. Such national rules and guidance are expected to help prepare their performance more enforceable in FA or DPS contracts.

2.2.3. Instrument of equal treatment

Since the CJEU deems transparency as a *secondary* principle for *equal treatment*,[287] *transparency* requirements for debriefing shall *inevitably* comply with the enforcement of equal treatment. While integrity is further expected to lay an ethical cornerstone for modern and civilised

[283] The PSD, recital (60).
[284] The PSD, recital (63).
[285] For more discussion about the standstill period, see Section Three in this chapter.
[286] For example, UK's PCR 2015 provides that, in terms of automatic debrief, those reasons for the decision, including the characteristics and relative advantages of the successful tender and the score obtained by the tender to become a party to the FA must be provided in the standstill notices to each tenderer concerning decisions to conclude a FA. See The Public Contracts Regulations 2015 (PCR 2015), reg 86(2).
[287] Sue Arrowsmith, *The Law of Public and Utilities Procurement*, para 7-05.

society,[288] equal treatment is an original requirement developed from the principle of non-discrimination enshrined by Article 18 TFEU.[289] CJEU's case-law established the principles of equal treatment that underlie the regime of EU public procurement, which devotes itself to promoting the EU's internal market.[290] In terms of its application in public procurement, the Commission has indicated that the principle of non-discrimination under the TFEU implied a general obligation of equal treatment which has developed into a principle of equal treatment in procurement directives.[291] Despite that, Article 18(1) PSD treats non-discrimination as *separate* from equal treatment. The first relates to treating tenderers differently because of their *nationality*, and the second is treating dissimilar situations differently and comparable situations the same.

The CJEU provides this interpretation of equal treatment: 'comparable situations must *not* be treated differently, and different situations must *not* be treated in the same way, unless such treatment is objectively justified. The principle of equal treatment is interpreted into *two* different aspects as the equality of *opportunity*[292] and *outcome*, or in other cases, as two aspects of formal equality[293] and substantive equality[294].' That CJEU's interpretation of equal treatment describes the *elements* of substantive equality. It should be noted that equality of outcome may seem *unrealistic* when there is usually only one awardee because of a competing tender or even when the contract is split into lots, the selected awardees receive the equal outcome from diverse lots.[295]

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[288] Omer Dekel, 255.

[289] The Commission has indicated that the principle of non-discrimination under the TFEU implies a general obligation of equal treatment that developed into a principle of equal treatment in public procurement directives. See European Commission, Commission Interpretative Communication on Concessions under Community Law [2000] OJ C 121/02 3.1.1.

[290] Case C-87/94 *Walloon Buses* Case C-243/89 *Commission v Kingdom of Denmark* EU:C:1993:257, [1993] ECR I-03353, para 54.

[291] European Commission, Commission Interpretative Communication on Concessions under Community Law [2000] OJ C 121/02 3.1.1.

[292] Omer Dekel, 246.

[293] Formal or procedural equality refers to the identical treatment to everyone according to, for example, rules, criteria, and processes. Any different treatment for any purpose will be considered as a discrimination that runs against the principle of equality. For example, each lottery ticket endorses an equal chance of winning. The winner is selected by drawing lots but treated in a same procedure or process with other buyers. See also ibid 250.

[294] Substantive equality additionally considers of different effects of the regulation in implementation or different treatments for interested parties subject to different circumstances. Unlike the formal equality substantive equality otherwise requires a value judgement regarding the criteria or characteristics that are ought to be used to identify or distinguish between circumstances. Such distinctive treatments or effects can be accepted or ruled out once the characteristics or criteria that relevant to discriminatory circumstances can be justified. See also, *Stanford Encyclopedia of Philosophy*; Westen Peter.

[295] Abby Semple, para 2.20.

However, the attainment of substantive equality is *realistic* as the *total* benefit of public procurement can be more evenly allocated among society's different units.[296] The derogation from equal treatment implies that, in some cases, the limitation or exclusion of the right to participate can be justified in the procurement procedures.[297] That must be objectively justified as legitimate based on its relevance to the specific criteria or characteristics of the particular situations by the contracting authority, which differentiates participation rights in practice. Otherwise, unlawful discrimination will impact the legal system's consistency and unity in enforcing the same legal instrument.

Admittedly, equal treatment is *de facto* self-evidence of generating an intrinsic value of a public procurement system, but by advancing other values, e.g., the fundamental right to good administration in Article 41 CFR[298] and Article 5 of the Code. The *author* prefers to understand it as an instrument for attaining other objectives of the public procurement system (i.e., integrity and economic efficiency). Then its importance can only be justified on a *proportional* basis. For instance, a late-submitting tender could be accepted or rejected subject to comparing long-term and short-term efficiency. If equal treatment has been *only* identified as an *instrumental* value, then the late tender is very likely to be accepted on the condition that it can be justified as the best efficient tender.[299]

The requirements for equal treatment tend to oblige the contracting authority for transparency compliance, such as in the general notification, but those measures are not generally 'thoughtful' for deterring corruption. From the definition perspective, equal treatment is more substantive

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[296] ibid, para 2.20.

[297] For example, subject to Article 57(3) PSD, on one hand, a tenderer who meets the criteria for mandatory exclusion could be allowed to participate on an exceptional basis, for overriding reasons relating to the public interest, such as public health or protection of the environment. On the other hand, an economic operator could be excluded from participation on non-mandatory grounds under Article 57(4) PSD if, for example, the contracting authority can provide sufficient and plausible indications that this economic operator has entered an agreement with other economic operators aimed at distorting competition. The differentiation between these treatments for economic operators (i.e., derogation from mandatory exclusion grounds or exclusion on non-mandatory grounds) in above examples must be relevant to the certain criteria or characteristics of different situations (i.e., concerns for public interest or fair competition). The irrelevant criteria for selection or exclusion grounds for the tender will violate the substantive equality. Nevertheless, the distinction between a relevant criterion that does not violate the substantive equality and an irrelevant criterion that does is not always explicit and usually throws up the dispute. See also Omer Dekel, 251.

[298] The Charter merely covers to the EU institutions and civil servants. Nevertheless, as the explanations that accompany the Charter make clear, the right to good administration is based on the case-law of the CJEU concerning good administration as a general principle of EU law. This means that good administrative as such a general principle also bind across the Member States when they are acting within the scope of EU law. For more discussion about the principle of good administration applicable to public procurement see Subsection 4.2, Chapter 4 concerning the procedural fairness of debriefing.

[299] Omer Dekel, 247.

equality than the formal since the Commission adopts the elements of substantive equality[300] for equal treatment as a principle.[301] In contrast, the objective of integrity for the contracting authority additionally imposes the duty to eschew the 'appearance' of favouritism apart from the prohibition of 'substantive' favouritism.[302] That requirement prevents the contracting authority from making decisions by considering the *irrelevant* concerns regardless of benefit or detriment.[303] By contrast, discrimination that arises from goodwill (e.g., for the sake of economic efficiency) can be objectively justified for equal treatment.

2.3. Debrief on Request

Article 55(2) PSD subsequently provides the specified requirements (see Table 2) for notifying the unsuccessful candidates or tenders of the rejection reasons by their written requests.[304] This debriefing obligation, termed debrief on request, is independent of either general notification as set out in Article 55(1) PSD or automatic debrief in Article 2a(2) RD. However, given the new Article 55(2)(d) PSD, it is still *unclear* whether the general notification as set out in Article 55(1) PSD should be interpreted as requiring *full* information available for debrief on request. In this perspective, debrief on request is a supplemental obligation to general notification since what is specified in sub-provision (2) should have been communicated primarily and proactively by the contracting authority in the general notification. *Full* disclosure of unsuccessful reasons seems to be an accountability measure for general notification, instead of those *necessary* for economic operators to initiate the review procedure –to decide whether to apply for the review or remedies.

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[300] Substantive equality additionally considers different effects of the regulation in implementation or different treatments for interested parties subject to different circumstances. Unlike the formal equality substantive equality otherwise requires a value judgement regarding the criteria or characteristics that are ought to be used to identify or distinguish between circumstances. Such distinctive treatments or effects can be accepted or ruled out once the characteristics or criteria that relevant to discriminatory circumstances can be justified. See , *Stanford Encyclopedia of Philosophy*.

[301] It is said that 'comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified.' See Joined Cases C-21/03 and C-34/03 *Fabricom*, para 27.

[302] Omer Dekel, 255.

[303] ibid, 254.

[304] Article 55(2) PSD provides that: [o]n request from the candidate or tenderer concerned, the contracting authority shall as quickly as possible, and in any event within 15 days from receipt of a written request, inform:

(a) any unsuccessful candidate of the reasons for the rejection of its request to participate,

(b) any unsuccessful tenderer of the reasons for the rejection of its tender, including, for the cases referred to in Article 42(5) and (6), the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements,

(c) any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement,

(d) any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.

Another opinion may suppose that Article 55(2) PSD probably allows a tenderer to obtain *more* detailed information according to transparency requirements, not limited to rejection reasons that have been provided in the general notification or automatic debrief for access to an effective remedy. However, this point of view cannot give a sound explanation for why indents (a), (b) and (c) of Article 55(2) PSD require *necessary* disclosure to file a complaint – unsuccessful reasons, name of the awardee and characteristics and relative advantages of the selected tenderers – whereas indent (d) enforces *disproportionate* disclosure – conduct and progress of negotiations and dialogue with tenderers. In this regard, there seems to be a *discrepancy* in the legislative thoughts behind the indents of Article 55(2) PSD.

Table 2: Requirements of On-Request Debrief[305]

Debriefing Obligations	**On Request Debrief**		
Time to Debrief	Within 15 Days from the Receipt of a Written Request		
Whom to Debrief	Unsuccessful Candidate	Unsuccessful Tenderer	The Tenderer that has Made an Admissible Tender
What to Debrief	Rejected reasons for its Request to Participant (Article 55(2a))	Reasons for the Rejection of its Tender (Article 55(2b))	Name, Characteristics and Relative Advantages or the Successful Tenderer or Parties to the Framework Agreement (Article 55(2c)); Conduct and Progress of Negotiations and Dialogue With (All) Tenderers (Article 55(2d))
Manners of Communication	A Written Request from the Candidate or Tenderer		

[305] Table 2 was created by the author based on the Article 55 PSD and the CJEU's case-law.

What to Withhold	Exceptions Subject to Public Interests, Legitimate Commercial Interests, Fair Competition (Article 55(3))

2.3.1. Notification of the name of the awardee

Despite greatly enhancing public procurement activities' integrity, that is disputable if the debriefing obligations' regulation engages in limitless or arbitrary transparency for a disclosure. Among the indents of Article 55(2), (c) and (d) PSD present another concern by allowing 'any tenderer', including the awardee, to request specified documents, while neither indent (a) nor (b) does. Literally, indent (c) obliges the contracting authority to inform 'any tenderer' of the 'name of the successful tenderer' and 'characteristics and relative advantages of the tenderer selected' by request.

By using a FA or DPS to contract, there is more than one tenderer selected when a FA or DPS concludes. In this situation, one selected tenderer could request the mentioned name, characteristics, and relative advantages of the other selected tenderers. Insufficient precedents of the CJEU have dealt with this situation, where a selected tenderer requested a debrief under Article 55(2)(c) PSD not mentioned to whether should the contracting authority accept the selected tenderer's request. Therefore, the question is not clear about whether the Commission has comprehensively acknowledged this situation.

Nevertheless, the author would advise the answer is *no* – the Commission does not mean to allow any successful tenderer to request the name, characteristics, and relative advantages of other selected tenderers under Article 55(2)(c) PSD. If the objective of Article 55(2)(c) in that case is to improve transparency, then each selected tenderer or awardee shall be able to request a debrief by using Article 55(2)(c) PSD. Otherwise, Article 55(2)(c) PSD's confusing expressions, such as '*any* tenderer', maybe better revised to '*any* unsuccessful tenderer' to avoid ambiguity. This viewpoint specified above again proves that debriefing cannot simply be regarded sorts of transparency obligations same with the those prior to Article 55 PSD despite the *implied* transparency requirements. Instead, debriefing obligations should primarily work for assisting the unsuccessful economic operators in realising whether they are aggrieved and whether they need an effective remedy or review,[306] whereas the winner requires neither. Therefore, the

[306] The debriefing provides awardees with an opportunity to identify any issues that should be addressed early in performance, to determine whether the contracting authority's source selection decision may be vulnerable to a potential review, to offer support to the contracting authority in the event a review is filed, and to introduce

author would *not* advocate that based on the indents (c) and (d) of Article 55(2) PSD the contracting authority should provide the awardee with information.

First, once the contract award decision is made, if the awardee wants specific information of the tender they have just won, they can wait to comply with other transparency provisions under the PSD (e.g., Article 50 on Contract Award Notices (CAN)). The main difference between the debriefing obligations with relative transparency requirements and other transparency obligations is that the former aim to provide the information required for acquiring effective remedies or any other form of legal challenge before the contract's conclusion. Otherwise, it seems meaningless to set up the standstill period and debriefing obligations to separate the moment a contract award-decision is made from the moment that a contract concludes. In other words, debriefing provisions do not need to be responsible for providing the awardee's information.

Second, if the awardee can acquire information regarding other economic operators under Article 552(c) and (d) PSD, then the contracting authority faces a situation where other economic operators should also be provided with the same or similar information subject to the principle of equal treatment.[307] In other words, those debriefing provisions should not be enacted in a way that contributes to the objective of integrity by taking the *extra* transparency compliance to the awardee.

Third, permitting those competitors to request sensitive information such as to identify each other could be troublesome in competition law that basically opposes the exchange of sensitive information among competitors in the relevant market.[308] In practice, the economic operators have been *de facto* encouraged to strategically use the debriefing opportunity in their interests since with those information exchanged they could tacitly coordinate or collude.[309] Worse, these winners are usually market players that have already obtained competitive advantages in

awardee's legal team to the contracting authority should that review assistance be necessary. See Keith R. Szeliga, 'Ten Tips for a Successful Debriefing' (*Sheppard Mullin, Government Contracts & Investigations Blog*, 9 April 2010) <https://www.governmentcontractslawblog.com/2010/04/articles/debriefing/ten-tips-for-a-successful-debriefing/ > accessed 17 May 2018.

[307] This argument has also been discussed in Subsection 2.2.3 of this chapter.

[308] For more discussion about the concerns about the exchange of sensitive information based on the game-theoretical models, see Subsection 2.1, Chapter 5.

[309] Tacit collusion will be explained in Subsections 2.2 and 2.3, Chapter 5 concerning its definition, conditions, and effects.

a particular service or goods industry, whether duly or unduly, the so-called 'oligopolies'.[310] The collusive oligopoly in terms of any procurement market will put SMEs in a more disadvantaged position to win the contract award.[311] Thus, the author thinks that the Commission should be cautious about approving additional transparency requirements besides lodging complaints in accordance with indents (c) and (d) of Article 55(2) PSD.

2.3.2. Full proceedings disclosed on request

The expression of Article 55(2)(d) PSD further implies that it enforces transparency to a greater extent than either of former indents – (a), (b) and (c) – of sub-provision (2). In comparison with Article 41(1) of Directive 2004/18/EC, due to the introduction of competitive dialogue, Article 55(2)(d) PSD requires the contracting authority to inform 'any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers'. To realise higher transparency, Article 55(2)(d) PSD seemingly provides almost the *full* scope of disclosure relating to the conduct and progress documents of *all* tenderers, if any of those tenderers submits an admissible tender request for that disclosure. In that situation, *full* disclosure becomes a confident choice for contracting authorities, undoubtedly in compliance with (d) to avoid potential complaints accordingly. In this respect, Article 55(2)(d) PSD prepares a routine for the legal practitioners to realise higher integrity by enforcing *exorbitant* transparency, which, however, conflicts with other indents of Article 55(2) PSD.

Moreover, that path overlaps transparency obligations in the PSD (e.g., Article 53 of the electronic availability of procurement documents). Admittedly, debriefing requires a certain degree of disclosure as a requirement of transparency. Simultaneously, they ought to serve the other distinct objectives of fairness and economic efficiency, as discussed in Sections 3 and 4, respectively, of Chapter 2. Debriefing obligations are distinguished from other transparency obligations, which somewhat explains why the RD does not incorporate a complete set of transparency rules for the review procedure. Compared with other transparency obligations set out in the PSD, it is argued that debriefing obligations take more *character* and *function* as a proceeding of the review procedures than that of the award procedures.

[310] For more discussion about the concern about oligopolistic-featured procurement markets, see Subsection 2.2, Chapter 5.
[311] This topic will be discussed in Chapter 5, Collusive Oligopoly Control.

Furthermore, Article 55(2)(d) PSD, in another approach, significantly increases abuse risks using *discretionary* power, leading to excessive disclosure. For example, this subparagraph may be used as a strategic tool by a *malicious* tenderer to obtain information in a lawful method. In that case, an on-request debrief has the same effects as express communication in its contribution to the formalization and stabilization of collusion in the repeated game for the long run. Those risks resulting from unclear provisions in the legislation need to be reduced to a *minimum* before considering an appropriate approach to balancing competing interests on a case-by-case basis.[312]

Above all, the degree of transparency designed for Article 55(2)(d) PSD should be further adjusted in an *explicit* and *specific* manner, such as the recipient of information, confidentiality of information, award procedures and the procurement process stage.[313] Accordingly, the *scope* for using *discretion* thereunder is expected to be restricted to *necessary* information on a proportionate basis. *Two questions* can be considered in this situation to make a judgment: first, whether the *extent* of the disclosure *only* allows unsuccessful or unselected tenderers to decide whether to initiate a proceeding for review or remedies; second, whether that *sort* of information relates to a contract award decision on the request of the economic operators following Article 55(2)(d) PSD, which shall also be *unprocurable* on the grounds of indents (a) and (b) thereof.

2.4. Exceptions to Disclosure – An Example of the UK's FOIA[314]

Considering the need to protect other interests subject to the *qualified* exemptions,[315] Article 55(3) PSD,[316] accordingly, provides a broad scope of discretion conferred on the contracting authority to interpret what should be withheld in debriefing.[317] The element concerning the potential infringement of a particular economic operator's *de facto legitimate commercial interests* could be used collectively with Article 21(1) PSD to protect the confidential aspects and

[312] Chapter 5 will address those approaches to containing collusive practices regarding their possibility and effects on debriefing after reviewing the relevant competition rules, procurement rules and the EU case-law.
[313] Governments should protect confidential information, such as trade secrets of tenderers, to ensure a level playing field for potential suppliers and avoid collusion. See OECD, 'OECD Principles for Integrity in Public Procurement' 127. For a detailed discussion, see Subsection 4.1, Chapter 4 for the protection of business or trade secrets and Section 2, Chapter 5 for the economic analysis of collusion.
[314] See FOIA 2000, hereinafter referred to as FOIA.
[315] Sue Arrowsmith, *The Law of Public and Utilities Procurement*, para 13-07.
[316] Article 55(3) PSD provides that 'contracting authority may decide to withhold certain information (…), regarding the contract award, the conclusion of framework agreements or admittance to a dynamic purchasing system, where the release of such information would impede law enforcement or would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or might prejudice fair competition between economic operators.'
[317] Albert Sánchez-Graells, 'Confidentiality under Reg. 21 Public Contracts Regulations 2015'.

the nature of the information that the provider has not designated.[318] That rule *equally* applies to elements concerning public interests and law enforcement where applicable.

Article 21(1) PSD, depending on the economic operator's *proactive* duty to designate *confidential nature* (i.e., 'technical or trade secrets'), seems reasonable only if it applies to confidential information and, therefore, subject to the *absolute* exemption. In contrast, the contracting authority has the discretion to identify legitimate commercial interests and to withhold concerned information from disclosure under Article 55(3) PSD. On the one hand, as that case-law implies, disclosure of trade secrets may directly infringe legitimate commercial interests of a particular economic operator and, therefore, 'unduly favourite or disadvantage' certain economic operators in breach of Article 18(1) PSD. On the other hand, a withdrawal of information that has been wrongly identified as 'trade secrets' violates transparency requirements on protecting access to legal remedies.[319]

It is worth noting that Article 55(3) PSD uses the term 'might' regarding the prejudice of fair competition *between* economic operators, which provides a *lower* threshold on that exception than the use of 'would' regarding the other interests.[320] That particular wording seems *prudent* since competitive effects resulting from the contracting authority's acts and decisions are duly considered, especially by the independent review body competent to adjudicate the complaint.[321] It appears that the EU procurement directives allow the customised information withdrawal from debriefing according to Article 55(3) PSD, and that withdrawal will *not* affect the contracting authority's enforcement of other *transparency* obligations. In that respect, the contracting authority's decisions to withhold particular information based on Article 55(3) PSD shall be identified or justified. However, to what *degree* such withdrawal could be justified is unclear. In terms of the use of 'might', the provision seems to suggest that such decisions will *probably* be able, even if there is the slightest chance, to prevent the instances of unfair competition, collusion, or other adverse effects on the competition it seeks to avoid.[322]

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[318] For the detailed discussion about the right to designate information as confidential as set out in Article 21(1) PSD on confidentiality, see Subsection 4.2, Chapter 4 of Procedural Fairness Balance.
[319] Case C-450/06 *Varec* Konstanze Von Papp, 'Case C-450/06, Varec SA v Belgian State' (2009) 46 Common Market Law Review 991.
[320] Sue Arrowsmith, *The Law of Public and Utilities Procurement*, para 13-25.
[321] Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules* 445-46.
[322] Case T-89/07 *VIP Car Solutions SARL v European Parliament*, paras 86-94.

As far as the *author* finds, the CJEU has noted in the settled case-law that a single document may be covered by one or several *exceptions*,[323] insofar as *personal data and commercial interests*.[324] To justify withholding certain information, the contracting authority shall adopt a measure considering 'a clear and unequivocal fashion' required for the statement of reasons. Nevertheless, the CJEU is expected to develop its policy by creating precedents on this issue to prevent abuse of those exceptions from violating the principle of *transparency* under the PSD and the principle of *effectiveness* under the RD.[325] Since recital 128 of the PSD states, '*the exchange of information is subject to national laws on confidentiality*', in addition to the relevant EU rules, this section takes the UK's domestic rules and policies on freedom of information (e.g., UK FOIA 2000, Code of Practice,[326] and its domestic case-law)[327] for discussion as a supplement analysis when necessary.

2.4.1. Public interest tests

Public interest tests apply to several exemptions under FOIA 2000, particularly *the commercial prejudice exemption*. Under FOIA, commercial prejudice is *not* sufficient for exemption in Section 43(2) to apply as it is a qualified exemption necessary to rely on a public interest test as set out in Section 2(2)(b) FOIA. This section entails an evaluation of respective public interests between the disclosure and maintaining the exemption. The 'default setting' of FOIA prefers the disclosure unless there is justification to withhold it, and if the competing interests are finely balanced, the disclosure must be ordered.[328] The interests against disclosure include interests in considering the commercial prejudice, namely both the *nature of information* and the *similarity of the prejudice*.[329]

Information Tribunal cases have been concerned with disclosing tender information at the post-award stage. The Tribunal adopts the view that, in general, contact information in a

[323] Case T-42/05 *Rhiannon Williams v Commission of the European Communities* EU:T:2008:325, [2008] ECR II-00156, para 126.
[324] Case T-363/14 *Secolux, Association pour le contrôle de la sécurité de la construction v European Commission* EU:T:2016:521 [2016] Digital Reports, para 64. Hereinafter referred to as Case T-363/14 *Secolux.*
[325] Charles Clarke, 288.
[326] Cabinet Office, *Freedom of Information Code of Practice* (2018). Hereinafter referred to as Code of Practice.
[327] Commercially sensitive information, for example, relates to intellectual property and other commercial interests. See *Veolia ES Nottinghamshire v Limited Nottinghamshire County Council* [2010] EWCA Civ 1214; [2012] PTSR 185 [120].
[328] Information Commissioner's Office, *Freedom of Information Act 2000 (FOIA) Decision Notice (Reference: FS50593297)* (2016) [89].
[329] ibid [72]-[73].

concluded contract must be disclosed in the public interests.[330] Several commissioner decisions indicate that, for example, basic price information that does not reveal how the price is made up is generally *not* protected from disclosure – the primary charges under the contract, liability caps, performance requirements, benchmarking model, etc.[331] As for the general impact of information on tender for future contracts, such as electronic gateway in one case, it should be noted that such impact would be limited by the fact that the contracts would be likely to be *different*.[332] The Tribunal also considered that such a widespread impact in deterring tendering for future government contracts should be given *little* weight so far as this kind of information should be generally disclosed at the post-contract stage,[333] unless an adverse effect on competition is shown against disclosure even after the contract concluded.[334]

Information Tribunal would likely decline the disclosure of two categories of information in its decisions. One category is information on suppliers' approach to work that is not in the public domain, where disclosure would weaken its competitive advantages, such as the information on specific working methods of the main contractor in fulling certain parts of the contract that were considered unique to the contractor and to give it a competitive advantage, and the screenshots produced by the contractor's sub-contractor for the electronic system and the description of their use and purpose (except for those already in the public domain).[335]

The Tribunal considered *two factors* to determine disclosure: how *widely* the information is known and whether it is *still* commercially sensitive. Another category of information that is considered *unnecessary* to be disclosed for the release allows competitors to determine *how* to calculate prices that are more problematic than simply revealing overall prices. Such information in this example include a costing mechanism that would allow others to deduce staff's day rates, discounts negotiated with subcontractors and pricing strategies, and the suppliers' financial models for managing cash flow over the life of the contract.[336] Similarly, the tribunal affirmed the information exempted in IT service for government electronic gateway

[330] ibid [85]-[87].
[331] ibid [101]-[102].
[332] Ibid [100]. The emphasis is added by the author.
[333] ibid [101]-[102].
[334] ibid [99].
[335] Sue Arrowsmith, *The Law of Public and Utilities Procurement*, para 13-90.
[336] *Department of Health v Information Commissioner EA/2008/0018Department of Health v Information Commissioner EA/2008/0018Department of Health v Information Commissioner EA/2008/0018Department of Health v Information Commissioner EA/2008/0018Department of Health v Information Commissioner EA/2008/0018Department of Health v Information Commissioner EA/2008/0018Department of Health v Information Commissioner* EA/2008/0018 [89].

subject to Section 43(2) FOIA 2000 includes the contractor's *detailed financial model* (which is considered to constitute a trade secret) that covers their pricing structure, profit margins, overhead recovery rates and a balance sheet.[337] The Tribunal further allows firms to *probably* refuse to provide such models in future if required to disclose.[338] The Tribunal considered that the presumption against disclosure of such model is generally up to the contract date and extends through the whole life of the contract.[339] However, the Tribunal considered it is essential to disclose the existence and nature of such financial models to ensure public confidence in the scrutiny of the contract.[340]

2.4.2. Legitimate commercial interests

The application of Article 55(3) PSD takes a critical role in adjusting *tensions* between competition and transparency, together with commercial interests as provided in this provision. On the one hand, the 'in-built' *exceptions* embedded in Article 55(3) PSD are merely fitting for certain obligations to disclose (e.g., debriefing obligations) insofar as those obligations are carried out in compliance with the principle of confidentiality in the PSD.[341] In this respect, those exceptions in Article 55(3) PSD cannot be *solely* relied on to prevent the contracting authority from disclosure in general, *unless* this is otherwise provided under EU law (e.g., Article 16(1) of TFEU) or domestic laws (e.g., UK FOIA).[342] On the other hand, although it is clearly stated that Article 21(1) PSD is *without* prejudice to Article 55 PSD,[343] information that is confidential under the former very likely falls under the latter, especially when relating to the *price* (e.g., price range, level, and schedule). The CJEU has recognised in its case-law that the tenders submitted by tenderers may fall within the *scope* of the exceptions relating to the protection of commercial interests on account of the *economic* and *technical* information contained in those tenders.

As EU case-law helps explain, to a certain degree, the protection of the *economic* and *technical* information rests on the close *interrelationship* between the protection of the commercial interests and the possible *distortion* of *fair competition* in the procurement process. Setting out specific

[337] Information Commissioner's Office [101]-[102].
[338] ibid [101]-[102].
[339] ibid [101]-[102].
[340] ibid [101]-[102].
[341] Sue Arrowsmith, *The Law of Public and Utilities Procurement*, para 13-10.
[342] Office of Government Commerce (OGC), *FOI (Civil Procurement) Policy and Guidance Version 2.0* (2008) 16.
[343] That means where Article 55(1) and (2) require disclosure in principle, if applicable, and an exemption under (3) is not applicable in that case, the information must be disclosed, even if it is information protected by Article 21(1). Sue Arrowsmith, *The Law of Public and Utilities Procurement*, para 13-25.

restrictions on the disclosure of tenders submitted by the *successful* tenderers is *integral* to the objective of EU public procurement law, which is based on *undistorted* competition.[344] Accordingly, it is possible to *omit* the communication of certain information to unsuccessful tenderers where it would undermine the protection of legitimate commercial interests or could distort fair competition.[345] In Case T-363/14 *Secoluxi,*[346] the Commission refused to give access to the successful tenderer's bid or its *price schedule*. To this, the CJEU rejected the applicant's request for that access based on a *comparison* between the disclosure of the *price schedule* and that of the award notice indicating the *price level* of its offer. It is argued that the *price schedule* is a more detailed document, setting out item by item the price of the services proposed, while the award notice merely givers the *overall* value of the contract awarded.[347]

Taking account of the *trust* between economic operators and contracting authorities, it is also necessary, in some circumstances, to *restrict* a disclosure that probably infringes the commercial interests. Such disclosure aims to assure economic operators that they can communicate any relevant information to the contracting authorities in the procurement process without fear that those information items will be communicated to third parties whose disclosure could be damaging to them.[348] In this view, the contracting authority must detect what information should not be communicated, if necessary, to protect fair competition and the legitimate interests of economic operators as required by Community law.[349] However, in the later Joined Cases T-339/10 and T-532/10 *Cosepuri*, the CJEU reflected on the *legitimacy* of that duty by the contracting authority by requiring 'to ascertain whether the contracting authority examined *whether* disclosure of documents covered by the exception relating to the protection of commercial interests would have precisely and effectively *undermined* the interest protected'.[350] Specifically, EFSA refused the applicant's request for access to the successful tenderer's bid or other unsuccessful tenderers' bids. The applicant considered that denying access to those documents meant that it was *impossible* to understand the evaluation committee report. To this, the CJEU discharged the applicant's argument and considered it possible to calculate the price

[344] Joined Cases T-339/10 and T-532/10 *Cosepuri Soc. Coop. pA v European Food Safety Authority (EFSA)* EU:T:2013:38, [2013] Digital reports (Court Reports - general), para 100.
[345] Case T-363/14 *Secolux*, para 55.
[346] ibid, para 47.
[347] ibid, paras 54, 55, 57 and 59.
[348] Case C-450/06 *Varec*, paras 34–36.
[349] ibid, para 43.
[350] Joined Cases T-339/10 and T-532/10 *Cosepuri*, para 96. Hereinafter referred to as Joined Cases T-339/10 and T-532/10 *Cosepuri*.

proposed by the successful tenderer without difficulty, despite *not* expressly referring to that price. Therefore, the CJEU rejected the applicant's argument.[351]

In UK domestic rules, FOIA does *not* provide exemptions for commercially confidential information in general.[352] Exemptions of 'commercial interests' set out in Section 43 of FOIA 2000 have *two branches*: in Section 43(1), trade secrets; and in Section 43(2), information if its disclosure would, or would be likely to, prejudice the commercial interests of any third party, including the public authority that holds the information.[353] The term 'trade secret' is not defined in Section 43(1) FOIA, but guidance suggests *how* to approach that exemption:[354] if the information constitutes a trade secret, then the exemption is engaged, as disclosure would cause *harm*. The Ministry of Justice has published working assumptions providing a summary of the information included in the procurement process, which should be used by the contracting authority when making their own disclosure decisions on a case-by-case basis. In terms of debriefing decisions, this guidance provides certain types of contract negotiation information that should be disclosed since 'a successful bidder is notified up to contract signature'.[355] This standpoint suggests that *most* invitation and tender information should not be released during *the selection process*. After the preferred tenderer has been chosen, most information regarding the final contract should be released except for particularly commercially sensitive information, such as *detailed financials* and *project risk logs*.[356]

In the UK, as Ramsey J said in *Mears Ltd v Leeds City Council* [2011] All ER (D) 134 (Jan), 'the requirement of knowledge was based on the principle that a tenderer should be in a position to make an informed view as to *whether* there had been an *infringement* for which it was appropriate to bring proceedings.'[357] In this respect, the general approach was confirmed by the short

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[351] ibid, paras 34, 38, 95 and 100.

[352] Information Commissioner's Office states in its guidance that: 'Information is not exempt from disclosure simply because it is labelled 'commercially confidential'. However, there are some specific exemptions that may be particularly relevant in an outsourcing context. These commonly arise in complaints to the Information Commissioner. Other exemptions may of course be engaged, depending on the facts of the case'. See Information Commissioner's Office, *Outsourcing and Freedom Of Information - Guidance Document* (2017), para 49.

[353] Charles Brasted, 'Freedom of Information: Commercially Sensitive Information' <http://login-westlaw-co-uk.ezproxy.bangor.ac.uk/maf/wluk/app/document?docguid=I71355A70363711E3A992EF40A40CDEE4> , para 43.

[354] Information Commissioner's Office, *Commercial Interests (section 43)* (2017) 3.

[355] Ministry of Justice, *Freedom of information guidance - working assumption - procurement - Annex A* (2008) 4–6.

[356] The original document is removed from the website of Ministry of Justice, citing Charles Brasted, para 51.

[357] *Mears Ltd v Leeds City Council* [2011] EWHC 40 (QB); [2011] BLR 155; [2011] Eu LR 596; [2011] PTSR D31; Official Transcript; Queen s Bench Division; See also discussion in Abby Semple, para 8.84; Paul Henty, 'Disclosure of Information and Time Limits for Proceedings in Public Procurement Cases: Mears Ltd v Leeds City Council' (2011) Public Procurement Law Review 93, 94.

time limits imposed on those *who* wished to challenge the award of public contracts.[358] The start of the relevant period was triggered by the knowledge which the claimant had (or should have) of the potential infringement.[359]

TCC Guidance Note on Procedures for Public Procurement Cases (TCC guidance)[360] is considered a helpful *benchmark* for treating confidential information in jurisdictions *beyond* England and Wales, provided that the practical solutions that derive from English and Welsh legal culture are adapted to domestic legislative features.[361] TCC guidance requires a claimant also to act *proportionately* and *reasonably*, which would *undoubtedly* include the respect for the *scope* of the claimant's requests.[362] In the context of procurement litigation in England and Wales, TCC guidance has adopted a *less* restrictive approach (i.e., *open* approach) to decisions than previous ones to achieve a *balance* of interests through practical approaches and general criteria.[363] TCC guidance states that 'confidentiality is *not* a disclosure bar. However, the basic principle of open justice needs to be balanced to protect confidential information'.[364]

Document disclosure is likely to be of particular interest to parties involved in public procurement disputes. The contracting authority in recent English case-law is prone to adopt a much more open approach to release the information early in proceedings.[365] In the Case of *Alstom Transport UK Ltd v London Underground Ltd & Anor* [2017] EWHC 1584 (TCC), Stuart Smith J adopts a *less* restrictive approach to the *scope* of disclosure where the order should *not* be restricted to documents only relevant to the application to lift the automatic suspension.[366] This approach is somewhat *less* restrictive than the principles summarised by Mr Justice

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[358] Paul Henty, 'Disclosure of Information and Time Limits for Proceedings in Public Procurement Cases: Mears Ltd v Leeds City Council', 95.
[359] Jan Miller, 'Disclosure and Inspection of Documents—Production of Documents—Production before Commencement of Proceedings' (2013) 163 New Law Journal 17, 17.
[360] Technology and Construction Court, *TCC Guidance Note on Procedures for Public Procurement Cases* (2017)
[361] Albert Sanchez-Graells, 'Interesting Guidance on Confidentiality of Commercial Secrets in Procurement Litigation Issued by The TCC' 4 September 2017 <http://www.howtocrackanut.com/blog/2017/9/4/interesting-guidance-on-confidentiality-of-commercial-secrets-in-procurement-litigation-issued-by-the-tcc> accessed 9 June 2018.
[362] Technology and Construction Court.
[363] Albert Sanchez-Graells, 'Interesting Guidance on Confidentiality of Commercial Secrets in Procurement Litigation Issued by The TCC'.
[364] Technology and Construction Court, para 27.
[365] Totis Kotsonis and Edward Williams, 'New Guide (TCC) Sets Out the Recommended Pre-action Process for Parties to Follow in a Procurement Dispute' Eversheds Sutherland International <https://www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/Diversified-industrials/Procurement_DI> accessed 09 September 2018
[366] *Alstom Transport UK Ltd v London Underground Ltd & Anor* [2017] EWHC 1584 TCC, para 5.

Coulson in *Roche Diagnostics Ltd v The Mid Yorkshire Hospitals NHS Trust*,[367] which is *opposite* to Mr Justice Akenhead's previous decisions regarding the restrictive approach to applying for disclosure that *only* targets s.47(H) hearing.[368]

3. Ensuring Access to a Monitoring System – A RD Perspective

Transparency alleviates information asymmetry to an *extent*, but it is, *per se*, not sufficient to make the public servant more *accountable*, especially in the case of *strategically* coordinated or collusive behaviours that could go easily *undetected*.[369] When *transparency* provisions cannot assist the unsuccessful tenderers or candidates in screening such *furtive* strategic behaviours, at least they are provided with a reference to the reason for their failure and the right to decide *whether* to make a complaint.

Establishing domestic review procedures or bid challenge mechanisms is an essential rampart against corruption for the public procurement system in the WTO,[370] the OECD,[371] and the EU.[372] To be more precise, the GPA requires each party to establish or maintain such procedures and to observe related procedural guarantees, especially that supplier challenges be reviewed in a timely, effective, transparent and non-discriminative manner.[373] The OECD suggests ten principles to enhance integrity in public procurement based on good governance, such as complaints handling in a *fair* and *timely* manner for the sake of *accountability* and *control*.[374] The EU Commission also suggests introducing strict 'complaints-handling procedures' when

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[367] *Roche Diagnostics Ltd v Mid Yorkshire Hospitals NHS Trust* [2013] EWHC 933 (TCC), [2013] All ER (D) 133 (Apr) TCC paras 16–20.

[368] *Alstom Transport UK Ltd v London Underground Ltd & Anor*, para 5.

[369] To 'flatten' the government where there lacks a clear framework for accountability to those outside the organisation, one alternative is to give officials more authority and make them more accountable to citizens. That can be done by making each stage of the procurement process – planning, solicitation, competition, and award – more transparent so that others can view the procurement process as it continues. It can also be done by establishing sound systems for review, such as remedies systems that allow for challenges by affected third parties. See also, Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (Peter-Armin Trepte ed, Oxford University Press 2004) 129–32.

[370] Robert D. Anderson, William E. Kovacic and Anna Caroline Müller 687.

[371] OECD, 'OECD Recommendation on Enhancing Integrity in Public Procurement' 115. see also OECD, 'OECD Principles for Integrity in Public Procurement' 109.

[372] Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules* 445–46.

[373] Article XVIII – Domestic Review Procedures

1. Each Party shall provide a timely, effective, transparent, and non-discriminatory administrative or judicial review procedure through which a supplier may challenge:
    a. a breach of the Agreement; or
    b. where the supplier does not have a right to directly challenge a breach of the Agreement under the domestic law of a Party, a failure to comply with a Party's measures implementing this Agreement,

arising in the context of a covered procurement, in which the supplier has, or has had, an interest. The procedural rules for all challenges shall be in writing and made generally available.

[374] OECD, 'OECD Principles for Integrity in Public Procurement' 127.

the public contract is *neither* drafted in compliance with technical specifications or tender documents *nor* well monitored.[375] For example, Article 1(1) RD requires the Member States to take necessary measures to ensure that the contracting authorities' decisions may be reviewed as *effectively* and *rapidly* as possible.

Specifically, in terms of debriefing, the general notification in Article 55 (1) PSD provides substantive and specific requirements for an automatic debrief in Article 2a(2) RD with the development of the procurement procedure PSD. Nevertheless, from the RD perspective, debriefing, either the general notification or the automatic debriefs, is *distinct* from those *transparency* obligations in Section 2 PSD. Debriefing provides tenderers and candidates with procedural guarantees for their access to the review procedures, which means a trigger for setting up the standstill period is *essential* to an effective oversight mechanism for the EU procurement activities.[376]

3.1. General Principles

Besides the procedural rules on organising the public contract award, the EU legislature considers it necessary to provide the remedies rules by which economic operators can enforce the procedural rules with *less* violations. To this end, the EU's adoption of Council Directive (EEC) 89/665 and Council Directive (EEC) 92/13 introduced the EU's remedies system regarding the public procurement regime.[377] The RD requires the contracting authorities'

[375] OLAF European Commission, 25.

[376] Since many more stakeholders can exercise oversight in a transparent procurement system. More transparency in a procurement system, fewer problems with integrity it is likely to meet. See Gabriella M. Racca and Christopher R. Yukins 2–3. See also, Christopher R. Yukins, 71–79.

[377] Remedies Directives includes Council Directive (EEC) 89/665 and Council Directive (EEC) 92/13, both of which are amended by Council Directive (EC) 2007/66. Before their release, the EU public procurement rules have always been enforceable by the affected parties in the national courts, in accordance with general principles derived from the relevant treaties. However, by the mid-1980s when the Commission came to review European policy on public procurement, many Member States did not provide effective remedies in practice – and often they did not provide any legal remedies for breach of national procurement rules either, or only very weak legal remedies. To address some concerns that the original remedies regime put in place by Council Directive (EEC) 89/665 and Council Directive (EEC) 92/13 were *not* entirely effective, the EU legislature adopted a *new* directive of Council Directive (EC) 2007/66 to amend these original EU remedies directives. The key *changes* introduced are: (i) a mandatory requirement for notifying award decisions to losing suppliers, and a requirement to delay conclusion of the contract for a certain time after notification, in order to allow time for challenges to the award decision (the 'mandatory standstill'); (ii) a specific minimum time limit to be allowed to suppliers for bringing legal actions; (iii) automatic suspension of procedures when a challenge is brought; (iv) a new requirement for concluded contracts to be ineffective in the case of certain violations in certain circumstances; (v) penalties of fines or contract shortening in certain circumstances. For more detailed comments, see Jane Golding and Paul Henty, 'The New Remedies Directive of the EC: Standstill and Ineffectiveness' (2008) Public Procurement Law Review 146 (emphasis added).

decisions be reviewed *effectively* and *efficiently* if they go against the PSD.[378] National law across the Member States regarding review bodies, legal remedies, eligible bodies allows requests for a review procedure, etc.,[379] and the main provisions of the RD are *mandatory* and must be transposed into national law.

Article 1 RD enshrines the principles of the RD, including the principles of *effectiveness*, *expediency*, *non-discrimination*, and *availability*. Those clear procedural rules must, however, 'be *no less* favourable than those governing *similar* domestic actions (i.e., principle of *equivalence*) and must *not* render practically impossible or challenging the exercise of rights conferred by EU law (i.e., principle of *effectiveness*)'.[380] For instance, the fees for applying for a review, varying with *levels* and *structures*,[381] must *not* compromise the efficacy of the RD.[382] Article 1(2) RD imposes an obligation on the Member States to *avoid* introducing review procedures for contracting authorities' decisions and procedures for awarding *damage* in a *discriminate* manner. Article 1(2) RD provides that 'Member States shall ensure that there is *no* discrimination between *undertakings* likely to make a claim in respect of *harm* in the context of a procedure for the award of a contract because of the *distinction* made by this Directive between national rules implementing Community law and other national rules'. This provision restates the TFEU principle of *non-discrimination* at the EU level as governing the review procedures for the award of public contracts. The Commission *similarly* underlines the application of those principles in obtaining the legal effectiveness of the RD by 'increasing the guarantees of transparency and non-discrimination; and providing economic operators with the assurance that *all* tender applications will be treated *equally*'.[383] Accordingly, Article 2(7) RD provides that Member

[378] This research mainly discusses the review procedures under Council Directive (EEC) 89/665 that applies to public supply, public works, and public services (Public Services) under the PSD. Since two Remedies Directives as amended are very similar, for the sake of simplicity, this research uses the term of RD to refer to the amend Council Directive (EEC) 89/665 regarding the review procedures correspondent to the award procedures of the public sector services.

[379] For example, some Member State additionally provides that a third party is eligible to start a review procedure (e.g., the Czech Republic, Denmark, and Portugal). See Commission Remedies Evaluation 25.

[380] Case C-166/14 *MedEval - Qualitäts-, Leistungs- und Struktur-Evaluierung im Gesundheitswesen GmbH* EU:C:2015:779, [2015] Digital reports (Court Reports - general), para 37; Case C-61/14 *Orizzonte Salute*, para 46; Case C-538/13 *eVigilo Ltd v Priešgaisrinės apsaugos ir gelbėjimo departamentas prie Vidaus reikalų ministerijos* EU:C:2015:166, [2015] Digital reports (Court Reports - general), para 39.

[381] Such difference is driven by a range of factors, such as the level of national procedural autonomy, different systems and procedures or the existence of administrative review bodies. See Commission Remedies Evaluation 40 and Annex 11.

[382] Case C-61/14 *Orizzonte Salute*, para 47; Case C-538/13 *eVigilo*, para 40; Case C-406/08 *Uniplex (UK) Ltd v NHS Business Services Authority* EU:C:2009:676, [2010] ECR I-00817, para 27.

[383] Commission, 'Report from the Commission to the European Parliament and the Council on the effectiveness of Directive 89/665/EEC and Directive 92/13/EEC, as modified by Directive 2007/66/EC, concerning review procedures in the area of public procurement' COM(2017) 28 final 5.

States must take *any* measures necessary to ensure that decisions taken by the contracting authority may be reviewed *effectively* and as *rapidly* as possible and can be *effectively* enforced because the decisions at issue have infringed *substantive* procurement rules, especially the PSD. For instance, the principle of effectiveness of review procedures under the RD enables the aggrieved party to initiate a proceeding to set aside the contracting authorities' unlawful decisions or to remove discriminatory technical, economic, or financial specifications in the invitation to the tenderer or any other procurement documents.[384]

In addition, the CJEU believes that the RD sets out 'the *minimum* conditions to satisfy the review procedures established in domestic law',[385] which shows the *minuscule* intention of harmonising the remedies system in public procurement.[386] Nevertheless, the CJEU allows the Member States to establish the detailed rules of administrative and judicial procedures under the principle of *procedural autonomy*. Those RD principles shall be ensured throughout the standstill period and the automatic debrief; they shall further the complete review and remedies procedures and regulate contracting authorities' use of *discretion* in their procurement conducts and decisions thereof. As noted in previous Subsection 3.2, Chapter 3, the CJEU also believes general principles of EU case-law must be interpreted associated with the fundamental rights set out in the CFR before a court or tribunal, especially the right to an effective remedy provided in Article 47 CFR examined in Section 4, Chapter 4.[387]

3.2. Standstill Period

The standstill period is created by *Alcatel's* decisions[388] of the CJEU, which have reformed the review procedure concerning the EU. Chart 1 below shows that the standstill period overlaps the award procedures and the review procedures. Of particular significance was *Alcatel*'s decisions that entailed a 'standstill period' (or *Alcatel* period) between the announcement of a potential awardee of the public contract, that is the 'Award Debrief', and before the conclusion of the public contract, that is the 'Contract Conclusion' (see Chart 1).

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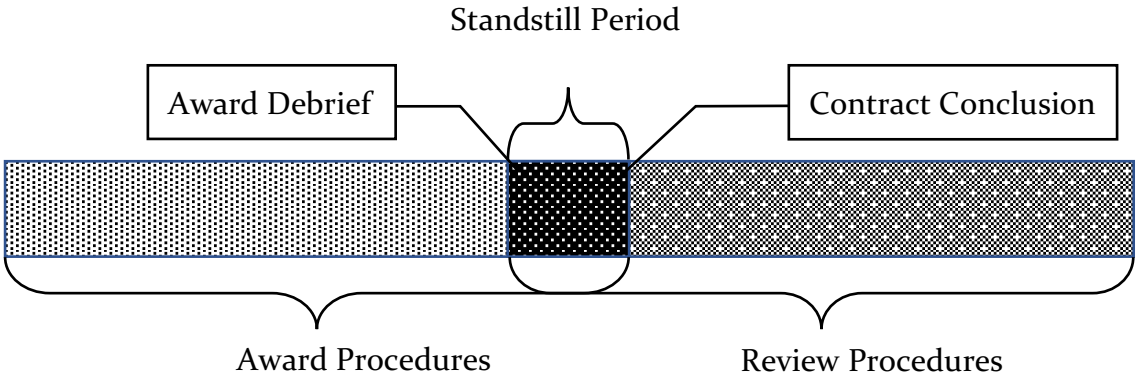
[384] Christopher H. Bovis, para 12.157 (emphasis added).
[385] Case C-314/09 *Stadt Graz v Strabag AG and Others* EU:C:2010:567, [2010] ECR I-08769, para 33.
[386] Commission Remedies Evaluation 14.
[387] Chapter 4 examines the existing judicial policies and approaches towards the use of discretion from the perspective of procedural fairness, subject to the principles of EU law to safeguard those fundamental rights, in making debriefing decisions following the objective of procedural fairness as stated in Section 3, Chapter 2.
[388] The CJEU ruled that the Court ruled that 'Member States are required to ensure that the contracting authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure with which it will conclude the contract is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of obtaining an award of damages'. See Case C-81/98 *Alcatel*, para 43.

Accordingly, the standstill period allows the contracting authority to perform debriefing obligations and the tenderers or candidates to file challenges during that time.

Chart 1: Timeline of the Standstill Period



In the subsequent Case C-212/02 *Commission v Austria* filed 2004,[389] the CJEU decided that first, an *effective remedy* requires an obligation to inform tenderers of the award decision (i.e., automatic debrief). As the CJEU ruled, 'a reasonable period must elapse between the time when the award decision is communicated to unsuccessful tenderers and the conclusion of the contract to allow an application to be made for interim measures prior to the conclusion of the contract'. Second, the unsuccessful tenderer could examine the *validity* of the award decision with sufficient time.[390] Article 2a RD, as amended by Directive 2007/66/EC, restates the standstill period, and the automatic debrief clarifies the *minimum* conditions for implementing those rules. The paragraph 2 of Article 2a RD provides that 'a contract may not be concluded following the decision to award a contract before the expiry of a period of, at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenders and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision'.

[389] Case C-212/02 *Commission v Austria* EU:C:2004:386 [2004] ECR (unpub), para 23.
[390] Commission Remedies Evaluation 17.

3.2.1. Legislative history of the standstill period

Before the 2007 amendment of the RD, contracting authorities could make an *irreversible* contract award decision, but the *only* remedy available for economic operators was *damage* subject to national laws. The authority is allowed to sign a public contract when making the award decision *without* waiting for this decision to be challenged.[391] After implementing that amendment for almost ten years, in 2017, the Commission published the Commission Effectiveness Report on the RD and the accompanying Commission Remedies Evaluation. The Commission found that, in the EU public procurement remedy system, both contracting authorities and economic operators consider that automatic debrief requirements are *indispensable* for enforcing the standstill period.[392] Based on the Commission's public consultation results, most respondents unconditionally believed that the standstill period is *necessary* for an effective review procedure.[393]

Accordingly, the revised RD provides Article 2a(2), under which a contract within its *scope* must *not* be concluded until a certain period after the standstill period has elapsed, following the notification of contract award decision in the procurement.[394] In any event, the provision avoids an *unduly* extended standstill period that lasts beyond a specified time. Otherwise, following the Case C-81/98 *Alcatel* judgement, the contracting authority must *re-start* the standstill period when it starts without the automatic debrief.

The Member States generally apply the *minimum* standstill period, i.e., 10 or 15 days subject to the means of communication used, as required by Article 2a(2) RD.[395] Nevertheless, some Member States have adopted different durations of the standstill period in their national legislation. For example, Ireland has adopted a more extended period, i.e., a minimum of 14 calendar days if sent by fax or electronic means and 16 days if sent by other means.[396] Italy applies the most prolonged period of 35 days from the date of the last communication of the contract award decision.[397]

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391 ibid 17.
392 ibid 52.
393 Commission Effectiveness Report 53.
394 Sue Arrowsmith, *The Law of Public and Utilities Procurement*, para 7-297.
395 Commission Effectiveness Report 26.
396 ibid 26.
397 ibid 26.

Article 2a(2) RD also requires an automatic debrief obligation for the contracting authority to provide tenderers or candidates with information about their rejection before the notification of the contract award decision. Furthermore, that notification shall reach each tenderer and candidate concerned and be accompanied by a summary of the relevant reasons as set out in Article 41(2) of Directive 2004/18/EC, subject to the provisions of Article 41(3) of that Directive, and a precise statement of the exact standstill period applicable under the provisions of national law transposing this paragraph.[398]

In addition, according to the Commission Remedies Evaluation, more than half of the Member States have opted to use the *derogation* from the standstill period in *three* cases as required in Article 2b RD.[399] These cases derogate from the standstill period accordingly include: first, a direct award that does not require prior publication of a contract notice; second, there is only one tenderer to be awarded and no candidates. However, they are *not* sufficiently explicit to indicate whether the contracting authorities shall *proactively* inform each tenderer with a summary of reasons. It is also *not* definite about *how* to ensure the possibilities of pre-contractual remedies when there are *no* compulsory requirements for the standstill period. Those uncertainties seem particularly serious concerning a specific contract based on a FA or a DPS when the rules are transposed into national laws by the Member States.

3.2.2. Extension of the standstill period

As provided under the RD, the standstill period typically lasts at least 10 or 15 calendar days, depending on fax, electronic or other means of communication used in the Member State's transposition. On the one hand, the duration of the standstill period, *overlapping* the time for economic operators to request a debrief, has been set out consistently by the Member States, which lasts for *limited* calendar days. The regime of recognising the post-contractual remedies,

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[398] Article 41(2) of Directive 2004/18/EC, as repealed by Article 55(2) of the PSD, provides another obligation to debrief on request:

> On request from the party concerned, the contracting authority shall as quickly as possible inform:
> — any unsuccessful candidate of the reasons for the rejection of his application,
> — any unsuccessful tenderer of the reasons for the rejection of his tender, including, for the cases referred to in Article 23, paragraphs 4 and 5, the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements,
> — any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement.
>
> The time taken may in no circumstances exceed 15 days from receipt of the written request.

In this respect, Article 2a(2) RD initially assumes the same contents to debrief either automatic or request.

[399] Eight Member States use derogation in one or two cases. Only four Member States (Austria, Greece, Malta, and Slovakia) have *not* applied the derogation at all and compelled the standstill period set in all domestic cases. See Commission Remedies Evaluation 26.

i.e., damages, is *not* regulated by the RD but by the Member States' detailed domestic rules.[400] It is reasonable to assure the *shortest* period for the on-request debrief under the EU public procurement rules. On the other hand, it is still demanding that the contracting authorities could complete an on-request debrief before the expiry of a limited standstill period, which cannot be suspended or extended in the preceding case because the complaints have not yet been found out to be substantive violations. For example, Italy's *most prolonged* standstill period is 35 days from the contract award decision's last communication.[401] In this regard, it is *not* persuasive that the standstill period's applied length can adequately guarantee the economic operator's right to request the *repeated* debriefs.

Another legal uncertainty is concerning a *period* that calls for the contracting authorities' fulfilment in their on-request debriefs in Article 55(2) PSD. In other words, this uncertainty questions the economic operators entitled to request a debrief after the expiry of the standstill period, all the while there is the conclusion of a contract. Nevertheless, the author considers that the contracting authorities shall completely fulfil their debriefing obligations *no* later than the period that the contract award notices are sent to the economic operators. According to Article 50(1) PSD, the contracting authorities shall send a contract award notice *no later* than 30 days after the conclusion of a contract or a framework agreement. As soon as a contract award notice is sent, the contracting authorities' decisions to award or conclude a contract becomes legally effective. If on-request debriefs are designed to secure pre-contractual remedies, the EU legislators should have regulated the post-contractual damages coherently with those interim measures or provided the essential standards for regulation at the EU level instead of leaving them to national lawmakers.

Furthermore, the lapse of a standstill period shall also guarantee economic operators' opportunities to acquire sufficient information through on-request debrief, which helps them appreciate *what* kind of interim measures are applicable. Specifically, the break provided by the standstill period comprises part of an automatic suspension that 'no earlier than the expiry of the standstill period' as provided in Article 2(3) RD. This provision on an automatic suspension similarly prohibits the contracting authorities from concluding the contract before the first instance review body has decided on 'the application either for interim measures or for review'. That means, at the *earliest* opportunity, any economic operator is entitled to apply for *interlocutory*

[400] ibid 29.
[401] ibid 26.

procedures, interim measures, the setting aside of unlawful decisions[402] or for a review of contracting authority's decision within time limits as stated in Article 2c RD.[403] In this regard, the standstill period is introduced to guarantee the award of interim remedies with proper time before the public contracts are concluded.[404] Despite a nominal cost of time, the standstill period may assist the review procedure to correct the alleged infringement or prevent further damage to the interests concerned as set out in Article 2(1)(a) RD, which ensures the effectiveness of the monitoring system.

In Recital (12), the RD, if an economic operator applies for the review of a contract award decision shortly before the end of the minimum standstill period, the first instance body responsible for the review should have the minimum time to respond to that latent application by significantly *extending* the standstill period.[405] From this viewpoint, the author would interpret the Commission's standpoint toward the circumstance above through the terminologies of 'an independent minimum standstill period' in Recital (12). In this regard, the author advocates that the standstill period should not end before the review body can decide to award interim measures or to set aside of an unlawful decision. In other words, the length of an independent minimum standstill period should be *flexible*, which customarily depends on *how long* the review body takes to decide on the application.

On the one hand, such a requirement for the standstill period obliges the contracting authority to carefully consider the economic operator's application and decide *before* the conclusion of a contract. For this concern, the RD customarily confers on the review body the right to extend the standstill period for the time required at its discretion. On the other hand, such *undefined*

[402] Once transposed into the national law, the domestic courts or administrative tribunals may set aside or annul the contracting authorities' acts to nullify their decisions to award a public contract before the contracts concluded. Setting aside or annulment order cannot attack the contract *per se*, as the latter represents a pact between the contracting authority and a third party. Typically, such an order needs to be justified by a test for a balance of interests considering weights and damages. In contrast, most legal systems merely consider the contracting authority's administrative acts as to whether they are lawful. See Christopher H. Bovis, para 12.168.

[403] Article 2c provides that 'where a Member State provides that any application for review of a contracting authority's decision taken in the context of, or in relation to, a contract award procedure falling within the scope of Directive 2004/18/EC must be made before the expiry of a specified period, this period shall be at least 10 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used, this period shall be either at least 15 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of the receipt of the contracting authority's decision.'

[404] Commission Remedies Evaluation 7.

[405] The RD, recital (12) (emphasis added).

and *unlimited* discretion may *blemish* the effectiveness of the standstill period.[406] As far as Article 2a(2) RD infers, the duration of standstill time, including the prolonged time when *necessary*, shall *not* be unlimited from the point of view of the legislation. Concerning that point, Article 2a(2) RD provides the Member States with an option of a *minimum* standstill period if electronic means or fax are not applicable, either at least 15 calendar days with effect from the day following the date on which the contract award decision is *sent* to the tenderer or candidate concerned or at least 10 calendar days with effect from the day following the date of the *receipt* of the contract award decision. It can be seen that Article 2a(2) RD tends to ensure a *minimum* standstill period that is *independent* of the delivery time of the contract award decision when that takes more than a single calendar day or is almost instantaneous, as with electronic delivery. In this respect, the RD shall provide the Member States with more *enforceable* and *explicit* rules for their transposition concerning the decision-making of extension thereof to limit *corruption*.[407]

To guarantee the effectiveness of the review procedure, Article 2c RD also provides *minimum* time limits for applying for review. Article 2c RD provides that 'where a Member State provides that *any* application for review of a contracting authority's decision taken in the context of, or in relation to, a contract award procedure falling within the scope of Directive 2004/18/EC must be made before the expiry of a specified period, this period shall be at least 10 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate if fax or electronic means are used or, if other means of communication are used, this period shall be either at least 15 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or candidate or at least 10 calendar days with effect from the day following the date of the receipt of the contracting authority's decision.' As seen above, Article 2c RD gives effect to time limits for applying for review from the *same* date concerning the standstill period given by Article 2a(2) RD if electronic means or a fax are used. Also, Article 2a(2) RD provides the Member States with a minimum duration in terms of the standstill period, which *equates* to time limits for applying for a review Article 2c RD.

[406] Because procurement officials can easily exercise discretion through the procurement process, corrupt government officials have ample opportunities to seek irregular payments from prospective contractors. See UNODC, 'Guidebook on Anti-corruption in Public Procurement and the Management of Public Finances: Good Practices in Ensuring Compliance with Article 9 of the United Nations Convention Against Corruption', (2013) 6.

[407] Efforts to limit the discretion of procurement officials with specific rules of operation have proven effective in curbing corruption. See, for example, ibid 25.

Despite some *commonalities*, it is necessary to distinguish the standstill period set out in Article 2a(2) RD from the time limits for applying for review by Article 2c RD. Since an application for review must be sent *before* the review body can decide on it, it appears that the Member States shall generally provide the standstill period with the minimum duration that warrants the minimum time limits for review of a contract award decision and the minimum time necessary for deciding on such application. Regarding *logistics*, it is suggested that Article 2a(2) RD shall provide an *independent* minimum standstill period just *longer* than the minimum time limits for applying for review. Otherwise, the review body cannot avoid the situation where an economic operator seeks review shortly before the end of the minimum standstill period. In that circumstance, the public servant responsible for taking decisions must extend the standstill period *frantically* to avoid challenges afterwards.[408]

However, Article 2c RD begins the time limit for applying for a review, if other means than electronic communication or fax are used, from the day following the date on which the contract award decision is *sent* to the tenderer or candidate *without* an option for the date of the *receipt* of contract award decision as provided in Article 2a(2) RD. That suggests a *flaw* if the Member States follow the above provision of the RD in regulating a minimum standstill period.[409] For example, if a contract award decision takes more than five calendar days on delivery, a minimum standstill period with effect from the day following the date of the *receipt* of the contract award decision (i.e., 10 calendar days) *plus* the delivery time may *not* cover the time limits for seeking review, *but* starting from the day following the date on which the contract award decision is sent (i.e., 15 calendar days).

3.3. Automatic Debrief

The Commission designated the 'automatic debrief' as an obligation to inform unsuccessful tenderers or candidates of a contract award decision before the standstill period, accompanied by 'a summary of relevant reasons' and 'a precise statement of the exact standstill period'

[408] Frédéric Jenny 31.
[409] In most Member States, the time limits follow the structure of the RD and thus lay down time limits that *mirror* the minimum standstill period. In some cases, such as the UK, a more extended period of thirty days is set. See Commission Remedies Evaluation, annexe 9 – time limits by member state.

applicable.[410] The obligation of an automatic debrief can also be termed the standstill obligation[411] or award notification before the standstill period.[412]

3.3.1. Timeliness of the automatic debrief

One of the significant variables that may affect the effectiveness of the automatic debrief under the RD is the time it takes to decide.[413] The Commission emphasises the timeliness for implementing automatic debrief under the RD: 'an effective and rapid action to be taken when there is an alleged breach of the Procurement Directives'. The requirement for 'rapid' signifies the importance of setting a *reasonable* time limit for an efficient remedy action in the legal process. Since the procedure without a specific time limit could always result in a great deal of administrative *cost*, which does *not* typically match or reflect financial compensation arising from damages. Those factors also *narrowly* relate to the *accessibility* of an effective monitoring system. Therefore, the remedy system is the RD's *indefinite* duration for the contracting authorities to decide *what* to debrief.[414] In other words, the provisions that lack the reasonable procedural requirements for time limits will *cripple* the effectiveness of the whole remedies system for public procurement in practice.

Nonetheless, the relevant provisions set out concerning the time limits of an automatic debrief are not sufficient nor explicit either in the PSD or the RD. Automatic debrief is obliged at the beginning of the standstill period under Article 2a(2) RD. However, the regulation on the length of time limit allowed for automatic debrief – prior to the standstill period – appears *scarce* and *vague*, not mention to the maximum. Likewise, the general notification (i.e., an automatic debrief) is far from time-sensitive under Article 55(1) PSD, which *inexplicitly* requires the general notification to be made 'as soon as possible (…) the decision reached'. Also, Article 55(1) PSD seemingly overlooked the extra time that should have been allocated for properly examining the information at hand and withholding certain information before the general notification. Moreover, such rules have been put more *loosely* into national practice.

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[410] Council Directive (EC) 2007/66 of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] OJ L 335/31, Article 1(2a)(2).
[411] Sue Arrowsmith, *The Law of Public and Utilities Procurement*, para 7-297.
[412] ibid, para 13-41.
[413] Commission Remedies Evaluation 36.
[414] ibid 36.

More specific requirements for a time-sensitive automatic debrief based on a contextual analysis are expected in policies and precedents at the European and national levels. For example, an intent to accelerate the procurement process is evident in the decided Case C-81/98 *Alcatel*, and it requires that the contracting authority's decisions before the contract conclusion are 'in all cases open to review in a procedure'. Also, more relevant precedents are expected to guide the contracting authorities on allocating time for an automatic debrief. Such time limits must consider time-consuming on a proper examination of *all* available information at hand and a decision to withhold certain information. Since it is unclear *how* to allocate time for confidentiality duties due *simultaneously* as with debriefing obligations, either to the general notification (also, automatic debrief) or on-request debrief, as implied by Articles 21(2) and 55(3) of the PSD. Considering its time-sensitivity, the author considers another way to ensure immediate access to a monitoring system, that is just to enable economic operators to obtain sufficient information that suffices them to appreciate *whether* the award decision is *unlawful* according to the procurement rules.

3.3.2. Prevention of the race to signature

Another concern for setting up the automatic debrief is to avoid the 'race to the signature',[415] which deprives the aggrieved parties of the '*possibility* to pursue pre-contractual remedies' under Article 2d RD. If a contract is signed before any remedies can be brought or resolved, the process thereby becomes *less* efficient. Worse, once the contract has been signed, the claim for setting aside any unlawful decisions in practice has always been rejected by a national court if an *overriding* interest is invoked by the contracting authority subject to a balance of convenience *test* where applicable.[416] In that regard, the automatic debrief is *primarily* set out to deal with this serious 'race to signature' problem.

On the one hand, the automatic debrief immediately terminates that potential race before the contract conclusion by initiating the standstill period or automatic suspension. Accordingly, the economic operators could request correct procedural irregularities, apply interim measures, or set aside the unlawful contract award decision due to that suspension. On the other hand, the contracting authority will not choose to risk violating Article 2a(2) RD by discarding the

[415] The absence of a period allowing an effective review between a decision to award a contract and the conclusion of the contract has resulted in problem of 'the race to signature' in which contracting authorities who wished to make *irreversible* the consequences of the disputed contract award decision proceeded very *quickly* to the signature of the contract. See ibid 16.
[416] ibid 16.

automatic debrief that entails the communication of the relevant rejected together with the contract award decision. If there is an infringement of Article 2a(2) RD either having deprived tenderers applying for a review of the *possibility* to pursue effective remedies or affected the chances to obtain the contract, the contract at issue becomes *ineffective* in Article 2d RD.

4. Conclusion

Since Section 2, Chapter 2 has indicated that *transparency measures* and *an effective monitoring* system are essential approaches to fight *corruption* – the *major* integrity violation in the procurement process, this chapter first examined Article 55 PSD on informing candidates and tenderers as transparency measures *proportionate* to that objective. In this way, the author attempts to resolve the legal uncertainty for the sake of contextual coherence and based on a comparison with Article 41 (2) of Directive 2004/18/EC. Subsequently, this chapter commends Article 2a(2) RD in terms of its effectiveness in ensuring access to a monitoring system concerning the discretion used to decide the extension of the standstill period and the timeliness of the automatic debriefing.

However, securing access to a monitoring system is just one step for improving its effectiveness. It is necessary to examine the effectiveness of other measures for a monitoring system and the respect for procedural rights through the review procedure, arising from the CFR within the European legal system. Those procedural rights under the CFR include Article 41 on the Right to good administration, Article 42 on the Right of access to documents, Article 43 on the European Ombudsman, Article 47 on the Right to an effective remedy and a fair trial and Article 48 on the presumption of innocence and right of defence.[417]

As stated in Subsection 3.1, Chapter 2, respecting procedural rights in the EU's administrative procedures is an indicator of *due process* anchoring procedural fairness. For this, through case-by-case studies, Chapter 4 will continue to examine their effectiveness within the *scope* of debriefing and their balance with the competing interests, especially confidentiality. Specifically, the *author* considers *how* to ensure an effective monitoring system. Arguably, debriefing shall enable economic operators to obtain information that suffices them to appreciate *whether* that contract award decision can be declared *ineffective* and which sorts of *remedies* apply to their situations. The next Chapter 4 will continue to explore those issues.

[417] Diana-Urania Galetta and others, 7.

CHAPTER 4

Procedural Fairness Balance

1. Introduction

Having explored the objectives of fairness from two perspectives – *substantive*[418] and *procedural* fairness, [419] this thesis clarified that transparency serves the *due process*, anchoring the procedural fairness, for the respect the rights of economic operators and the balance with the *confidentiality* rights owed to the third parties.[420] In this regard, the author considers the procedural rights owed to economic operators and the administrative acts towards their protection contribute to the fairness of the procurement procedure where applicable. Those fundamental rights under the CFR include Article 41 on the right to good administration, Article 42 on the right of access to documents, Article 43 on the European Ombudsman, Article 47 on the right to an effective remedy and a fair trial and Article 48 on the presumption of innocence and right of defence.[421]

Those procedural rights are *simultaneously* codified by the EU case-law and the CFR that entered into force by the Treaty of Lisbon and acquired the same legal status with other Treaties.[422] The EU legal system adopts a *pluralist* approach in protecting the procedural rights as a general principle and as a fundamental right *simultaneously* instead of a *hierarchical* course.[423] A pluralist approach to *overlapping* and *complementary* protection by both national and European sources is preferred.[424] The development from good administration as a general principle of EU law to a

[418] Substantive equality additionally considers different effects of the regulation in implementation or different treatments for interested parties subject to different circumstances. Unlike formal equality, substantive equality requires a value judgement regarding the criteria or characteristics that ought to be used to identify or distinguish between circumstances. Such distinctive treatments or effects can be accepted or ruled out once the characteristics or criteria relevant to discriminatory circumstances can be justified. See, *Stanford Encyclopedia of Philosophy*.

[419] Formal or procedural equality refers to equal treatment of everyone according to, for example, rules, criteria, and processes. Any different treatment for any purpose will be considered discrimination against the equality principle. For instance, each lottery ticket endorses an equal chance of winning. The winner is selected by drawing lots but treated in the same procedure or process as other buyers. See also Omer Dekel, 250.

[420] D. Daniel Sokol 197.

[421] Diana-Urania Galetta and others, 7.

[422] See Ottavio Marzocchi (n 48).

[423] Neither the wording of Article 6 TEU nor the teleological, systematic, or contextual interpretation of the Treaties suggest a *hierarchical* approach favouring the Charter over the general principles of law. See Herwig C.H. Hofmann and Bucura C. Mihaescu, 'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case' (2013) 9 European Constitutional Law Review 73, 100-01.

[424] ibid, 100-01.

fundamental right of individuals unveils the role of the EU's legal system as an *incubator* of *innovative* legal solutions to new problems of European integration.[425]

The EU's legal system prefers the CFR to the general principles of EU law currently,[426] partially because holding it as a fundamental right under the CFR may provide substantive protection of individuals in their contact with administrative institutions.[427] Nevertheless, the personal and institutional scope of protection of fundamental rights, such as the right to good administration in Article 41 CFR, is more limited than the scope of protection of the general principle of good administration made by the CJEU.[428] While the general principles of EU law protect both the *individuals* and *institutions* participating in the EU's procurement activities, the CFR has not declared its application to the procurement and remedies systems. Despite *not* enforcing direct legal effectiveness to the review procedure, the CJEU has required that the RD be interpreted to comply with fundamental rights in the CFR and EU case-law, as noted in Subsection 3.2, Chapter 2.[429]

Furthermore, considering the coherence of EU law, the Commission affirms that economic operators shall effectively ensure the observance of those fundamental rights created in EU law *everywhere* through the EU for European integration, [430] including the fields of public procurement and remedies. In this respect, debriefing obligations shall be interpreted into more specific aspects in line with the protection of fundamental rights against the administrative decisions in the CFR or the general principles of EU law for law enforcement. This chapter explores the CFR and the EU case-law in the protection of fundamental rights, seeking innovative legal solutions to enhance the legal effectiveness of the debriefing process from the viewpoint of procedural fairness. Those fundamental rights relating to the formulation of the fairness of debriefing for this chapter to discuss includes the right to be heard (Article 41 (2)(a)

[425] ibid, 100.
[426] ibid, 100-01.
[427] Areean Mustafa, 'Comprehension of the Principle of Good Administration in the Framework of EU Administrative Law' (2017) 3 Journal of University of Human Development 259, 259.
[428] ibid, 259.
[429] It means that all fundamental rights set out in the CFR, including those covered in this sub-section, must be observed when interpreting EU Directives, including those concerning public procurement procedures. To that effect, see Case C-212/13 *František Ryneš v Úřad pro ochranu osobních údajů*, para 29.
[430] The Commission stresses 'it would not be possible to realise their objectives if economic operators would be unable to effectively ensure that the rights given them by the EU rules were observed everywhere in the EU' (emphasis added). See Commission, 'Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation' (Staff Working Paper) SEC(2011) 853 final, 26.

CFR), the obligation to give reasons (Article 41 (2)(c) CFR), the right to review the administrative decisions and the right to effective remedies (Article 47 CFR).

In addition, this chapter discusses the *method* to balance procedural rights with confidentiality rights when considering fairness as a connecting factor to employ the enforcement mechanisms from the different regimes of EU law. Those fields where substantive protection include fundamental rights, public procurement, competition, and data protection rules. Confidentiality rights include the right to trade and business secrets set as a general principle of the EU case-law, the right to designate information as confidential arising from the common law before being introduced into the EU law and the rights of data subjects owing its origin from the CFR and the TFEU.

2. Right to Good Administration

This section explores the issues around the design of debriefing that arise from the principle of the good administration of EU law, which relates to Article 41 CFR. The general direction of good administration arises from the development of CJEU's case-law[431] and, to a *large* degree, rests on the binding nature of the applicants' pleas within CJEU's judicial review system.[432] The principle of good administration implies an administration of information management requirements typically and its information aspects related to defence rights in the EU law.[433] Nonetheless, the CJEU distinguishes good administration as a general principle of EU law from the more specific rights of defence from which subjective rights arise *only*.[434]

Article 41 CFR primarily explains good administration as containing subjective rights intended to limit *arbitrary* administrative conducts in the EU and to fulfil the demands of the rule of law in administrative procedures beyond the case-law.[435] However, compared with the case-law of

[431] The right to good administration was one of the first rights enumerated in the Charter to be cited in the case-law of the EU courts in terms of subjective rights of individuals prior to the entry into force of the Treaty of Lisbon conferring binding legal force to the Charter. See Case T-54/99 *max.mobil Telekommunikation Service GmbH v Commission* EU:T:2002:20, [2002] ECR II-313, para 48.

[432] That indicates the explanation that 'the courts, feeling 'generally bound to give an express response' to applicants' pleas entice litigants to take up the judges' response to former pleas in future litigation'. See Hanns Peter Nehl, 338.

[433] Information management includes the 'duty of care' requiring complete and impartial investigation of the fact before decision-making, where necessary, the use of scientific evidence and the obligation of adequate reasoning of a decision. See Herwig C.H. Hofmann and Bucura C. Mihaescu, 84.

[434] Joined cases 33/79 and 75/79 *Richard Kuhner v Commission* EU:C:1980:139 [1980] ECR 1980-01677, para 25.

[435] The Explanations to the text of the Charter prepared by the Presidium of the Convention confirm its approach inspired by the case-law of the CJEU, stating that 'Article 41 is based on the existence of the Union as subject to

the CJEU on the principle of good administration, the formulation of Article 41 CFR appears *limited* in its *material*, *institutional* and *personal* scope.[436] Those have been enshrined in Articles 41(1) CFR on the right to a fair hearing and, specifically, 41(2) CFR on self-standing rights, including the right to be heard (indent (a)), the right to have access to documents (indent (b)) and the obligation to give reasons (indent (c)).[437] Under Article 41(3) CFR, the right to good administration also ensures the possibility of claiming damages against the administration if any harm is caused by its servants in the performance of its functions.[438] Some issues that arise from the *interplay* between Article 55 PSD, Article 2a(2) RD and Article 41 CFR providing the authority's information obligations related to the defence rights of individuals participating in the procurement procedures under EU law.

The CJEU holds that those procedural rights guaranteed by the EU legal order in administrative procedures shall be respected as those in particular mandate the public administration to provide *adequate* reasons for its decisions.[439] The measure must be adopted in such a way as to 'enable the persons concerned to *ascertain* the reasons for the measures and to *enable* the competent court to exercise its power to review the *lawfulness* of the measure thereof'.[440] That opinion implies that the CJEU has placed two conditions on the public administration in giving reasons subject to the procedural rights of EU law. The *first* condition concerns the judgement passed by the CJEU on *whether* the public administration acted legally in the first place, and the *second* relates to the applicant's appreciation of *what* kind of judicial protection they shall apply for, either effective review or remedies.[441]

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the rule of law whose *characteristics* were developed in the case-law which enshrined *inter alia* good administration as a general principle of law.'. See Herwig C.H. Hofmann and Bucura C. Mihaescu, 86.

[436] ibid, 86.

[437] Takis Tridimas, *The General Principles of EU law* (2nd edn, Oxford University Press 2006), 410-12.

[438] Diana-Urania Galetta and others, 19. See also Takis Tridimas 411.

[439] Case T-667/11 *Veloss International SA and Attimedia SA v European Parliament* ECLI:EU:T:2015:5, [2015], para 39; Case T-89/07 *VIP Car Solutions SARL v European Parliament*, para 61; Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte* EU:C:1991:438, [1991] ECR 1991 I-05469, para 14.

[440] Case T-187/11 *Mohamed Trabelsi and Others v Council of the European Union* EU:T:2013:273, [2013] Digital reports, para 66.

[441] There is a close relationship between the obligation to state reasons and the fundamental right to effective judicial protection and the right to an effective remedy under Article 47 of the Charter of Fundamental Rights. See Case T-183/10 *Sviluppo Globale GEIE v European Commission* EU:T:2012:534 [2012] ECR I-0000, para 40. See also, Albert Sánchez-Graells, 'Duty to Give Reasons under EU Procurement Law and EU Trademark Kaw: Is There A Contradiction?' (*European Law Blog*, 17 October 2012) <https://europeanlawblog.eu/2012/10/17/duty-to-give-reasons-under-eu-procurement-law-and-eu-trademark-law-is-there-a-contradiction/> accessed 12 December 2018.

2.1. Who Are Entitled to the Right to Be Heard?

The foremost concern regarding the enforcement of Article 41 CFR in public procurement is whether the right to good administration applies to a *legal person* when Article 41 CFR uses terminologies of 'every person' *without* excluding the legal person *explicitly*. By comparison, the 'economic operator' in the PSD means any natural person and legal person or public entity or group of such persons and entities. The discussions may depend on differing viewpoints. The CFR clarifies the principle of good administration as one of the fundamental rights of individuals, while it also differentiates between the various sub-components of the principle to create a comprehension of their specific features.

When holding it as a fundamental right under the CFR, 'every person' shall not include the legal person throughout the CFR for legal coherence except as otherwise noted. This viewpoint is reached by looking through the analogues terminologies used by other CFR provisions. For example, Article 42 CFR entitles any *legal person* residing or having its registered office in the Member States to the right of access to documents of the EU institutions, bodies, offices, and agencies. Another example is Article 3 CFR on the right to the person's integrity, providing that 'everyone has the right to respect for his or her physical and mental integrity' in which *everyone* undoubtedly refers to a natural person.

However, when holding the good administration as a general principle of EU law, the CJEU's case-law has granted *both* citizens and legal persons the enforceable rights. Since the general principles of EU law governing the investigation of a matter directly concerns the public authority's activities related to citizens, such as transparency and the duty of care,[442] the CJEU has *no* legal basis for treating a legal and natural person differently. In terms of the right to be heard in Article 41(2)(a) CFR, for example, either the companies or individuals requires transparency since it is a core component of good administration when confronted with administration. In this respect, the CFR has adopted a confusing method by *particularly* entitling the legal person to some procedural rights against the public authorities of the EU.

[442] Diana-Urania Galetta and others, 10.

2.1.1. Economic operators adversely affected

It is admitted that the CFR's formulation of the right to be heard is inexplicit concerning the *scope* of interested parties to be communicated with the reasons.[443] As introduced in Subsection 3.2, Chapter 2, the Code describes the right to be heard as 'the rights or interests of individuals are *involved*',[444] while the CJEU prefers a *narrow* formulation by referring to the persons *adversely* affected by a 'decision', as does Article 41(2)(a) CFR.[445] Also, as Article 41(2)(a) CFR prefers it, 'the right of every person to be heard, before any individual measure which would affect him or her *adversely* is taken'. For this, it should be noted that the wording of '*involved*', i.e., only 'affecting' is much *wider* than using 'adverse effect'.[446]

According to the Code, rights of defence apply to all relationships between the administration,[447] which can be interpreted as encompassing *third parties*. Article 41(2)(a) CFR appears to be individualist in character by stressing 'before any *individual* measure which would affect him or her adversely is taken'.[448] It assumes that no measures can be taken against a person before an opportunity to express the opinion. As stated, such expression has not been followed by subsequent EU case-law and the CFR. That expression also can be faulted as the right to be heard should be determined by the interests of a person that may be affected by the outcome of the proceedings rather than by the character of a measure.[449] Besides, the CJEU has provided the 'adverse effect' criterion inconsistently.[450]

Insofar as debriefing, Article 55(1) PSD separates the interested parties (i.e., 'each candidate and tenderer') who shall be informed of decisions from those who shall be provided with reasons (i.e., 'grounds') for the decisions that *adversely* affect them. Since the former group includes the potential awardee while the latter does not, only those unsuccessful tenderers or candidates have defence rights. Accordingly, it is problematic to argue for defining the scope of those economic operators endorsed by Article 55(2) PSD since indents (a) and (b) have outlined the

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443 Klara Kańska, 'Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights' (2004) 10 European Law Journal 296, 315.
444 The European Ombudsman, art 16(1).
445 Case T-170/06 *Alrosa Company Ltd v Commission* EU:T:2007:220, [2007] ECR II-2601, para 191.
446 Klara Kańska, 318.
447 Joana Mendes, 'Good Administration in EU Law and The European Code of Good Administrative Behaviour' <http://cadmus.eui.eu/bitstream/handle/1814/12101/LAW_2009_09.pdf?sequence=3&isAllowed=y> , 9. See also, Felix Arndt and Jürgen Bast, 'Legal Instruments in European Union Law and Their Reform: A Systematic Approach on an Empirical Basis' (2004) 23 Yearbook of European Law 91, 101-06.
448 Jurgen Schwarze, *European Administrative Law* (Sweet & Maxwell 1992) 1258 (emphasis added).
449 Klara Kańska, 316.
450 ibid, 316.

'*unsuccessful*' candidates or tenderers while indents (c) and (d) have described them as 'that has made an *admissible* tender'. Precisely, Article 55(2) PSD indents (a) and (b) have described those tenderers or candidates entitled to the notification of reasons for the rejection as '*unsuccessful*'. However, this formulation is *not* verified by the following indents (c) and (d), which provide 'any tenderer that has made an *admissible* tender' with the access to the specific information and negotiations documents.[451] This manifestation seems to adopt the *broader* scope as the meaning of 'involved' implies.

By contrast, Article 2a(2) RD does not use the term '*unsuccessful*' as such in Article 55(2) PSD or the terminologies '*adversely* affect' as with Article 41(2)(a) CFR. Article 2a(2) RD defines those candidates or tenderers as '*concerned*' with the communication of reasons by using an innovative approach – tenderers having *not* yet been definitively excluded or candidates having not been informed of the rejection reasons for their application before the notification of the contract award decision. In this respect, Article 2a(2) RD outlines the tenderers and candidates concerned with the notification of reasons *neither* in the same manner as Article 55(2) PSD *nor* with Article 41(2)(a) CFR. This phenomenon may lead to different treatments by the contracting authority on economic operators *who* apply for the notification of the unsuccessful reasons, especially candidates *not* deemed as concerned under Article 2a(2) RD. This issue is clarified in the following Subsection 2.1.2.

2.1.2. Deficient protection of the excluded candidates

Regarding the lawfully *excluded* candidates, Article 41(2)(a) CFR provides substantive protection for individuals who have been *adversely affected* by the first instance review body (i.e., the contracting authority or the judiciary). In evolving that fundamental right in EU procurement regimes, Article 55(2)(b) PSD provides the unsuccessful candidate with the reasons for rejecting their requests to participate. Those articles protect the *overall* protection of applicants entitled to the right to a fair hearing in Article 41(1) CFR, which is closely related – a step forward – to the right to effective judicial protection in Article 47 CFR. Nevertheless, in developing Article 47 CFR in the remedies system for the EU procurement, Article 2a(2) RD has *not* fully

[451] As the Guidance for the UK PCR 2015 explains: a tender will be admissible in a procurement procedure where it has: a) been submitted by a tenderer who has not been excluded under Regulation 57 (Exclusion grounds) and who meets the *minimum* selection criteria; b) conforms to the technical specifications; and c) is not irregular, unacceptable, or unsuitable. See Cabinet Office and Crown Commercial Service, *Public Contracts Regulations 2015 Chapter 9 – Tendering and Contract Award* (version 10, 2015).

guaranteed those defence rights of candidates as soon as the exclusion and selection decisions are made.

To avoid challenge, Article 2a(2) RD requires the contracting authority to communicate information about the rejection of their applications when the contract award decision is made to the candidates who have not been made available. In other words, the candidates can be notified of the contract award decision *only* if they are deemed 'concerned' when they have *neither* been informed of the exclusion *nor* the selection decisions during both the qualification and selection process. In that respect, the excluded candidates become the 'concerned' in line with Article 2a(2) RD in communicating the contract award decision due to *negligence* of the administrative duty upon the contracting authority. In this case, the contracting authority is in a position to notify those candidates of the contract award decision in accordance with Article 2a(2) RD for their access to review procedures under Article 1 RD.

However, Article 2a(2) RD provides a *narrower* scope of candidates entitled to the automatic debrief and the standstill period than the scope of review procedures in Article 1 RD. Article 1 RD provides the *scope* and *availability* of review procedures that 'the Member States shall take measures necessary to ensure that, regarding contracts falling within the scope of the [PSD], decisions taken by the contracting authority may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this [RD], on the grounds that such decisions have *infringed* Community law in the field of public procurement or national rules transposing that law'. In other words, it is advised that the contracting authority shall send the notification to the candidates *not* qualified to submit tenders as soon as the exclusion decision is created.

Nonetheless, those exclusion decisions taken by the contracting authority will *not* initiate the automatic debrief and the standstill period under Article 2a(a) RD. Article 2a(2) RD presumes that the obligation to communicate reasons is invoked *only* at the stage prior to the standstill period (i.e., when the contract award decision is sent). In other words, *only* the contract award decisions can trigger the communication of the reasons (i.e., debriefing), while the exclusion decisions will *not* work in Article 2a(a) RD. Even though the contracting authority has notified the candidates of the rejections for their requests for participation under Article 55(1) PSD, there lacks a mechanism for effective judicial protection for the exclusion decisions prior to the contracts concluded, which is comparable with automatic suspension, automatic debrief or the

standstill period for the contract award decisions. Therefore, the candidates are potentially *deprived* of the right to be heard against the exclusion decisions in Article 2a(2) RD. In contrast, their rights of defence owned by everyone having been *adversely* affected must be ensured according to Article 41(2)(a) CFR and the general principle of EU law, not mention to the judicial protection Article 47 CFR.

2.2. Standards for Stating Unsuccessful Reasons

For transposition at the national level, Article 55(2) PSD sets out precise requirements on the contracting authority to communicate to the economic operators the reasons for the rejection of its tender or its request to participate and the name, characteristics, and relative merits of the successful tenderer.[452] In Case C-235/11 P *Evropaïki Dynamiki v Commission*, the General Court clarified that 'in order to fulfil its obligation to state reasons, the contracting authority was required to communicate to the applicant the reasons for the rejection of its tender, the characteristics and relative merits of the successful tender, and the name of the successful tenderer. This judgement did not follow the judgement of Case T-59/05 *Evropaïki Dynamiki v Commission* that the contracting authority was required to provide the applicant with a *complete* copy of the valuation report.[453] From those judgements, the CJEU appears to provide the *standards* for the judicial review of administrative behaviours under EU law that such assessment needs to be *objective*, *reasonable* and *proportional*, and the outcome is *either* compliance or non-compliance.[454]

The CJEU reveals *two* main *aims* for duty to give unsuccessful reasons in administrative proceedings: *first*, the adversely affected parties can *ascertain* the reasons to the extent that they can expect *whether* it is worthwhile to apply for review or remedies. The CJEU considers that the unsuccessful tenderers or candidates can ascertain the economic bids submitted by the successful tenderer if they can *obtain* the characteristics and relative advantages of the successful tender and the name of that potential awardee;[455] *second*, the judiciary may examine the *effectiveness* of the administrative decisions by reviewing the *elements* of decisions presented in the

[452] Case C-235/11 P *Evropaïki Dynamiki v Commission*, para 46.
[453] Case T-498/11 *Evropaïki Dynamiki v Commission* EU:T:2014:831, [2014], para 43. See also, Case T-50/05 *Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Commission* EU:T:2010:101, [2010] ECR II-01071, para 25.
[454] Albert Sanchez-Graells, 'Assessing the Public Administration's Intention in EU Economic Law: Chasing Ghosts or Dressing Windows?', 115.
[455] Joined Cases T-339/10 and T-532/10 *Cosepuri*, paras 96, 100, and 102.

statement of reasons following the different legal routes for assessment.[456] The *former* aim concerns the *knowledge* of the economic operators to exercise the defence rights, while the *latter* concerns the *applicability* of judicial review by a competent judicature having the jurisdiction.

2.2.1. Objectiveness, reasonableness, and proportionality tests

Such objective standards for the judicial review of administrative behaviours reveal there is *no* need to explore the subjective elements thereof in cases of non-compliance due to the *lack* of relevance.[457] Regarding procurement setting, that stance indicates the contracting authority does not need to present subjective elements of the award or selection decision by its statement of reasons. Whether the contracting authority makes the decision *voluntarily* or *negligently* is *irrelevant* to the judicial review of the decision at issue. In the settled cases concerning the EU's legal order in administrative procedures, the CJEU advised the competent institution to provide *adequate* reasons for its decisions – '*only* in this way can the EU judicature verify *whether* the *factual* and *legal* elements upon which the exercise of the *discretion* depends was presented.'[458]

The reasoning for complying with this duty must be shown *clearly* and *unequivocally* in such a way as, *first*, to enable the applicants to understand the justifications for the measure taken to assert their rights and, *second*, to enable the CJEU to exercise its power of review.[459] In Case T-667/11 *Veloss,* even if the Parliament argued that the applicants could have calculated the price offered by the tenderer ranked first through working backwards, that *cannot* be accepted.[460] In this regard, the applicants had *no* certainty regarding the correct application of that formula and the accuracy of the result obtained.[461] In other words, an objective standard signifies that the elements of decisions presented could *not* have been given by the statement differently as such a decision at that moment is already a *fait accompli* and the elements thereof.

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[456] The judiciary generally considers the protection of business or trade secrets while assessing the *lawfulness* of administrative decisions or acts. See Subsection 4.1 of this chapter for the detailed discussion.
[457] Albert Sanchez-Graells, 'Assessing the Public Administration's Intention in EU Economic Law: Chasing Ghosts or Dressing Windows?', 115.
[458] The General Court advocated that '[w]here the Parliament, like the other institutions, enjoys a wide power of appraisal, respect for the rights guaranteed by the European Union legal order in administrative procedures is of fundamental importance. Those guarantees include, in particular, the duty of the competent institution to provide adequate reasons for its decisions. Only in this way can the European Union judicature verify whether the factual and legal elements upon which the exercise of the discretion depends were present.' See Case T-667/11 *Veloss*, para 39. See also, Case T-89/07 *VIP Car Solutions SARL v European Parliament*, para 61; Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte*, para 14.
[459] Case T-667/11 *Veloss*, paras 61-65; Case T-50/05 *Evropaïki Dynamiki v Commission*, para 143.
[460] Case T-667/11 *Veloss*, paras 62-65.
[461] ibid, para 65.

The CJEU's stance on the *objective* reasons for the justification of decisions entails, *first*, an objective analysis of the circumstances of *each* case in which the contracting authority creates the decision, and *second*, an assessment of the reasons for such decision subject to specific requirements of measures arising from the previous contextual analysis. Those objective reasons given by the contracting authority shall satisfy the judicial review of *any* suspect unlawful acts according to the elucidation of the principle of good administration in the case-law.[462] As the CJEU explains about the *reasonableness* in line with Article 41(2)(c) CFR, the statement of reasons 'must be appropriate to the measure at issue and the context in which it was adopted'.[463] The discussion shall focus on assessing the reasons at the *second* stage that need to be used to justify that statement as meeting *all* requirements by the measures in a specific situation. Such an 'appropriate' statement shall generally enable the EU judicature to understand the contested decision and *verify* its compliance with EU law for public procurement.

As argued above, it is also advised that the administration *cannot* provide any reason t for its administrative acts pleasing that objectiveness test if the rules it *deviates* from have already contained *implicit* policy options. For example, the public administration is *unable* to provide a justification based on social considerations if policies in that regime have already provided *weight* that can be given to those considerations.[464] In that case, the public administration must provide adequate, reasonable and acceptable reasons for validating that there would be *no* breach of any EU law.[465] It is noted that the term 'adequate' as used by the CJEU for the standard of giving reasons under Article 41(2)(c) CFR, suggesting more disclosure beyond the *minimum* level as required by the objective standard.[466] The EU case-law also has revealed a trend to *extend* the scope of unsuccessful reasons given for their decisions in the procurement setting,[467] such as avoiding infringing on the right to effective judicial protection according to Article 47 CFR.

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[462] EU case-law has presented some implicit requirements related to the principle of good administration, such as reasonableness, objectivity, and proportionality. See Albert Sánchez-Graells, *Three Recent Cases on EU Institutions' Procurement and One Common Theme: Good Administration and Confidential Information (T-498/11, T-91/12 & T-199/12)* 115-16.

[463] Case T-187/11 *Mohamed Trabelsi and Others v Council of the European Union*, para 66.

[464] For a further comparable discussion about non-economic justifications provided to derogate from EU competition rules, see Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules*, 185-93.

[465] Albert Sanchez-Graells, 'Assessing the Public Administration's Intention in EU Economic Law: Chasing Ghosts or Dressing Windows?', 116.

[466] Case T-667/11 *Veloss* ibid ibid, para 39.

[467] Charles Clarke, 288.

In addition, the CJEU requires that those objective reasons for justification be clear from a strict *proportionality* test.[468] That test arises from Article 5 TFEU on the principle of proportionality and the Protocol (No 2) annexed to the TFEU on criteria for the application. Proportionality means that the content and method of EU action must be limited to *what* is necessary to achieve the objectives of the TFEU.[469] In public procurement, for example, that principle requires the contracting authority's measures to be taken on a proportional basis when *excluding* certain economic operators from the procurement process on the grounds of equal treatment or transparency.[470] In Joined Cases C-21/03 and C-34/03 *Fabricom* and Case C-213/07 *Michaniki*, the CJEU held that such exclusionary measures in award procedures for public contracts *exceeded* what is necessary to achieve that objective despite the observance of equal treatment and transparency principles. In Case C-450/06 *Varec*[471] and Case C-536/11 *Donau Chemie*[472] the CJEU required that the review bodies and national courts carry out a proportionality test between the measures and the objectives at issue. There is the circumstance, for example, where the effectiveness of fundamental rights derived from EU law *collides* with protecting the private or public interest.[473] In case of urgency, for example, the contracting authority must demonstrate this situation, justifying a *derogation* from the principle of the free movement of goods and demonstrating that the measures taken are proportionate based on an *overriding* public-interest requirement for the protection of public health.[474]

As noted in Subsection 2.3, Chapter 3, Article 55(2)(d) PSD provides any tenderer *involved* with access to a third party's (i.e., the potential awardee and other unsuccessful tenderers) documents related to their conduct and the process of negotiations and dialogues. Since this provision leaves a *too* broad scope for exercising the administrative discretion, the contracting authority's debriefing tends to fail the proportionality test in disclosure, making the contract award decision

[468] It is noted that the CJEU limits the scope of objective reasons that the contracting authority is allowed to adduce to justify its behaviour in breach of EU directives. See Albert Sanchez-Graells, 'Assessing the Public Administration's Intention in EU Economic Law: Chasing Ghosts or Dressing Windows?', 116.
[469] Proportionality is a general principle of EU law. For further details about the EU level, see Takis Tridimas, chps 3-5; Case C-210/03 *Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health* EU:C:2004:802, [2004] ECR I-11893, para 47.
[470] See also, Christopher H. Bovis.
[471] Case C-450/06 *Varec*.
[472] Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others* EU:C:2013:366 [2013] ECR I-00000 (Case C-536/11 *Donau Chemie)*.
[473] Christopher H. Bovis, 'The Effects of the Principles of Transparency and Accountability on Public Procurement and Public-Private Partnerships Regulation' (2009) 4 European Procurement & Public Private Partnership Law Review 7, para 12.266.
[474] See Case C-6/05 *Medipac-Kazantzidis AE v Venizeleio-Pananeio (PE.S.Y. KRITIS)* EU:C:2007:337, [2007] ECR I-04557, paras 60-61.

challengeable from the start. This disclosure *scope* in Article 55(2)(d) PSD is *not* necessary since indents (a), (b) and previous PSD information obligations (e.g., Articles 48, 49, 50 and 53 on prior information notices, contract notices, contract award notices and electronic availability of procurement documents, respectively) has enforced *similar* or *wider* disclosure. Those legislative risks need to be reduced to a maximum extent before applying the proportionality test on a case-by-case basis in the use of discretion.

Furthermore, Article 55(2)(d) PSD is doubted on its legal source from the EU law for the sake of coherence within the EU's legal system, either in terms of general principles of good administration in EU law or the fundamental rights under the Article 41(2) CFR. As noted in the below discussion in Subsection 4.1 of this chapter, the CJEU has interpreted the general principle of good administration as enforcing the contracting authority to comply with the confidentiality duties. Also, considering its *full* disclosure feature, it does *not* seem to provide the parties with the opportunities to challenge the contested decisions as required by Article 41(2)(c) CFR, which has enshrined in indents (a), (b) and (c) of Article 55(2) PSD for procurement activities. From this point of view, it may be argued that Article 55(2)(d) PSD follows Article 41(2)(b) CFR by providing the parties sufficient access to the administrative files while facing questions about the risks of generating more *administrative costs* for the *confidentiality* and the GDPR compliance.[475] Also, it should be noted that such risks could be used as a strategic tool by any *malicious* tenderer intended to *collude tacitly* [476] instead of obtaining judicial protection.

2.2.2. Equality appraisal of administrative discretion

Another approach to assessing the contracting authority's exercise of administrative discretion in procurement activities could rest on *equality*, which can be interpreted as 'administrative' or 'unconstitutional' equality in the application.[477] The 'unconstitutional equality' refers to the inequality that is based on a *minority* group or *underprivileged* status of an individual (e.g., race, nationality, gender). In contrast, 'administrative equality' is *not* related to an individual's self-respect or self-esteem. The current national practice bases its procurement performance on

[475] In case those documents include the personal data falling under the scope of the GDPR, the GDPR will affect any case where the contracting authority (i.e., data controller) shares personal data delivered by one economic operator (i.e., data processor) with the rest of other economic operators (i.e., third parties). For the detailed discussion, see Subsection 4.3 of this chapter.
[476] Tacit collusion usually occurs where firms undergo actions that are likely to minimize a response from another firm, e.g., avoiding the opportunity to price cut an opposition. Putting another way, two firms agree to play a particular strategy without explicitly saying so. For the detailed discussion, please see Section 2, Chapter 5.
[477] Omer Dekel, 251-53.

ensuring 'administrative equality' instead of 'unconstitutional equality' since the latter is *easier* to identify with a more significant number of precedents at the EU level.[478] For example, the contracting authority, in general, can *neither* set out the technical specifications on the grounds of nationality (unconstitutional discrimination) *nor* lay down characteristics (e.g., specifying an intellectual property right) that are *not* necessary for supplies or services but could potentially favour a particular tenderer (administrative discrimination).[479] In contrast, the *conception* of administrative inequality is *obscured*, depending on the national legal system applicable to administrative decisions.[480]

The contracting authorities shall be responsible for demonstrating their classification of *all* suspiciousness in their procurement decisions into *all* types of discrimination.[481] The classification is based on the distinction between different *kinds* of unequal treatment and the different *levels* of legal protection against them.[482] Such treatments against equal opportunity should be proven relevant to a specific degree (e.g., necessary, or sufficient) to pursue a legitimate interest or objective. The judicial review of such a decision should be subject to *tiered* scrutiny on either a rational or a strict basis.[483] For instance, unconstitutional discrimination on the ground of *race* and *nationality* is better subjected to *strict* judicial scrutiny if tangled with selection or exclusion criteria. In contrast, in an appraisal of administrative inequality, if selected as economic efficiency, a late submitted tender will violate the equal treatment of other competing rivals. Such administrative discrimination is better subject to *minimal* or *rational* scrutiny to justify rather than a strict one.[484]

This problem concerns legal effectiveness by asking *how* the contracting authority could have made debriefing decisions *out* of administrative inequality when the rules have *not* identified its conditions. Nevertheless, it can be expected that the *most* questionable unlawful decisions of the

[478] The CJEU has provided many precedents fighting against such kind of unconstitutional discrimination on the grounds of race, nationality, and gender according to TFEU (e.g., Article 18 of TFEU relating to the discrimination on the grounds of nationality). For a detailed discussion about the cases where the instrument of equal treatment has been used in general and procurement, see Subsection 2.2.3, Chapter 3.
[479] Omer Dekel, 251-53.
[480] ibid, 253.
[481] For example, there are a 'suspicious' classification, a 'mildly suspicious' classification and a non-suspect classification in American case-law. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980), 30-31.
[482] ibid, 30-31.
[483] Calvin Massey, 'The New Formalism: Requiem for Tiered Scrutiny' (2004) 6 University of Pennsylvania Journal of Constitutional Law 945, 945.
[484] Omer Dekel, 253.

contracting authority would fall within the *scope* of administrative discrimination and are appropriately subjected to *rational* scrutiny as *economic efficiency* requires. It is almost *impossible* for a contracting authority in the competitive tendering process to create and justify unconstitutional inequality based on race, religion, nationality, gender, sexual inclination, ethnic origin, etc.[485] Therefore, to *what* degree the *rational* scrutiny should suffice for a non-discriminatory decision, *inter alia*, insofar as achieving economic efficiency awaits to be identified by case-law with the development of objectified justification. Before that, the CJEU is expected to provide more precedents in developing the judicial standards for justifying such administrative discrimination.

3. Right to Effective Review and Remedies

As noted by Chapter 3, the adversarial right owed to economic operators can trace their legal source to the right to an effective remedy in Article 6(1) of the ECHR.[486] Further, the ECtHR has consistently held that 'the *adversarial nature* of proceedings is one of the factors which enables their fairness to be assessed, but it may be balanced against other rights and interests'.[487] Subsequently, Article 47 CFR restates Article 6 ECHR,[488] as the 'right to an effective remedy and a fair trial' (also, adversarial right). Specifically, the first and second paragraphs of Article 47 provide that: '[e]veryone 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. [e]veryone 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.' Article 6 ECHR proposes a fair and public hearing that both parties must be heard in any judicial procedure and recognizes the adversarial principle as a general principle of EU law.

This section compares Article 41(2) CFR on duty to give reasons with Article 47 CFR on the right to effective review regarding their implications on regulating the debriefing in Article 2a(2) RD for fairness in procurement procedures. Article 47 CFR for a right to judicial review has *not* been advised as an *express* instrument for regulating the review procedure but as 'an aid' for

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485 ibid, 253.

486 Case 85/76 *Hoffmann-La Roche v Commission*, para 9. See also, Case C-450/06 *Varec* (Case C-450/06 *Varec*), where the CJEU confirms Article 6(1) of the ECHR as it provides that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal (…)'.

487 Case C-450/06 *Varec*, para 46.

488 The European Convention on Human Rights (formally, the Convention for the Protection of Human Rights and Fundamental Freedoms).

the interpretation of general rules of EU law.[489] The third paragraph of Article 47 requires that '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'. In other words, that paragraph of Article 47 compels the *information-sharing obligations* before a trial, comparable with the obligation to give reasons in Article 41(2) to assist any aggrieved party in exercising the adversarial right.

Article 47 CFR deserves a *separate* study. Some aspects of judicial review could be advised, if necessary, to ensure the effectiveness of administrative procedures for judicial control.[490] The CJEU identifies a *close* relationship between the duty to state reasons under Article 41(2) CFR and the fundamental right to effective judicial protection and the right to an effective remedy in Article 47 CFR.[491] The duty to give reasons needs to satisfy requirements derived from the principle of good administration of EU law and to ensure the right to effective review and remedies in Article 47 CFR in administrative procedures. In public procurement, that argument implies that in case the contracting authority has *not* performed the duty to give reasons, the *judicature* shall ensure the applicability of judicial review other than the *applicant's* potential application for the review filed with the *full* knowledge of the facts.

Nonetheless, those procedural rights developed by the CFR may result in different rulings regarding the duty's scope, purpose, and the requirement to give reasons, respectively, in their applications to regulating debriefing for fairness of the procurement process. In observance of the right to good administration in Article 41(2) CFR, the previous Section Two has noted that the obligation to state unsuccessful reasons could have enhanced the applicability of the judicial review by the EU judicature to validate the lawfulness of administrative acts that have *already* happened. Putting the court with jurisdiction in a position to carry out the judicial review, the CJEU requires the public authority to present the legal and factual elements in its statement of reasons upon which the exercise of discretion depends. By contrast, in complying with effective

[489] That means Article 55 PSD and Article 2a(2) RD shall be interpreted following the CFR as provisions of EU secondary law. See Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 375, 376. See also Albert Sanchez-Graells, "If It Ain't Broke, Don't Fix It'? EU Requirements of Administrative Oversight and Judicial Protection for Public Contracts", 14-15.

[490] Klara Kańska, 298.

[491] The General Court has stressed the link between both Articles 41 and 47 CFR: 'the right to good administration under Article 41 of the [CFR] of the [EU] sets an obligation on the administration to justify its decisions and that this motivation is not only in general, the expression of the transparency of administrative action, but it must also allow the individual to decide, with full knowledge of the facts, if it is useful to apply to the competent jurisdictional body. Therefore, there is a close relationship between the obligation to state reasons and the fundamental right to effective judicial protection and the right to an effective remedy under Article 47 of the [CFR].' See Case Case T-183/10 *Sviluppo Globale GEIE v European Commission*, para 40.

judicial protection in Article 47 CFR, the communication of reasons shall provide the interested parties with an actionable procedural right in case of its encroachment. For that purpose, the CJEU elaborates the requirements of the effectiveness of the judicial review under Article 47 CFR: 'the person concerned be able to *ascertain* the reasons (…) either by reading the decision itself or by communication of those reasons on its request (…) so as to enable him to defend his rights in the best possible conditions and decide in *full* knowledge of the circumstances that it is 'worthwhile applying to the court having jurisdiction'. [492] It should also be noted that the duty to give reasons is actionable *per se* without prejudice to the power of the court having jurisdiction to require the administrative authority concerned to communicate reasons. [493]

In a procurement setting, the reasons given by the contracting authority must be tailored to enable the economic operator to decide, in *full* knowledge of the situations *whether* it is worthwhile applying for either review of ineffectiveness or pre-contractual remedies or abandon those rights for application. The pre-contractual remedies include the imposition of interim measures, setting aside the decision, removing discriminatory specifications, and automatic suspension of award procedures whilst the complainants are being reviewed.[494] In comparison, as Subsection 3.1 noted in detail, post-contractual remedies become applicable if the contract in question has been awarded, including a declaration of ineffectiveness in Article 2d(1)(b) RD, an imposition of alternative penalties in Article 2e(1) RD, or the awards of damages for the aggrieved parties according to the national law.[495] The subsequent sections analyse the procedural fairness of debriefing by exploring whether it has provided the interested parties with such competent perception of the grounds for taking adversarial actions based on CJEU's interpretation of Article 47 CFR.

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[492] The CJEU elaborates that '[i]t follows from the case-law of the Court that the effectiveness of the judicial review guaranteed by Article 47 of the Charter also requires that the person concerned be able to ascertain the reasons upon which the decision taken by an administrative authority in relation to him is based, either by reading the decision itself or by communication of those reasons on its request, without prejudice to the power of the court having jurisdiction to require the authority concerned to communicate them so as to enable him to defend his rights in the best possible conditions and to decide in full knowledge of the circumstances whether it is worthwhile applying to the court having jurisdiction, and in order to put the latter fully in a position to carry out the review of the lawfulness of the national decision in question' (emphasis added). See Case C-230/18 *PI v Landespolizeidirektion Tirol* EU:C:2019:383, [2019] Court Reports - general, para 78.

[493] ibid, para 78.

[494] According to the Commission Effectiveness Report, there were around 50,000 first instance decisions across the Member States during 2009-2012. The most frequent remedy sought was to set aside the decision, followed at a distance by interim measures and the removal of discriminatory specifications. See Commission Effectiveness Report, para 3.

[495] Damages are neither recognized nor awarded by the RD. Therefore, the Member States must lay down the detailed procedural rules governing actions for damages, including time limits. See also Commission Remedies Evaluation 30. Those detailed procedural rules must be subject to the principles of equivalence and effectiveness. See Case C-166/14 *MedEval*, para 37.

3.1. Possibility for Ineffectiveness or Alternative Penalties

Where specific infringements of the standstill period or the automatic suspension have deprived the tenderers applying for a review of the possibility to pursue pre-contractual remedies, the Member States shall also provide for ineffectiveness according to Article 2d(1)(b) RD or alternative penalties according to Article 2e(1) RD. Articles 2d and 2e of the RD together improve debriefing effectiveness by providing appropriate punishments or compensations for substantive violations. Specifically, as in the case of an infringement of the standstill period or the automatic suspension, the contracting authorities could *fail* to perform the debriefing obligations specified in Article 55 PSD. The review body may then apply Articles 2d and 2e of the RD to consider the contract ineffective or impose alternative penalties. The economic operators may *not* expect the contracting authorities to follow public procurement rules. What is *essential* is that *anytime* there is a *breach* of rules, there is an opportunity for *redress*. The more effective the remedies, *inter alia*, and compulsory remedies, the more confident economic operators will be to participate in that procurement system.

Therefore, the first step advised for the economic operators concerned is to anticipate *whether* the contract could have been declared ineffective by a review body independent of the contracting authority in the situations under Article 2d(1)(b) RD. Ineffectiveness can be triggered on three grounds in Article 2d(1)(b) RD:[496] *first*, illegal direct award (i.e., *without* an advertised tender process) in breach of public procurement rules; *second*, not only a procedural breach of the standstill period or the automatic suspension (thereby depriving of the tenderer of the possibility to pursue pre-contractual remedies) but also a substantive breach of the procurement rules (thereby depriving the tenderer of the chances of obtaining the contract);[497] third, in the case where a derogation from the standstill period has been invoked for contracts based on an FA or a DPS there is an infringement of Article 33(5) PSD,[498] Articles 34(5) or (6)

[496] Olivia Carter, 'Public Procurement: Declarations of Ineffectiveness' Trowers & Hamlins LLP 1. See also Commission Remedies Evaluation, 18-19.

[497] Article 2d(b) RD sets out 'if this infringement has deprived the tenderer applying for a review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of Directive 2004/18'. As noted above, Directive 2004/18/EC is repealed by the PSD.

[498] The indents (b) and (c) of Article 33(4) PSD are referred to as the competitions that exist in the case of a framework agreement that is concluded with more than one economic operator (...) where the framework agreement sets out all the terms or not governing the provision of the works, services and supplies are laid down in the framework agreement. Article 33(5) further provides that the said competitions 'shall be based on the same terms as applied for the award of the framework agreement and, where necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the procurement documents for the framework agreement, in accordance with the following procedure: (a) for every contract to be awarded, contracting

of the PSD [499] and the contract value is equal to or above the thresholds for the application of the procurement rules.[500] It should be noted that an infringement of the standstill period or the automatic suspension having deprived the tenderer of the *possibility* to pursue pre-contractual remedies does *not* invoke ineffectiveness under Article 2d(1)(b) RD.[501] Such infringement must be combined with a breach of substantive public procurement rules, such as Article 55 PSD.

In terms of alternative penalties, Article 2e(1) RD states that alternative penalties are imposed in the same situations with ineffectiveness unless the review body finds the effects of the contracts should be maintained (i.e., when ineffectiveness is *not* available). In other words, after assessing *all* relevant aspects, the review body should decide *whether* it is appropriate to declare a contract ineffective or impose alternative penalties according to Article 2d(3) RD, subject to the general interest. In addition, Article 2e RD also requires the imposition of alternative penalties must be 'effective, proportionate and dissuasive', taking the form of the imposition of fines on the contracting authorities or the shortening of the duration of the contract. Alternative penalties are an optional measure applicable in occasions where the Member States might

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authorities shall consult in writing the economic operators capable of performing the contract; (b) contracting authorities shall fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders; (c) tenders shall be submitted in writing, and their content shall remain confidential until the stipulated time limit for reply has expired; (d) contracting authorities shall award each contract to the tenderer who has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement'.

[499] Article 34(5) PSD states that '[c]ontracting authorities shall give any economic operator, throughout the entire period of validity of the dynamic purchasing system, the possibility of requesting to participate in the system under the conditions referred to in paragraph 2. Contracting authorities shall finalise their assessment of such requests in accordance with the selection criteria within ten working days following their receipt. That deadline may be prolonged to fifteen working days in individual cases was justified, particularly because of the need to examine additional documentation or verify whether the selection criteria are met. Notwithstanding the first subparagraph, if the invitation to tender for the first specific procurement under the dynamic purchasing system has not been sent, contracting authorities may extend the evaluation period provided that no invitation to tender is issued during the extended evaluation period. Contracting authorities shall indicate in the procurement documents the length of the extended period they intend to apply. Contracting authorities shall inform the economic operator concerned at the earliest possible opportunity of whether or not it has been admitted to the dynamic purchasing system'. Under Article 34(6), 'contracting authorities shall invite all admitted participants to submit a tender for each specific procurement under the dynamic purchasing system, in accordance with Article 54. Where the dynamic purchasing system has been divided into categories of works, products, or services, contracting authorities shall invite all participants having been admitted to the category corresponding to the specific procurement concerned to submit a tender. They shall award the contract to the tenderer that submitted the best tender based on the award criteria set out in the contract notice for the dynamic purchasing system or, where a prior information notice is used as a means of calling for competition, in the invitation to confirm interest. Those criteria may, where appropriate, be formulated more precisely in the invitation to tender.'

[500] According to Article 2d(1)(b) RD, those procurement rules concerning a DPS, and a FA are 'the second indent of the second subparagraph of Article 32(4) or of Article 33(5) or (6) of Directive 2004/18/EC'. Article 32(4) and Article 33(5)(6) of Directive 2004/18/EC are repealed by Article 33(5) and Article 34(5)(6) PSD, respectively.

[501] In Sweden, the contract may remain valid despite being awarded in breach of a standstill period. However, in this case, the Competition Authority must pursue cases for alternative penalties. See the Commission Remedies Evaluation 29.

consider ineffectiveness inappropriate,[502] and the award of damages does *not* constitute an appropriate penalty.

Nonetheless, the concerned economic operator who requests the communication of reasons prior to the standstill period *only* needs to ascertain whether the situation potentially falls under Article 2d(1)(b) or not, regardless of the result of a decision by such a review body. In other words, the requirements of examining *all* relevant respects in Article 2d(3) RD and assessing *overriding* reasons relating to a general interest rest on the exercise of discretion by the review body instead of the minds of the economic operator. In that respect, the reasons should be communicated by the contracting authority to allow the economic operator to ascertain the reasons for the decision and estimate the probability of declaring the ineffectiveness (i.e., award of damages) or imposing alternative penalties.[503]

The RD strengthens the procurement rules' effectiveness by imposing a *stricter* set of requirements for the ineffectiveness of contracts awarded in their breach,[504] including the grounds, specific derogations, a general interest derogation, etc.[505] By the end of the standstill period, candidates or tenderers *only* need to appreciate if there is a ground of infectiveness that can be applied and, in such a case, if a specific derogation may be invoked. In that regard, communication of the reasons should immediately enable the tenderer to acquire such information relating to the grounds of infectiveness and the respective derogations. Moreover, such information does not need to be communicated by the contracting authority. In most cases, it is quickly learnt by the candidate or tenderer when a procedure lapses *de facto*.

The first ground of the new derogation, i.e., the Voluntary Ex-Ante Transparency (VEAT) notice, is specifically designed to remove the risk that a national court may declare

[502] For instance, when the contract is not declared ineffective because of overriding reasons relating to a general interest; when ineffectiveness was declared only for those obligations which would still have to be performed (*ex nunc*); and in the case of infringements of the standstill period or the automatic suspension if that infringement, for example, is *not* combined with an infringement of substantive provisions. See Commission Remedies Evaluation 20.

[503] It should be noted that the award of damages does not constitute the imposition of fines on the contracting authority (i.e., the second category of penalties set out in Article 2e(2) RD. See Albert Sanchez-Graells, 'If It Ain't Broke, Don't Fix It'? EU Requirements of Administrative Oversight and Judicial Protection for Public Contracts' 27.

[504] Sue Arrowsmith, *The Law of Public and Utilities Procurement*, para 7-194.

[505] Olivia Carter, 1-3.

ineffectiveness if there is a direct award without prior publication.[506] While a VEAT notice allows the contracting authority to avoid the sanction of ineffectiveness, it inadvertently increases the risk of the economic operator applying for a review of ineffectiveness in the meanwhile.[507] Recitals 13 and 14 to the RD specify that the unlawful direct award of contracts is the most *severe* breach of EU law in the public procurement regime, which is necessary to penalise, in principle, by a declaration that the contract is ineffective. In that regard, a VEAT notice shall be only published if certain criteria are met and the specific circumstances are fulfilled.[508] The criteria include that: i) the contracting authority *must* consider a direct award without the publication of a contract notice is permitted by the procurement rules, ii) a VEAT notice is published expressing the authority's intention to award the contract, and iii) the authority has not entered into the contract for at least ten days since the date after the VEAT was published.[509]

In this case, a VEAT notice can be used to avoid the potential challenges where the *applicability* of such rules may be uncertain in fact.[510] The CJEU has admitted that, at least, a VEAT notice can be used in limited circumstances where the *Teckal* exemption applies,[511] or where it is unclear if changes to contact are 'material' as noted by Case C-454/06 *Pressetext*.[512] It appeals to the contracting authority to publish a VEAT notice whenever it decides not to apply the procurement rules to the award of a contract or whether it is indeed permitted not to advertise such notice.[513] Accordingly, a VEAT notice must be published with a justification that clearly and unequivocally discloses the reasons that moved the contracting authority to consider it

[506] Recital 26 to the RD emphasises the need to avoid the legal uncertainty that could arise as a result of the contract being deprived of effects in the specific case contemplated in Article 2d(4) RD. See also, Case C-19/13 *Fastweb SpA*, para 43.
[507] Adrian Brown, 'When Will Publication of a Voluntary Ex Ante Transparency Notice Provide Protection Against the Remedy of Contract Ineffectiveness? Case C-19/13 Ministero dell'Interno v Fastweb SpA' (2014) 24 Public Procurement Law Review 10, 15.
[508] Olivia Carter, 2; Commission Remedies Evaluation 28-30.
[509] Olivia Carter, 2.
[510] A VEAT notice is not used to rectify an infringement in a situation where the contracting authority is aware that it is breaching the requirements of the regime. The contracting authority must consider that there was no need for a contract notice. Case C-19/13 *Fastweb SpA*. See also Olivia Carter, 2 (emphasis added).
[511] The *Teckal* exemption applies where the contracting authority contracts with a legally distinct entity – usually, this will be a company that the authority has set up, either on its own or in concert with others – to provide services. Especially, a contract is very close to the financial thresholds, where a contracting authority obtains services from 'in-house' sources and is not required to comply with advertising requirements. See Case C-107/98 *Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia* EU:C:1999:344, [1999] ECR I-08121. See discussion in Olivia Carter, 2.
[512] In such case, a tender process is applicable. Case C-454/06 *Pressetext Nachrichtenagentur GmbH v Republik Österreich (Bund), APA-OTS Originaltext-Service GmbH and APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung* EU:C:2008:351, [2008] ECR I-04401. See also Olivia Carter, 2.
[513] Adrian Brown, 15.

legitimate to award a contract without an CJEU contract notice,[514] so that the interested economic operators may be able to 'decide with full knowledge of the relevant facts whether they consider it appropriate to bring an action before the review body' and 'the review body can undertake an effective review'.[515] Therefore, in cases associated with VEAT notices, such a justification of a direct award decision should be included in the communication of the reasons prior to a standstill period though not stipulated in Article 2a(2) concerning the standstill period.

3.2. Interim Measures or Setting Aside of Decisions

Once the candidate or tenderer has estimated that the concluded contract could rarely be considered ineffective in circumstances as the previous Subsection 3.1 noted, they shall be clear that they may otherwise obtain instant remedies under the RD. Any tenderer or candidate deemed to be 'concerned' in Article 2a(2) RD can apply for pre-contractual remedies as soon as the standstill period launches and does not need to decide upon *which* type of remedies they may claim prior to the standstill period. Nevertheless, they still require the communication of the reasons to decide whether they should apply for pre-contractual remedies even if they are allowed by the rules. That indicates a *de jure* that the communication of the reasons does not serve the tenderer's understanding of the possibility of declaring ineffectiveness but for obtaining pre-contractual remedies. Furthermore, such communication should satisfy the condition that the economic operators understand their positions in applying for pre-contractual remedies set out in the RD rather than identify a specific sort of remedy before initiating an application.

The indents (a) and (b) of Article 2(1) RD respectively provide the grounds for taking interim measures or setting aside unlawful decisions. Article 2(1)(a) RD aims to correct the alleged infringement or prevent further damage to the interest concerned at the *earliest* opportunity through *interlocutory* procedures. Indent (a) specifies that interim measures require suspending the award procedures or suspending the implementation of the contracting authority's decision, which means the communication of unsuccessful reasons shall enable the aggrieved party to beware of an infringement of substantive rights, or the questionable decisions could already cause damages.

[514] Case C-19/13 *Fastweb SpA*, paras 47-48.
[515] ibid, para 48.

Article 2(1)(b) RD clarifies that the setting aside of unlawful decisions includes the removal of the discriminatory technical, economic, or financial specifications in the invitation to tender, the contract documents or any other document relating to the contract award procedure. The decided Case C-81/98 *Alcatel* requires that the contracting authority's decision prior to the contract conclusion is 'in *all* cases open to review in a procedure'.[516] In this regard, the parties concerned may request to nullify any questionable decision or administrative act by the contracting authority before the contract is concluded. The review body is responsible for justifying its annulment order by testing for a balance of interests in terms of weights and damages.[517] Nevertheless, most national legal systems merely consider *whether* the contracting authority's acts or decisions are lawful.[518]

4. Balance with Confidentiality

It is argued that due process relating to procedural fairness demands a balance between the enforcement of procedural rights entitled to those economic operators and the rights of *confidentiality* owed to third parties not participating in the procedures.[519] For that matter, debriefing design must consider those *approaches* for defining the confidential aspects of information and the *techniques* for balancing its enforcement with those rights endorsed by the EU legislature throughout the debriefing. Nevertheless, Article 21(1) PSD only provides an overall rule *defining* confidentiality for its enforcement throughout the procurement activities, leaving room for the contracting authority to develop the regulatory criteria for specific duties at a particular stage. Also, the general principle of EU law, the protection of business or trade secrets, is at risk of improper disclosure to potential candidates or tenderers.[520] That legal uncertainty demands judicial clarification for debriefing *procedural fairness*,[521] such as what information should be designated as confidential, the scope of trade or business secrets and data privacy protection if required.

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[516] Case C-81/98 *Alcatel*, para 29.

[517] The annulment order towards the administrative acts or decisions cannot attack the contract's effectiveness *per se*, which represents a pact between the contracting authority and a third party. See Christopher H. Bovis, *The Law of EU Public Procurement*, para 12.

[518] Once transposed into the national law, the domestic courts or administrative tribunals may set aside or annul acts of contracting authorities to nullify their decisions to award a public contract before the contracts concluded. See ibid, para 12.

[519] D. Daniel Sokol, 197.

[520] Yseult Marique, 'Cooperation and Competition in Complex Construction Projects: Implementation of EU Procurement Rules in England and Belgium' (2013) 5 International Journal of Law in the Built Environment, 53-54.

[521] Sue Arrowsmith, 'Implementation of the New EC Procurement Directives and the Alcatel Ruling in England and Wales and Northern Ireland: A Review of the New Legislation and Guidance' (2006) 3 Public Procurement Law Review 86, 107.

This section classifies those *substantive* confidentiality rights for examination, such as the right to protect business or trade secrets and the right to designate information as confidential and personal data rights. Their regulated *relationship* with other procedural rights is discussed in this chapter to appraise procedural fairness. Subsection 4.1 investigates the legal source from the CJEU's interpretation of the right to protect business or trade secrets established as a general principle of the EU law and the EU Trade Secrets Directive (i.e., TSD).[522] Subsection 4.2 explores the general principle of EU law – the right to protect business or trade secrets. After that, that subsection also provides some implications on the enforcement mechanism for the CJEU's consideration by analysing the comparable rules setting out the common law duty of confidence. Accordingly, Subsection 4.3 explores the issues arising from the requirements for personal data protection in debriefing according to the General rules of data protection (GDPR).[523] In addition to the relevant EU rules, that section discusses the UK's domestic rules and policies on freedom of information (e.g., UK FOIA 2000, Code of Practice,[524] and its domestic case-law) as a supplement analysis when necessary.

4.1. Right to Protection of Business or Trade Secrets

To explore the legal source of Article 21 PSD on confidentiality in EU law thereinafter follows a discussion about the right to protection of business or trade secrets laid down by the CJEU as a general principle,[525] its source from Article 8 of the ECHR,[526] and its compliance by the design of debriefing for the sake of procedural fairness. In line with the protection of business secrets as a general principle of EU law, Article 7 CFR enshrined respect for private and family life as one of the fundamental rights for EU citizens. In UK transposition, Section 6 of the Human Rights Act 1998 (HRA) makes it unlawful for public authorities to act in *any* way incompatible with ECHR rights. Consequently, disclosure that would be incompatible with the

[522] Council Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L 157/1 (herein after referred as Trade Secrets Directive).
[523] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR), OJ 2016 L 119/1.
[524] Cabinet Office, *Freedom of Information Code of Practice* (2018). Hereinafter referred to as Code of Practice.
[525] Case C-36/92 P *Samenwerkende Elektriciteits-Produktiebedrijven (SEP) NV v Commission of the European Communities* EU:C:1994:205 [1994] ECR I-01911, para 37. Case C-450/06 *Varec*, para 49. Case C-1/11 *Interseroh Scrap and Metal Trading GmbH v Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH (SAM)* EU:C:2012:194 [2012], para 43.
[526] Intellectual property and other commercially sensitive information, for example, are protected under the right to peaceful enjoyment of possessions in Article 1 of Protocol 1 (A1P1) of the ECHR.

ECHR right will fall within Section 44 FOIA. In practice, such information is also likely to fall within other exemptions under FOIA.[527]

In terms of its application in debriefing, the CJEU merely allows the *minimum* extent of disclosure of information required to ensure effective access to legal remedy,[528] as the protection of adversarial rights requires a considered balance of interests.[529] However, EU case-law *neither* provides a comprehensive and *unambiguous* interpretation of the *definition* of business or trade secrets *nor* the relevant approaches to justifying the contracting authority's actions or decisions concerning debriefing. This section discusses those issues for understanding the concept and scope of trade secrets as required in Article 21(1) PSD and the CJEU's techniques for picking a legal route to justify the lawfulness of the debriefing arising from those procedural rights.

4.1.1. Interpretation of trade secrets in the TSD and its UK transposition

The Trade Secrets Directive (i.e., TSD)[530] may complicate the application of the principle of confidentiality regarding the interpretation of trade secrets and its knock-on effect on the ease of cartelization of public procurement markets.[531] Recital 18 TSD, in particular, indicates its application to contracting authorities: 'public authorities should not be released from the confidentiality obligations to which they are subject in respect of information passed on by trade secret *holders* (…) in the context of procurement procedures under the [PSD]'. Current protection for trade secrets varies significantly across the EU, and these discrepancies risk deterring cross-border investment. Therefore, the TSD provides a *minimum* standard for protecting a 'trade secret' that meets all Article 2(1) requirements. A common definition of 'trade secrets' includes all following requirements for information:

(a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question.

(b) it has commercial value because it is secret.

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[527] For examples of such information falling within other exceptions of FOIA, see Charles Brasted, para 54.
[528] Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules* 445 (emphasis added).
[529] The principle of effectiveness is paramount for the review procedure in ensuring legal protection but needs to be balanced with the requirements of the confidentiality of information. For more discussion about that principle, see Subsection 3.1, Chapter 3.
[530] Trade Secrets Directive. After Brexit, this directive remains part of the UK law as retained EU law.
[531] Albert Sanchez-Graells, *The Difficult Balance between Transparency and Competition in Public Procurement: Some recent trends in the case law of the European Courts and a look at the new Directives* 24.

(c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

The Trade Secrets (Enforcement, etc.) Regulations 2018 (Regulations 2018) is the UK's transposition of the TSD. Before that release, UK common law had already reflected the substance of the TSD. Its implementation in the UK is unlikely to result in significant changes in practices, despite the uncertainty in how the TSD interacts with the common law of confidence.[532] Regulation 2018 also provides the interpretation of an 'infringer' – a person who has *unlawfully* acquired, used or disclosed a trade secret – and that of 'infringing goods' – goods, the design, functioning, production process, marketing or a characteristic of which significantly *benefits* from a trade secret *unlawfully* acquired, used or disclosed. The interpretation of 'trade secrets' is set out in the fourth paragraph of Regulation 2 of the Regulations 2018,[533] and the 'trade secrets holder' means any person *lawfully controlling* a trade secret.

Information Tribunal has suggested in the Case *Department of Health v Information Commissioner* that a trade secret is more than simply commercially sensitive information and indicates something technical and unique achieved with a degree of difficulty and investment.[534] Due to its specific requirement for technical or industrial nature, that interpretation in case-law is narrower than in the TSD. Instead, UK common law provides the concept via the circumstance in which it is achieved or discovered with a degree of *difficulty*. In comparison, Article 2(1)(c) of the TSD provides the concept of trade secrets via regulating the circumstance in which it is stored or used by reasonable steps to *keep* its secrets.

In addition, *whether* there is a trade secret depends on several relevant *factors*:

i) Whether the information is used for the *purpose* of a trade or business;

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[532] Practical Law Commercial and Bird & Bird, 'Protecting Confidential Information: Overview' <https://uk.practicallaw.thomsonreuters.com/8-384-4456> accessed 11 June 2018, 4.

[533] Regulation 2 Interpretation provides a common definition of 'trade secrets':
'trade secret' means information which—
(a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among, or readily accessible to, persons within the circles that normally deal with the kind of information in question,
(b) has commercial value because it is secret, and
(c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret;

[534] *Department of Health v Information Commissioner* EA/2008/0018 [52]-[53].

ii) Whether the information, if released by a competitor, would cause real (significant) *harm* to the trade secrets holder;[535]

iii) Whether the information is *already* known;

iv) How *easy* it would be for a competitor to discover and use the information and;[536]

v) Whether the owner must *limit* the dissemination of the information, or at least, *not* encourage or permit widespread publication.[537]

Trade secrets cover such matters as pricing formulas or recipes and manufacturing know-how, as well as pricing structures or unique methodologies that give a competitive edge.[538] For example, Tribunal considered the financial model provided by the contractor a trade secret, which covers the pricing structure, details of costs, profits margins, overhead recovery rates and a balance sheet.[539] Such matters are also covered by the exemption in section 43(2) FOIA on an inexplicit condition that such disclosure would, or would be likely to, prejudice any commercial interests. However, whether the information would cause actual harm is relevant to the scope and definition of trade secrets, and the *likelihood* of commercial prejudice is essential when balancing the public interests for or against disclosure under section 43(2) FOIA.[540] Commercial prejudice exemption is qualified when the public interest in disclosure outweighs the interest in remaining confidential. Whilst the information constitutes a trade secret, it appears that there is always strong public interest in non-disclosure because of the investment likely to have involved and likely impact on the competitive position of the tender concerned, such as the financial model to be withheld after balancing the public interests concerned.[541]

4.1.2. Judicial routes to justifying the confidentiality

As previously discussed in Subsection 3.2, Chapter 2, the principle of good administration has incorporated the duty to state unsuccessful reasons and protect their business secrets (i.e., the principle of confidentiality) in the CJEU precedents.[542] The duty to state unsuccessful reasons

[535] Charles Brasted, para 45.
[536] Sue Arrowsmith, *The Law of Public and Utilities Procurement*, para 13-92.
[537] *Lansing Linde Ltd v Kerr* [1991] 1 WLR 251;.
[538] Sue Arrowsmith, *The Law of Public and Utilities Procurement*, para 13-92.
[539] Information Commissioner's Office, *Freedom of Information Act 2000 (FOIA) Decision Notice (Reference: FS50593297)* [21].
[540] Sue Arrowsmith, *The Law of Public and Utilities Procurement*, para 13-92.
[541] Information Commissioner's Office, *Freedom of Information Act 2000 (FOIA) Decision Notice (Reference: FS50593297)* [84].
[542] The CJEU has referred to good administration principles since the very early case-law: Joined Cases 7/56, 3/57 to 7/57 *Algera and Others v Common Assembly of the ECSC* [1957] ECR 0039; Case 32/62 *Alvis* [1963] ECR 49,

otherwise endorse those potential aggrieved economic operators the *necessary* information to access an effective legal remedy and a fair trial (i.e., adversarial right). The CJEU noted that the extent of disclosure must *not* constitute a violation of the principle of confidentiality,[543] which shall *reconcile* with those providing access to effective legal remedy and shall respect the aggrieved parties' rights of defence to the dispute.[544] Those information rights arising from the adversarial principle have been enshrined into Article 41(2)(b) CFR on the right to have access to documents and (c) the obligation to give reasons, respectively.[545] In this viewpoint, the principle of good administration of EU case-law generally requires a *balance* between the competing requirements for the adversarial rights and the protection of business secrets.[546]

At least from the CJEU's judicial stance, it can be noted that a choice of different legal interests for justification of the administrative act – disclosure or withdrawal of the relevant documents containing the confidential information may – leads to different *routes* and *outcomes*. The CJEU has recognised the need for this balance between competing interests. In Case C-450/06 *Varec*, the Court held that, on the facts, the confidentiality of the business secrets *outweighed* the interest of right of access to documents and the right to effective judicial protection.[547] It provides that 'in some cases, it may be necessary for certain information to be withheld from the parties to preserve the fundamental rights of a *third* party or to safeguard an important public interest'.[548]

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para 1A; Joined Cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299; Case 64/82 *Tradax v Commission* [1984] ECR 1359.

[543] Rix LJ in domestic cases took this view. See, for example, *Veolia ES Nottinghamshire v Limited Nottinghamshire County Council* [2010] EWCA Civ 1214; [2012] PTSR 185. Another view considers those provisions prohibit disclosure only to the extent that the national laws have already prohibited it. In that sense, a violation of domestic law on confidentiality during procurement procedures, in the meanwhile, constitutes a violation of EU Procurement Directives and concerned transposed regulations. For more discussion on this debate, see Sue Arrowsmith, *The Law of Public and Utilities Procurement*, paras 13-06 and 07.

[544] Albert Sánchez-Graells, *Three Recent Cases on EU Institutions' Procurement and One Common Theme: Good Administration and Confidential Information (T-498/11, T-91/12 & T-199/12)*.

[545] Article 41(2) CFR of Right to good administration provides that:

> 2. This right includes:
> (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
> (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
> (c) the obligation of the administration to give reasons for its decisions.

[546] See Case T-498/11 *Evropaïki Dynamiki v Commission*, paras 28–50. See also Albert Sánchez-Graells, *Three Recent Cases on EU Institutions' Procurement and One Common Theme: Good Administration and Confidential Information (T-498/11, T-91/12 & T-199/12)*.

[547] PLC Competition, *High Court Ruling on Disclosure in Public Procurement Claim* (Practical Law UK Legal Update Case Report 0-502-1337, 2010).

[548] Case C-450/06 *Varec*, para 47.

In addition, the CJEU should be *more* cautious about relying on either the right to be heard in Article 41(2)(a) CFR or the obligation to give reasons in (c) when it rules on the *lawfulness* of withdrawal of certain information during debriefing. In Case T-498/11 *Evropaïki Dynamiki v Commission*, the contracting authority was allowed to withhold specific information, such as technical aspects of a successful tender, without giving reasons for such 'confidentiality of each of the pieces of information concerned'.[549] The General Court considers that the contracting authority cannot justify each wording removal without disclosing that precisely.[550] According to the obligation to give reasons in Article 41(2)(c) CFR, the contracting authority has justified its *refusal* since the refusal does not affect the CJEU's access to information (i.e., the CJEU will have all information at hand regardless) and its *capability* to make a judgement. However, such refusal may affect the *outcome* of the judicial review (i.e., the CJEU's judgement of whether such behaviours comply with EU law).

In comparison, the contracting authority may *not* relieve itself from giving insufficient reasons to apply for either an effective review or remedies according to Article 41(2)(a) CFR, relying on the right to be heard, a traditional right of defence, as Section 2 of this chapter noted. In Case T-187/11 *Mohamed Trabelsi*,[551] the interested party cannot ascertain *why* their tenders or applications are rejected in procurement activities due to incomplete information revealed by the contracting authority. In that regard, it is *arduous* for them to use their defence rights and prejudiced. In this respect, the right to be heard is *more* appropriate than the other fundamental rights under CFR, such as the 'right to an effective remedy and a fair trial', to balance the tense relationship between the competing interests of confidentiality and adversarial. Considering their balanced relationship, if loose conditions are placed on the exercise of administrative discretion in withholding certain information, such decisions will create more obstacles before the aggrieved parties have access to judicial review.[552]

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[549] The General Court states that it is since 'it may be impossible to state the reasons precisely justifying the confidentiality of each of the pieces of information concerned without disclosing them and therefore negating the effectiveness of the second subparagraph of Article 100(2) of the Financial Regulation.' See Case T-498/11 *Evropaïki Dynamiki v Commission*, para 45.

[550] ibid, para 45.

[551] Case T-187/11 *Mohamed Trabelsi and Others v Council of the European Union*, para 66.

[552] Albert Sánchez-Graells, *Three Recent Cases on EU Institutions' Procurement and One Common Theme: Good Administration and Confidential Information (T-498/11, T-91/12 & T-199/12)* holds the opinion that in the management of confidential information a trend that contracting authorities are '*less* open to (viable) legal challenge than could have been though (…) should reduce the existing pressure towards *excessive* transparency in the public procurement setting'. See ibid Albert Sanchez-Graells, *The Difficult Balance between Transparency and Competition in Public Procurement: Some recent trends in the case law of the European Courts and a look at the new Directives*.

In the procurement regime, indents (a) and (b) of Article 55(2) PSD set out precise requirements on the contracting authority to inform any *unsuccessful* tenderer or candidate of the reasons for the rejection of its tender or request to participate. Article 55(2)(c) PSD can be understood as having listed the substantive matters that should have been incorporated into the statement of reasons, contributing to legal certainty and enforcement's effectiveness. Those substantive matters in Article 55(2)(c) PSD include the name of the selected tenderer and the characteristics and relative advantages of the selected tenderer. Considering the rationale behind the right to be heard arising from the principle of good administration of the EU law and the fundamental right in Article 41(2)(a) CFR, there is rarely a need for notifying the selected tenderer's name given for a challenge purpose by Article 55(2)(c) PSD. Having the characteristics and relative advantages of the selected tenderer at hand is sufficient for applicants to understand the unsuccessful reasons and decide whether they should file a complaint against the contracting authority responsible for good administration.

4.2. Right to Designate Information as Confidential

Article 21(1) PSD obliges the contracting authority to secure the confidentiality of information designated by economic operators as confidential on a *mandatory* basis. Nevertheless, that provision endorses the *broadened* scope of discretion by the contracting authority to identify confidential aspects of tender other than technical or trade secrets instead of specifying those confidential aspects. In contrast, Article 21(2) PSD entitles the contracting authority to impose the requirements for protecting the confidential nature of information on economic operators, but voluntarily. Article 21(2) PSD also suggests an *antecedent* duty on the contracting authority to detect confidential information *before* imposing those protection requirements on the economic operator.

4.2.1. Information designated as confidential

Article 21(1) PSD generally describes the confidentiality of information as 'the information *forwarded* (…) by economic operators which they have *designated* as confidential'. In the literal sense, Article 21(1) does not endorse the contracting authority's right to decide whether certain information is subject to confidentiality after it has been designated as confidential and forwarded by the economic operator. That provision also entitles economic operators to the *unconditional* right to protect the forwarded information. It means that *once* they have designated certain information as confidential, they are obliged with *no* further justification for such

withdrawal from any access of their rivals.[553] Nevertheless, Article 21(1) PSD has adopted a problematic method in providing an *open* interpretation of 'confidential aspects of tenders', leaving the *room* for the lawmakers and judicature rule on *definitive* elements or components at the national level other than specifying the 'technical or trade secrets' at the EU level. It implies, at least, that 'technical or trade secrets' can be referred to as information of a confidential nature. Those terminologies shall be interpreted aligning with the qualified 'in-built' exceptions to the disclosure in Article 55(3) PSD for legal coherence when deciding on the information to be withdrawn in enforcement.

Nevertheless, the contracting authority shall be aware of the difference between the scope of 'confidential aspects' in Article 21(1) PSD and 'legitimate commercial interests' in Article 55(3). Information falling under the latter scope does not essentially meet conditions – 'forwarded by economic operators which have been designated as confidential' – for the *absolute* exemption set out in Article 21(1) PSD. For example, trade secrets cannot be qualified as information is 'forwarded' to the contracting authority subject to Article 21(1) PSD in some cases, where such information is *de facto* 'produced' by the contracting authority itself despite legitimate access (e.g., with the permission of data subjects) to private databases of economic operators. However, such trade secrets may still fall under Article 55(3) PSD if their release is considered prejudiced commercial interests at the contracting authority's discretion. This subsection, therefore, argues that those provisions indicate two overlapping but different groups of information in the application, though the CJEU does not, notably, provide more explanations for such differences. That can be attributed to *different* approaches to the definition of confidentiality as used in Articles 21(1) and 55(3) of the PSD, which, relatively, put the onus on economic operators and contracting authorities to identify the confidentiality of information.

Regarding debriefing obligations in Article 55 PSD, the contracting authority should primarily conform to confidentiality obligations before releasing information. As stated, in Subsection 2.4, Chapter 3, Articles 21(1) and 55(3) of the PSD together comprise confidentiality obligations in

[553] However, in the UK's practice, although economic operators designate all confidential information in their tenders, this may not mean the information is exempt from disclosure. Contracting authorities must include FOI warnings in Invitation to Tender documents and put economic operators on the onus to identify commercially sensitive information. Upon receipt of an FOI request, contracting authorities shall promptly consult with the affected economic operators and consider whether any exemptions apply. See Emma Butcher, 'Public Procurement: will My Bid Remain Confidential?' (*Clarkslegal*, 01 February 2018) <https://www.clarkslegal.com/Blog/Post/Public_procurement_will_my_bid_remain_confidential > accessed 10 December 2018.

the context of the debriefing. Furthermore, Article 55(3) PSD provides an *advanced* requirement in creating debriefing decisions for the sake of confidentiality. This requirement is a complementary guarantee for the general requirements set out in Article 21 PSD. Article 55(3) PSD imposes a duty on contracting authorities to withhold certain information against the public interest, commercial interests, fair competition, etc. These legal interests are critical to understanding and implementing confidentiality requirements for debriefing in a particular context, which should be based on EU case-law. Those CJEU's precedents are discussed on the ground of the concerns in this thesis regarding the public interest tests and legitimate commercial interests noted in Subsection 2.3, Chapter 3, and fair competition *between* economic operators in Subsection 3.2, Chapter 5.

As it can be seen, those values all seem to create a culture of integrity and fairness. Nevertheless, there can always be a *conflict* among these said legal values of transparency, equal treatment, and confidentiality in making debriefing decisions. For example, certain information about a potential awardee should be communicated to other unsuccessful tenderers at the debriefing stage in compliance with the requirements of transparency and equal treatment. Nevertheless, such released information could be *beyond* the boundary of information subject to legitimate publication or communication, e.g., trade secrets. In that case, the release of such information will potentially infringe on the confidentiality of certain tenderers and may prejudice the fair competition that Article 55(3) PSD avoids. Despite that, *all* confidentiality, transparency, and equal treatment requirements align with the objective of fairness.

In dealing with those competing interests regarding the confidentiality requirements at UK's national level, the High Court decided that *whether* to disclose a relevant document must have regard to the *fact* that discovery would be a breach of confidence – if *third* parties had designated certain information of the documents at issue as 'not for disclosure' or as containing confidential information under Regulation 43 of the Public Contracts Regulations.[554] In Case *Durham*, the defendant contracting authority, Durham County Council, argued that disclosure of certain information about the Council's evaluation of tenders should be restricted to the directors and employees of the claimants. Otherwise, that disclosure would *unfairly* benefit the claimants and make it difficult for the Council to run a *new* procurement process.[555] The High Court

[554] PLC Competition.
[555] *Croft House Care Limited, Orchard Home Care Limited, Kelly Park Caring Agency v Durham County Council* [2010] EWHC 909 (TCC). Hereinafter referred to as Case *Durham*.

concluded that *neither* the confidentiality of the document *nor* the potential difficulties of re-running the tender process justified *not* making the documents available to the relevant directors or personnel of the claimants subject to appropriate safeguards. In other words, in that specific case, the need for the documents to be disclosed to and inspected by the claimants' directors and personnel *outweighed* other considerations for their purpose of pursuing an effective review of the procurement process. Nevertheless, there should be safeguards to *limit* the access by the relevant directors or personnel *only* to documents *necessary* for them to give instructions.

4.2.2. Common law duty of confidence

Regulation 21 PCR 2015 [556] (i.e., the UK provision that transposes Article 21 PSD without any substantive revision) requires the contracting authority to provide information under the FOIA 2000.[557] The provision places the statutory prohibition on disclosing information forwarded by an economic operator during the public procurement process, providing that such information is reasonably designated confidential. Such provision significantly overlaps section 41 FOIA on information provided in confidence.

The UK common law duty of confidence protects information that must either have confidential *quality* [558] or be disclosed in the *circumstances* importing an obligation of confidence.[559] The obligation to keep the information confidential may either be imposed by contract or implied because of the circumstances of disclosure or because of the special *relationship* between the parties concerned (e.g., that of employer and employee).[560] Therefore, information that is designated as confidential qualifies as confidential under a common law duty of confidence, but it will not last indefinitely.[561]

'Forwarded' in Article 21(1) PSD can be understood as equal to 'obtained' in section 41 of FOIA. That term is critical as it restricts the *scope* of the information under Article 21(1) PSD. In UK common law, the Information Tribunal considered that once information is included in a *contract*, rather than only as a part of a tender document, it becomes '*mutual*', accordingly

[556] The Public Contracts Regulations 2015 (PCR).
[557] Sue Arrowsmith, *The Law of Public and Utilities Procurement*, para 7-34.
[558] It refers to the 'necessary quality of confidence about it, and it must *not* be something which is public property and knowledge'. See *Saltman Engineering Co v Campbell Engineering Co Ltd* 65 RPC 203 [215].
[559] *CF Partners (UK) LLP v Barclays Bank Plc & Another* EWHC 3049 (Ch).
[560] Practical Law Commercial and Bird & Bird.
[561] Charles Brasted, para 54.

falling outside the scope of Article 21(1) PSD.[562] In contrast, Veolia ES Nottinghamshire v Limited Nottinghamshire County Council [2010] EWCA Civ 1214; [2012] PTSR 185 provides a clue that Rix LJ is not prone to take that *narrow* view by considering that the information can be probably understood as 'forwarded' by an economic operator provided that such information originates from that economic operator.[563]

4.3. Individual Rights of Personal Data

In light of the mandatory enforcement of e-procurement on the legislative reform of public procurement in 2014, EU legislators have devoted themselves to *digitalising* the public procurement process, i.e., the transition to e-procurement.[564] The enforcement of e-procurement in procurement procedures, such as debriefing, aims to provide new opportunities for SMEs and encourage their participation by taking advantage of the single digital market.[565] For example, the new self-declaration form used for economic operators in procurement activities makes excluding tenderers in the selection phase more challenging.[566]

That evolution in the regime of public procurement is not simply introducing electronic tools, which also allows the integration of *data-based* approaches throughout the procurement process. That situation triggers the application of the EU data privacy law considering their substantive protection of the rights of the data subjects *while* collecting and processing personal data in the e-procurement. Subsection 3.3 of Chapter 2 interprets the principle of fairness in EU data protection law and its legal source from the EU primary law, especially the CFR.[567] Fairness is a substantive principle of the EU data protection law,[568] including the GDPR, which runs throughout its operation concerning collecting and processing personal data of individuals.[569] Following that, this section introduces its position in aligning substantive protections under the

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[562] ibid, paras 39-42.
[563] *Veolia ES Nottinghamshire v Limited Nottinghamshire County Council.*
[564] For more details about e-procurement, see Commission, 'E-procurement'.
[565] Commission, 'New Opportunities for SMEs under the Reform of Public Procurement Legislation'.
[566] Before the introduction of the ESPD, companies had to submit various documents proving that they could participate in a procurement procedure (e.g., having paid taxes or not having been convicted of criminal activity). ESPD, by contrast, allows qualified companies to meet these obligations with a single self-declaration form – the ESPD. Only the winner of the tender then needs to provide the actual documents. The Commission's eCertis service lists these documents. For more details about ESPD and eCertis, see also Commission, 'European Single Procurement Document and eCertis' <https://ec.europa.eu/growth/single-market/public-procurement/e-procurement/espd_en > accessed 21 April 2019.
[567] Inge Graef, Damian Clifford and Peggy Valcke, 220-23.
[568] The European Data Protection Supervisor (EDPS) has confirmed the core principles of the data protection regime, including fairness, lawfulness, and transparency. European Data Protection Supervisor, 8.
[569] Inge Graef, Damian Clifford and Peggy Valcke, 200.

GDPR, especially the *data subject rights* towards the fairness of debriefing in the procurement process for coherence over those EU legal regimes.

The GDPR resolves previous *uncertainties* about the *definition* of personal data by explicitly referring to that as having been encrypted, and online identifiers such as IP addresses and sensitive personal data will include genetic and biometric data.[570] Data protection principles should *not* apply to anonymous information not relating to an identified or identifiable natural person or to personal data rendered anonymous in the processing of such anonymous information for statistical or research purposes.[571]

The GDPR redistributes personal data and control rights from the *controllers* and *processors* to the data subjects (i.e., an identified or identifiable natural person).[572] For an example of internet companies, the GDPR took the advice from Solid Project[573] to radically change the social web application's work today with substantive data ownership and improved privacy.[574] That legislation trend signals the right direction for policymakers[575] since it promises the most significant effect on internet companies' behaviour without directly regulating conduct or market structure.[576]

Since the GDPR provides the data subjects with renewed insights on protection enforcement as primary legislation, the EU institutions, and bodies[577] or the Member States must respect that fundamental right in their procurement activities as required by due process. Good practice has long required the contracting authority to detail *what* personal data is to be

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[570] Council Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1, art 4.
[571] ibid, recital 26.
[572] Martin Sandbu, 'Taking Back Control of the Internet: EU Data Rules Rebalance Power in the Digital Economy' <https://on.ft.com/2sdHRCP> accessed 23 May 2018.
[573] Solid is an exciting new project led by Professor Tim Berners-Lee, inventor of the World Wide Web, taking place at MIT. The project aims to radically change the way how Web applications work today, resulting in true data ownership as well as improved privacy. See website: https://solid.mit.edu.
[574] Sarah Gordon and Aliya Ram, 'Information Wars: How Europe Became the World's Data Police' (*Financial Times*, 20 May 2018) <https://on.ft.com/2KPULP6 > accessed 23 May 2018.
[575] Martin Sandbu, 'Civilising the Digital Economy' Ownership rights and algorithmic accountability <https://on.ft.com/2GObYq3> accessed 23 February 2018.
[576] Martin Sandbu, 'Fixing the Internet's Broken Markets: Can Big Tech Be Restructured for the Common Good?' <https://on.ft.com/2GNyXRP> accessed 23 February 2018.
[577] Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, [2018] OJ L 295/39, recital 1.

processed and *how*, and the *nature* of the organisational and technical measures for their protection in procurement procedures and execution the public contracts.[578]

The GDPR consolidates previous practice into substantive individual rights, including the right to be informed (Article 13 and 14), the right of access (Article 15), the right to rectification (Article 16), the right to erasure (Article 17), the right to restrict processing (Article 18), the notification obligation regarding rectification or erasure of personal data or restriction of processing (Article 19), the right to data portability (Article 20), the right to object (Article 21) and the rights related to automated decision making including profiling (Article 22).

The concern for all these rights is remarkable when the tenderers or candidates are *natural persons* or *legal representatives* of a company (i.e., legal person). In those circumstances, the contracting authority shall be cautious about disclosing personal data at the debriefing stage required by Article 55(1)(2) PSD. The exclusion grounds (Article 57 PSD), selection criteria (Article 58 PSD) and contract award criteria (Article 67 PSD) are all designed to evaluate the *personal aspects* of tenderers or candidates when they are natural persons or their legal representatives when they are legal persons. In those cases, those personal aspects of natural persons or legal representatives embedded in the mentioned provisions are *potentially* sorted components of unsuccessful reasons for rejecting the participation requests on the exclusion grounds and the tenders based on either the selection or contract award criteria under Article 55(1) and (2) of the PSD. Furthermore, Article 55(2)(b) PSD enforces the notification to any tender of the *name* of the successful tenderer or the parties to the framework agreements, which may cause a *higher* risk of breaching the GDPR since the name (also, title, first name and surname) and function directly identify natural persons or legal representatives falling within the scope of personal data under the GDPR.

Another *universal* compliance matter arises when the unsuccessful reasons for the rejection of the request to participate or the tender duly notified according to Articles 55(1) and (2) PSD probably include the personal data from the *employees*, *end-user customers* and *subcontractors* of the tenderer or candidates. For example, the selection criteria in Article 58(4) PSD may relate to technical and professional ability with requirements indicating necessary human and technical resources and experience to perform the contract to an appropriate *quality* standard.

[578] Christopher Knight, 'What Public Bodies Should Take from Procurement Policy Note 03/17' (2018) Privacy & Data Protection 8, 8.

Furthermore, the best price-quality ratio of contract award criteria in Article 67(2) PSD may compare the organisation, qualification and staff experience assigned to perform the public contract. The staff quality can significantly impact the level of performance of the contract. In previous circumstances, the contracting authority may risk infringing the individual rights of those data subjects, whether owed by *itself* or by a *third* natural person. According to the right to be informed, for example, if personal data submitted for the tender competition is anticipated to be disclosed to *any* other applicant during debriefing, the contracting authority shall notify the data subjects *no later* than the disclosure. The right of access further requires that disclosure be easily accessible for the end-users. Nevertheless, there are a few exceptions: when the data subjects already had the information *while* it would be impossible to provide it, or where there is a legal obligation to obtain the data.

5. Conclusion

Considering the effectiveness and coherence of the EU's enforcement mechanism for procedural fairness, this chapter compares debriefing requirements in procurement with the *primary* legislation from which those requirements are *traced*. That EU legislation noted includes the general principles of the EU law (i.e., good administration and effectiveness) and with the fundamental rights in Articles 41 and 47 CFR (i.e., the rights to good administration and an effective remedy and a fair trial, respectively). This chapter initially addressed the *issues* arising from the right to good administration, including the *scope* of economic operators to the right to be heard and the *objective standards* for stating unsuccessful reasons in the CJEU's precedents. In addition, considering Article 47 CFR and EU case-law implications on the review procedures, the author identifies the *critical* information the economic operator needs to understand *before* applying for the review or interim measures or setting aside unsuccessful decisions. As for the grounds of ineffectiveness and the specific derogations, the economic operators can easily acquire the relevant information *without* communicating the reasons.

Nonetheless, it is admitted that the information specified in Article 55(2) PSD is usually associated with confidence in applying for effective remedies. For this viewpoint, debriefing shall also provide effective mechanisms for enforcing those substantive rights enshrined by the EU regulation, directives, and case-law, deliberately balanced with confidentiality in procurement procedures for procedural fairness, especially *due process*. Those substantive rights subject to confidentiality for discussion include the general principle of the EU law – the protection of business or trade secrets, the developed common law duty – right to designate

information as confidential and the personal data privacy – the individual rights of data subjects. Therefore, it is necessary to *categorise* the confidential nature or formulate protection measures of the substantive rights from *diverse* legal sources as discussed by contemplating their *balanced* relationship in particular circumstances *before* adopting administrative actions and decisions.

CHAPTER 5

Collusive Oligopoly Control

1. Introduction

Following the previous appraisal of integrity and fairness, this thesis has recognised economic efficiency as the third objective for regulating the debriefing in the regime of EU public procurement with its definition and application thereof sensibly interpreted, such as *Pareto-optimality* and *social costs of the procedure*. EU legislation relies on applying public procurement to maximise social welfare to ensure that the public fund is *wisely* spent and adequately accountable.[579] However, what if there is a lack of competition between contracting authorities in their marketplace or economic operators have taken *advantage* of EU legislation by strategically using debriefing for collusion[580] during the procurement process? As suggested in Subsection 4.2, Chapter 2, the debriefing review adopts the criteria for *maximising* social welfare by relying on EU legal instruments, such as competition, procurement rules and general principles of EU law, to prevent collusive oligopoly caused by the coordinated behaviours using debriefing for repeated interactions. This chapter continues to evaluate the EU legal instruments, focusing on comparing procurement with competition rules considering their functional role in the collusive oligopoly control for the sake of economic efficiency.

In previous chapters, this thesis has proven that the EU legislation and judicature potentially misconstrued transparency of the procurement process with an *emphasis* on enlarging the disclosure scope, which runs against the objectives of integrity and fairness for debriefing. Furthermore, this chapter repeats the concern that such practice of *unlimited* transparency trends to increase the tension between competition and transparency in the EU public procurement law regime.[581] For example, the OECD has devoted significant effort to dispel

[579] Robert D. Anderson, William E. Kovacic and Anna Caroline Müller 685. See also Christopher R. Yukins, 65-68. Frédéric Jenny, 31.

[580] Collusion commonly refers to any form of coordination or agreement between competitors with the objective of raising profits to a higher level than attained through competition on merits. A collusion scheme allows participants to agree on a common policy, monitor the adherence to this common policy and punish any deviation from the common policy by one of the parties. see also OECD, 'Algorithms and Collusion: Competition Policy in the Digital Age' <www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm> accessed 10 May 2018, 19.

[581] David Lewis and Reena Das Nair, 4-6. OECD, 'Collusion and Corruption in Public Procurement (Policy Roundtable)'; OECD, 'Public Procurement: The Role of Competition Authorities In Promoting Competition (Policy Roundtable)', 188-91.

the tension between those two critical principles in a public procurement regime, especially from the lack of competition and corruption risks.[582]

Economic analysis of law attempts to answer *two* fundamental questions about legal rules concerning debriefing.[583] From the economic perspective, the first question asks whether any detrimental competition effect of collusions, such as bid-rigging and indirect price signalling, exists or possibly exists by enforcing debriefing under the EU procurement rules. To answer that question, Section 2 of this chapter provides an economics study to interpret the occurrence of tacit collusion based on oligopoly theory, game theory and auction theory, which respectively explain the featured public procurement markets, a behavioural model of tacit collusion and similar efficiency auction allocation mechanism where the repeated interactions have been intensely concerned.

The second question asks whether those collusive behaviours can be effectively captured in debriefing enforcement through reliance on EU competition rules, such as Article 101 TFEU or EU public procurement rules, especially Articles 18(1) PSD on the principle of competition. Since the principle of competition in those fields owed its legal origin from the TFEU fundamental principle of free movement, Section 3 starts a legal analysis from the EU primary law TFEU to the secondary law, such as directives. The research considers that the PSD imposes higher transparency on debriefing to stimulate *open competition* across the EU single market for the coherence of the EU legal system.[584] However, that legal instrument has *not* functioned to deter coordination, collusion, or improper practices of economic operators in the oligopolistic-featured public procurement markets. [585] In contrast, those behaviours are considered by EU competition law. Then, Section 3 examines those EU competition tools as a

[582] OECD, 'Competition in Bidding Markets'. OECD, 'Public Procurement: The Role of Competition Authorities In Promoting Competition (Policy Roundtable)', 188-91; OECD, 'Designing Tenders to Reduce Bid Rigging' <http://www.oecd.org/competition/cartels/42594504.pdf> accessed 28 August 2018; OECD, 'Collusion and Corruption in Public Procurement (Policy Roundtable)'.

[583] Louis Kaplow and Steven Shavell, 'Economic Analysis and the Law' in Martin Feldstein A.J. Auerbach (ed), *Handbook of Public Economics*, vol 3 (Elsevier 2002) 1661.

[584] Some transparency rules set out in the PSD, despite their pro-competition purpose, allow the increasing risk of tacit collusion in oligopolistic public procurement markets. See Carmen Estevan de Quesada, 229.

[585] The Guidelines for the application of Article 101 of the TFEU have identified the characteristics of the oligopolistic markets essential for acting in tacit collusion in markets. Those characteristics include transparency, concentration, non-complexity, symmetry, and stability. See Article 101 TFEU Guidelines, para 77.

supplement to EU procurement tools in tracking collusive behaviours pursuing tacit collusion in the public procurement markets.[586]

2. Strategic Use of Debriefing for Collusion – An Economics Brief

This section demonstrates that economic operators have the potential to use debriefing to strategically request information verging on to the tacit collusive or coordinated oligopolies in economic analysis. Specifically, this section introduces the oligopoly categories by introducing the game theory in Subsection 2.1 and explains *how* oligopolistic public procurement markets feature restrictive effects on competition in Subsection 2.2.

Moreover, Subsection 2.3 relies on the auction theory to portray that specific behavioural model, a long-term repeated game noticeable in auction mechanism that allows the opportunist to interact for collusion, repeatedly and tacitly. Considering Pareto-optimality efficiency that describes the maximum social welfare as argued in Subsection 4.2, Chapter 2, auction allocation where similar repeated interactions exist diminishes the society's welfare.

This approach provides a *stronger* argument for debriefing's design to be efficient in allocating social welfare rather than against it and premises the subsequent legal study with a theoretical basis. For risk *avoidance*, the EU's legislators and regulators should have paid more attention to oligopoly collusion in public procurement markets, considering the information-sharing of debriefing. For this, Section 3 regards the regulatory debriefing as a set of EU rules *tailored* to authenticate and compensate for the *loss* of economic operators by procedural and remedies rules to realise the *most* efficient allocation.

2.1. Oligopolies Categories in the Game-Theoretic Model

Game theory can distinguish the cooperative and non-cooperative oligopolies with the implication of the oligopoly theory.[587] From this point of view, EU competition law describes a cooperative oligopoly (i.e., explicit collusion) as a cartel while non-cooperative oligopolies as tacitly coordinated oligopolies (i.e., tacit collusion).[588] Nonetheless, the economists are *not*

[586] Tacit collusion is sometimes called 'tacit co-ordination'. This thesis uses the expression 'tacit collusion', given that it is generally adopted both in economic and legal literature. See Richard Whish and David Bailey 180-82. See also Antonio Capobianco, 'Collusion, Agreements and Concerted Practices: An Economic and Legal Perspective ' in Giuliano Amato and Claus-Dieter Ehlermann (eds), *EC Competition Law: A Critical Assessment* (Hart Publishing 2007) 54.
[587] Carmen Estevan de Quesada, 232.
[588] ibid, 232.

particularly concerned about whether collusion is 'explicit' or 'tacit' but are concerned more about the *effects* of collusion instead.[589] The economic literature presents a set of *equilibria* in a repeated oligopoly which is often the *same* in the said situation.[590] Whether competitors communicate is *a legal fact* rather than an economic concern since it *decides* regulators' *choice* of legal instruments and standards following the EU competition rules and policies.

In the public procurement markets, bid-rigging is a typical case of explicit collusion and a *hardcore* cartel, which is *illegal* under Article 101 TFEU.[591] Bid-rigging occurs when several firms agree to collaborate when responding to an invitation to tender to supply goods or service.[592] Suppliers in this respect aggregate and behave as a selling power in the public procurement market, which compels the public buyer to pay a *higher* price for goods or services. Both the economic and legal literature reveals that bid-rigging is significantly *pervasive* in the public procurement market, and the economic loss for public buyers is considerable.[593] The number of bid-rigging cases is *not* significant because of the *difficulty* of producing and collecting evidence (i.e., the problem of proof), the same problem with many cartel cases in general.[594]

Likewise, capturing tacit coordination in law enforcement of EU competition law is *more* challenging due to the problem of proof. Evidence of *explicit* communication constitutes a violation of EU competition law, mainly Article 101 TFEU across the EU single market. There are *no* other feasible *indications* to perceive a collusive agreement *without* communication.[595] Since explicit collusion is unequivocally prohibited, those market players are inclined to conceal and prejudice information.[596] Tacit collusion is optimal to *escape* the punishment of the EU competition law but obtain the *same* outcome in restricting the competition since market behaviours without information exchange are *not* unlawful. Admittedly, lacking communication evidence may obstruct the observation of tacit price coordination accordingly.

To contain tacit collusion in law enforcement, EU lawmakers provide another approach to *defining* market structure where such risks are significant in addition to monitoring collusive

[589] Richard Whish and David Bailey 573.
[590] Miguel A. Fonseca and Hans-Theo Normann, 'Explicit vs. Tacit Collusion—The impact of Communication in Oligopoly Experiments' (2012) 56 European Economic Review 1759, 1759.
[591] Stefan E. Weishaar 67-69.
[592] Richard Whish and David Bailey 519.
[593] Robert D. Anderson, William E. Kovacic and Anna Caroline Müller 692, 698–703.
[594] Carmen Estevan de Quesada, 237.
[595] Miguel A. Fonseca and Hans-Theo Normann, 1759.
[596] ibid, 1760.

behaviours or improper practices. The Commission has summarised certain specific market features as having restrictive effects on competition across the EU's single market, such as those related to public procurement, in its Guidelines for applying Article 101 TFEU.[597] The Guidelines provide specific *measures* for the contracting authority in deterring collusive behaviours through debriefing enforcement, especially improper practices *not* falling under Article 101(1) TFEU.

2.2. Procurement Market Having Anticompetitive Structure

The Commission establishes that public procurement markets *always* have anticompetitive structures, such as those dominated by a limited group of contestants (i.e., *oligopolies*).[598] The 'Structure-Conduct-Performance Paradigm (SCPP)' further claims that such *featured* market structure determines the behaviour of the competitors and that in turn determines market performance.[599] For example, market players are *more* likely to disclose *sensitive pricing information* in concentrated sectors, such as healthcare, defence and security, to hinder market entry.[600] The public buyers must be aware of those *features* before adapting their administrative actions and decisions to regulate strategies towards open competition in such markets.[601] The Commission identification of market *characteristics* is essential for participants to seek collusion: transparency, concentration, non-complexity, symmetry and stability.[602]

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[597] Article 101 TFEU Guidelines, para 77.

[598] For example, many Member States often have one or two big firms in waste disposal markets. The construction sector is only concerned about infrastructure projects (of high value), oligopolistic and prone to cartel-building (those may fall in the scope of the Concessions Directive after 2014). Other markets likewise are IT supply, the electricity market (e.g., Czech Republic, Spain, and Italy) and certain postal services markets (e.g., Sweden, Finland, and Austria). See Commission, 'Green Paper on the modernisation of EU public procurement policy' COM(2011) 15 final, para 3.2.

[599] Myron W. Watkins, Paul T. Homan and Edgar M. Hoover, 'Price and Production Policies of Large-Scale Enterprise' (1939) 29 The American Economic Review 100. The Chicago School then criticised the SCPP. George J. Stigler, 'A Theory of Oligopoly' (1964) 72 Journal of Political Economy 44.

[600] Peter Trepte, 'Public Procurement and the Community Competition Rules' (1993) Public Procurement Law Review 93, 114.

[601] Commission, 'Green Paper on the modernisation of EU public procurement policy' COM(2011) 15 final, para 3.2.

[602] Market stability affects the *sustainability* of collusive outcomes, referring to specific market conditions, such as a stable demand with *no* growth perspectives or innovation in such a market is *not* frequent or relevant, which are essential to *measuring* the occurrence of tacit collusion in a specific market. However, some market conditions, such as *barriers* to entry or product or service characteristics, are *unlikely* to be altered by its market participants and determined, to a certain degree, by the economic sector instead. Some *sectoral* public procurement markets (e.g., security and defence, education, healthcare) are more likely to be stable according to relevant conditions (e.g., higher barriers to entry and comparatively weak competitive position of public buyers). See Carmen Estevan de Quesada, 231.

Transparency is an essential condition for operating a collusive scheme among economic operators by allowing them to *agree* on an ordinary course of action and to monitor compliance.[603] Transparency may accelerate express collusion by making agreements or express communication among rivals more *accessible*, such as cartel agreements. In other words, it becomes *more* arduous to pursue express collusion in an *opaque* market since market players must further explore necessary information for operation by reaching collusive agreements.[604]

In the monopolistic competition theory, oligopolies do *not* need to reach agreements to coordinate their behaviours in that featured market.[605] Transparency permits them to *recognise* their interdependence and *coordinate* their behaviours accordingly by *adapting* their conduct to others' actions *without* communication.[606] Therefore, transparency is essential for those tacitly collusive behaviours, unilateral facilitating practices[607] or repeated interactions (i.e., the repeated game),[608] when competitors seek to coordinate or collude *without* punishment. For that concern, market players are *more* inclined to develop market transparency through various *implicit* methods, such as standardisation agreements, pricing policies with distributors or the most favoured client clauses.[609] Even so, this has *not* caused as much legislative reaction as expected.[610]

Concentration is *another* essential condition for realising tacit collusion since a market with defined features and conditions, such as tight oligopolies, promotes a coordinated course of action

[603] George J. Stigler, 44. Carl Shapiro, 329.
[604] Carmen Estevan de Quesada, 240.
[605] Edward Chamberlin, *The Theory of Monopolistic Competition: A Re-orientation of the Theory of Value* (7th ed. edn, Cambridge, Harvard University Press 1956). Joan Robinson, *The Economics of Imperfect Competition* (London: Macmillan New York: St. Martin's Press 1965).
[606] Carmen Estevan de Quesada, 240.
[607] Facilitating practices refer to activities that make it *easier* for firms to coordinate their behaviours on price, subject matter, or quantity to obtain the benefits of tacit collusion. The facilitating practices may *not* have actual anticompetitive effects in those cases, but they *continuously* have increased the potential for generating such effects. See Phillip E. Areeda and Herbert Hovenkamp 1407b. For a more detailed discussion about *unilateral* facilitating practices, see Subsection 3.3 of this chapter.
[608] The repeated game refers to a situation, described by the game-theoretic models, where each bidder observes the history of *past* prices or patterns of actions of competitors in *continuous* interactions and repeatedly sets its *price* or *output* to respond to such choices by its rivals in auctions. See Carmen Estevan de Quesada, 232-39. Andrzej Skrzypacz and Hugo Hopenhayn, 'Tacit Collusion in Repeated Auctions' (2004) 114 Journal of Economic Theory 153, 153. Susan Athey and Kyle Bagwell, 'Optimal Collusion with Private Information' (2001) 32 The RAND Journal of Economics 428, 454-457. For a more detailed discussion about the repeated game in the auction model, see Subsection 2.3 of this chapter.
[609] Stefan E. Weishaar 67-69.
[610] Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules* 74.

among market participants, either expressly or tacitly.[611] Oligopolists are *more* motivated to coordinate with each other's market strategy and punish deviations from the *ordinary* course of action.[612] Both the *number* of competitors in the market and the *market share* of each rival relate to concentration.[613] However, economic literature has not identified the exact number of competitors that may trigger the risk of collusion.[614] The EU Horizontal Merger Guidelines[615] suggests that a *given* number of market participants with different shares each may result in *diverse* market situations from the competition perspective.

Theoretically, public procurement markets can exist in *diverse* structures, from very *deconcentrated* markets with sufficient public buyers and suppliers to 'monopsony-monopoly'.[616] Nevertheless, public procurement markets are *generally* concentrated where public buyers are likely the *sole* or the *main* procurers in many markets, such as public works, including public buildings, roads, airports, healthcare, education or the security and defence industry.[617] In that situation, the demand interests of the *sole* or *main* procurers will likely converge. That similar or identical demands (e.g., their cost structure) from public buyers increases the homogeneity of suppliers and leads to higher *market symmetry* in relevant markets.[618] In addition, public procurement markets are *less* complex since goods or services required by public buyers are clear and specific

[611] Richard A Posner, *Antitrust Law* (2nd edn, Chicago University Press 2001) 69–79. Higher concentration indices represent the fewer oligopolistic market participants to reach an agreement. Stefan E. Weishaar 29. However, this argument is questionable if using the game-theoretic approach to the new industrial economics. It is evidenced that market concentration does not necessarily relate to the increase in cartel agreements. See George Symeonidis, 'In Which Industries is Collusion More Likely? Evidence from the UK' (2003) 51 Journal of Industrial Economics 45, 45-74. Likewise, the empirical literature provides limited evidence on the relationship between industry concentration and cartel stability. There is no doubt that industry concentration aids cartel stability. However, organisational responses (e.g., industry associations) in an unconcentrated industry can also overcome the challenges facing cartel formation. See Margaret C. Levenstein and Valerie Y. Suslow, 'What Determines Cartel Success?' (2006) 44 Journal of Economic Literature 43, 85-86.

[612] Carmen Estevan de Quesada, 232.

[613] ibid, 233.

[614] Frederic M. Scherer, *Industrial Market Structure and Economic Performance* (2nd edn, Rand McNally College Publishing Co. 1980) 277-279.

[615] Commission, 'Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings' (Communication) [2004] OJ C 031/5. Hereinafter termed as EU Horizontal Merger Guidelines.

[616] This refers to a situation where a single buyer faces a single supplier. For details see also Carmen Estevan de Quesada, 238.

[617] ibid, 238.

[618] Market symmetry's assessment involves a wide range of data, such as costs, demand, market shares, and product range capacities. The more those data converge, the more accessible market participants are to understand the market strategies of other competitors, and the more they are encouraged to coordinate market behaviour with each other. Market symmetry, therefore, establishes homogeneous specifications of potential suppliers who seek to participate in the award of public contracts. Since they have a solid motivation to satisfy those specifications, their expertise, capacities, and experience could be significantly more or less similar in a concerned regime. See ibid, 238.

(e.g., concerning quality or security standards), following the procedural requirements for transparency. That *non-complexity* trend otherwise promotes the *homogeneity* of suppliers.

Auction theory indicates that *aggregating* bidders can also exercise *collective* market power against public buyers in auction markets, which is *prevalent* in the procurement mechanism.[619] Oligopolists are inclined to increase *transparency* in a *smaller* scaled public procurement market (e.g., electronic commerce)[620] or a stable *sectoral* public procurement market (e.g., security and defence,[621] construction,[622] education, and healthcare)[623] with certain conditions. When *transparency* rises in those markets, their specific *conditions* for demand-side markets (e.g., high barriers to entry, complex security standards to satisfy, and weak competitive position of public buyers) may become more significant.[624] That trend may be *exaggerated* by entering *multimarket* contracts when bidders are conglomerates, joint ventures or alliances that operate and interact in several markets.[625]

Admittedly, oligopolists could acquire such data *effortlessly* from tender documents (e.g., contract notices and contract award notices), pre-bid meetings, competitive dialogues and, especially, *debriefing* as argued in Section 2, Chapter 3. Economic literature[626] and legal doctrine[627] have affirmed that those transparency requirements of the PSD have increased transparency in the EU's oligopolistic public procurement markets to the degree that might signal the risk of

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619 Catriona Munro, 352-53.

620 Pedro Telles, *Public Contracts Regulations 2015 - Regulation 21 [updated]* (telles. eu 16 March 2015).

621 The defence and security sector adopts higher thresholds for the award procedures of public contracts (i.e., EUR 443,000 for supply and service contracts) and more stringent requirements for selection criteria. See Council Directive (EC) 2009/81 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 [2009] OJ L 216, art 8 (as amended by Article 1 of Commission Regulation (EU) 2017/2367). Hereinafter referred to as the EU Directive on Defence and Security Procurement. See also Article 58(1) of the PSD provides a general standard for selection criteria: '[s]election criteria may relate to (a) suitability to pursue the professional activity; (b) economic or financial standing; (c) technical or professional abilities'. EU legislators also set out detailed rules concerning the issues above in the field of defence and sensitive security, as provided in Articles 39-42 of the EU Directive on Defence and Security Procurement.

622 Catriona Munro, 359-60.

623 Case C-205/03 P *FENIN v Commission [2006] ECR I-6295,* ECLI:EU:C:2006:453, [2006] ECR I-06295, para 4.

624 Carmen Estevan de Quesada, 238.

625 Dimitrios Konstadakopulos, 'The Linked Oligopoly Concept in the Single European Market: Recent Evidence from Public Procurement' (1995) Public Procurement Law Review 213, 221-223.

626 ibid, 216. Giancarlo Spagnolo and others 347, 351-52, 357-58. OECD, 'Fighting Cartels in Public Procurement (Policy Brief)' <http://www.oecd.org/competition/cartels/41505296.pdf> , 3.

627 Peter Trepte, *Public Procurement in the EU: A Practitioner's Guide* (Oxford University Press 2007), 114.

collusion.[628] Subsection 2.3 presents the auction model to explain a situation where bidders possibly collude *tacitly* or reinforce collusion accordingly even *without* circulation of data during their repeated interactions in markets with restrictive effects on fair competition.[629]

2.3. Lessons from the Repeated Game in Auction Model

Economic literature has revealed that tacit collusion frequently occurs in the auction and public procurement markets,[630] where similar procedures apply.[631] Since auction theory might reduce the likelihood of comparable market failures, such as bid rigging and collusion,[632] the auction mechanism is proven to be superior to the traditional public procurement mechanism for welfare-maximising allocation.[633] The authority has been advised to choose an auction mechanism that maximises expected social welfare, maximise revenue at auctions and minimises costs at procurements.[634] The application of auction theory and relevant experience dealing with tacit collusion is expected to provide debriefing with an economic premise for perceiving tacit collusions before exploring EU legal tactics to reduce those risks accordingly.

Auction designers limit the access to information available to bidders in the repeated game.[635] Practitioners in public procurement markets have adopted those auction techniques to prevent improper practices in repeated interaction such as competitive procedures.[636] For example, in avoidance of collusion, the authority could use the first price sealed-bid format rather than the English or some other ascending bid format and reveal as little information as possible.[637] In

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[628] William E. Kovacic and others 381, 402. Giancarlo Spagnolo and others 352–53. B. Douglas Bernheim and Michael D. Whinston, 'Multimarket Contact and Collusive Behavior' (1990) 21 The RAND Journal of Economics 1. Andrzej Skrzypacz and Hugo Hopenhayn.

[629] Giancarlo Spagnolo and others, 352-353. William E. Kovacic and D. Anderson Robert, 'Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets' (2009) 18 Public Procurement Law Review 67, 402. Svend Albæk, Peter Møllgaard, and Per B. Overgaard, 'Government-Assisted Oligopoly Coordination? A Concrete Case' (1997) 45 The Journal of Industrial Economics 429, 429. Pedro Telles, *Public Contracts Regulations 2015 - Regulation 21 [updated]*. William E. Kovacic and others, 402.

[630] Andrzej Skrzypacz and Hugo Hopenhayn, 153. Susan Athey and Kyle Bagwell, 454-57.

[631] Carmen Estevan de Quesada, 237.

[632] Omer Dekel, 238.

[633] Louis Kaplow and Steven Shavell 1661. John Morgan, 'Efficiency in Auctions: Theory and Practice' (2001) 20 Journal of International Money and Finance 809. R. Preston McAfee and John McMillan, 708. Andrzej Skrzypacz and Hugo Hopenhayn 153. Susan Athey and Kyle Bagwell, 454-57.

[634] Paul Klemperer, 'What Really Matters in Auction Design' (2002) 16 Journal of Economic Perspectives 169, 169.

[635] Andrzej Skrzypacz and Hugo Hopenhayn, 154.

[636] Steven W. Feldman, 'Traversing the Tightrope between Meaningful Discussions and Improper Practices in Negotiated Federal Acquisitions: Technical Transfusion, Technical Leveling, and Auction Techniques' (1987-1988) 17 Public Contract Law Journal 211, 211.

[637] In the spectrum auctions, Klemperer argues that auction designers should be especially conscious of collusion and other anticompetitive behaviour. See Paul Klemperer, 170, 179. See also discussion about spectrum auctions

public procurement markets that share similarities with the auction markets, awarding of public contracts occurs regularly, and those are situations *where* long-term repeated interactions are challenged.[638] That situation has been described in *game-theoretic* models where *each* bidder observes the history of past prices or patterns of actions of competitors in continuous interactions repeatedly sets its price or output to respond to such choices by its rivals in auctions.[639] Admittedly, there is *no* need for explicit communication in a theoretical scenario, such as an auction that requires repeated interactions over time.[640] That situation is *evident* in fundamental markets where competitors can coordinate with each other regularly and easily.[641]

Typical examples of the so-called repeated interactions that arise in public procurement settings are competitive procedures, i.e., competitive dialogue and innovation partnership, set out in Articles 30(3) and 31(4) PSD. Those selection procedures have been designed for *goodwill*, such as for *less* bureaucracy and *higher* efficiency.[642] The contracting authority might resort to those competitive procedures when they have difficulties in defining the means of satisfying their needs or assessing *what* the market can offer through technical, financial, or legal solutions, or *when* they aim to develop works, goods or services that do not exist in the market. In those situations, the contracting authorities strongly rely on the tenderers' proposals, know-how and the circulation of information revealed in negotiation to find the project's core definition that operates as the basis for price competition within those procedures.[643] For example, the PSD expects the competitive procedure with negotiation to provide tenderers with more opportunities for complex contracts, such as *large* infrastructure projects where technical specifications *cannot* be defined at the outset.[644]

A pick of those competitive procedures, in terms of their availability, scope, steps and purpose, demands the contracting authority to arrange considerations for Pareto-optimal efficiency

in Hong Wang and Hong-min Chen, 'Deterring Bidder Collusion: Auction Design Complements Antitrust Policy' (2016) 12 Journal of Competition Law & Economics 31, 64-65.
[638] Dimitrios Konstadakopulos, 221-223.
[639] Carmen Estevan de Quesada, 232-39. Andrzej Skrzypacz and Hugo Hopenhayn, 153. Susan Athey and Kyle Bagwell, 454-57.
[640] Susan Athey and Kyle Bagwell, 428-65. OECD, 'Public Procurement: The Role of Competition Authorities In Promoting Competition (Policy Roundtable)'.
[641] OECD, 'Public Procurement: The Role of Competition Authorities In Promoting Competition (Policy Roundtable)'.
[642] Commission, 'EU Public Procurement Reform: Less Bureaucracy, Higher Efficiency', 6.
[643] Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules* 76.
[644] Commission, 'EU Public Procurement Reform: Less Bureaucracy, Higher Efficiency', 6.

before debriefing mindfully.[645] Those competitive procedures are prone to create distortions in competition due to their procedural requirements for frequent exchange of information and,[646] accordingly, *acquiesce* in the *close* cooperation between those competing economic operators.[647] Specifically, such recurrent and significant flows of information with certain features (e.g., homogeneous) exchanged amongst economic operators may feature oligopolistic characteristics of public procurement markets (e.g., concentration, transparency and symmetry). Those oligopolistic-featured public procurement markets encourage *implicit* collusive behaviours seeking tacit collusion but *without* being easily detected and those are typically concerted and facilitating practices among those competitors.[648] For example, economic operators might strategically use debriefing to acquire competitors' information for further coordinated practices *beyond* its designed purpose, such as access to a review and remedies due to its requirements. That discussion follows next.

3. Blocking Collusion by Regulating EU Debriefing – A Legal Study

The founding principle of TFEU, free movement, unconditionally applies to EU procurement directives. The free movement of goods and services is pivotal for promoting cross-border economic activities for the EU's internal market.[649] That fundamental principle also provides a *legal basis* for developing a set of *competition-oriented* public procurement rules to ensure fair and effective competition for public contracts awarded at EU and national levels, despite no explicit evidence.[650]

Although the CJEU considers the EU public procurement rules as a legal tool *separated* from the EU competition rules generally,[651] they build on a long-term market competition

[645] John Morgan, 809-38.
[646] Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules* 77.
[647] ibid 75.
[648] Frédéric Jenny, 31.
[649] Article 34 TFEU prohibits quantitative restrictions and measures having an equivalent effect, covering both direct and indirect restrictions on free movement. The CJEU has then adopted an approach to scrutinise the effect of various measures taken in the Member States rather than their formal designation or stated purpose, which also has been applied to examine the restrictions within procurement procedures.
[650] This opinion is acknowledged as there is *no* explicit TFEU basis for regulating public procurement. See Albert Sanchez-Graells, 'Competition and Public Procurement' (2018) 9 Journal of European Competition Law & Practice 551. See also Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules* 237.
[651] Case C-113/07 P *SELEX Sistemi Integrati SpA v Commission of the European Communities and Organisation européenne pour la sécurité de la navigation aérienne (Eurocontrol)* ECLI:EU:C:2009:191, [2009] ECR I-02207, para 102. See also, Albert Sanchez-Graells, 'Competition and Public Procurement'. Commission, 'Green Paper on the modernisation of EU public procurement policy' COM(2011) 15 final, paras 3.2–3.3. Grith Skovgaard Olykke, 'How Does the Court of Justice of the European Union Pursue Competition Concerns in a Public Procurement Context?' (2011) Public Procurement Law Review 179, 180.

contributing to the economy and society from an economist's viewpoint.[652] EU competition rules aim to realise the economist's prospect for competition to *maximise* consumer welfare by encouraging market players' competitive behaviours across the EU single market.[653] EU procurement rules regulate the contracting authority's behaviours in managing public funds on society's behalf to increase economic efficiency.[654]

Those EU procurement rules cannot ensure that social welfare is *maximised* since they observe administrative behaviours concerning their effects on competition between private participants,[655] for instance, due to the risk of corruption. In other words, the EU procurement rules alone *cannot* prevent private participants from coordinating tacitly against the public buyers in the featured public procurement markets, especially those more *concentrated*, such as defence and security. Those private participants can use debriefing to reach the same effect with communication considering its function on formalisation and stabilisation of collusion.

For that concern, the EU single market's order for open competition established by the fundamental principle of free movement at the EU level must be guaranteed,[656] regardless of market circumstances or procedural requirements that are about to apply. EU competition rules and policies are expected to improve the regulation of awareness of the existing collusive behaviours in oligopolistic public procurement markets. EU competition rules have essentially been devoted to preventing private undertakings' construction of barriers with the same effects as those measures or restrictions prohibited by free movement rules.[657] Those *mechanisms* and *techniques* are constructive for capturing collusive behaviours or improper practices that strategically use *debriefing* to coordinate or collude tacitly in the EU public procurement markets.

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[652] Catriona Munro, 352.

[653] Competition rules normally embrace the views of economists on competition in respect of performance, that is, *whether* they have advanced the *main* objective of *consumer welfare-maximising* by encouraging competitive behaviours of market players. See Phillip E. Areeda and Herbert Hovenkamp, 100a.

[654] The figure indicates that public procurement accounts for more than 15% of the Gross Domestic Product (GDP) in OECD countries. OECD, 'Competition in Bidding Markets', 23. As for the Member States of European Union, the corresponding figure of EU GDP has decreased slightly since 2009, when it was estimated at 20%; in 2010, the percentage fell to 19.7% and in 2011, it fell still further to 19%. See Commission, 'Annual Public Procurement Implementation Review 2013' SWD(2014) 262 final, 5.

[655] Competition in the context of public procurement can be considered from both an *internal* and *external* perspective, referring to the achievement of value for money by public buyers using such award procedures (i.e., internal perspective) and intense competition in market dynamics for the whole society (i.e., external perspective). See also Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules* 108.

[656] William E. Kovacic and D. Anderson Robert, 79.

[657] J. Baquero Cruz, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community* (Hart Publishing 2002) 86.

3.1. Fundamental Principle of Free Movement

It is suggested that the primary drive to promote the free movement of goods and services is to boost EU market integration, which concerns the *overall* economic welfare both for the country of origin and the receiving country in the long run.[658] The economic importance in public procurement markets has been accepted for the 'ideal of breaking down nationalism' and the 'spreading privatisation of greater budgetary rigour'.[659] It is noted that public procurement is more often used as a strategic lever to achieve the most efficient use of public investments in crucial sectors[660] or a policy instrument to realise a more innovative,[661] sustainable,[662] and competitive economy. Nevertheless, the current findings of the *linkage* between a specific and direct economic *outcome* and a more extensive public procurement market *integration* are *not* significant.[663] It is also difficult to measure market performance precisely, which could have been long-standing and thorny.[664]

This economic situation leads to a question about *legislative* power: *how* far should the Commission have stepped into national legal and business systems? The costs of enforcing the extensive and expensive procurement rules across the EU public procurement markets during the progress of market integration are *not* trivial.[665] For instance, Article 18(1) PSD, which establishes the principle of competition at the EU secondary law level, owes its origin from the fundamental principle of free movement at the EU primary law level. The apprehension of the principle of competition in EU public procurement markets must comply with that

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[658] Abby Semple, para 2.08.

[659] The Economist, 'Where Nationalism dies hard', Europe Internal Market Survey (London, 8 July 1989), 3.

[660] Public investment, taking up around 14% of the EU GDP, is spent through public procurement, making it a fundamental element of the investment ecosystem, when facing increasing global competition. See Commission, 'Making Public Procurement Work in and for Europe' (Communication) COM(2017) 572 final, 2.

[661] Despite the lack of empirical evidence on implementation effectiveness, the use of public procurement as a policy instrument for innovation has been by proposed by plenty of inquiries and reports at both the EU and UK level. See Luke Georghiou and others, 'Policy Instruments for Public Procurement of Innovation: Choice, Design and Assessment' (2014) 86 Technological Forecasting and Social Change 1, 2-3.

[662] Integrating resource-efficiency, energy-efficiency, and economic considerations. See Commission, 'Making Public Procurement Work in and for Europe' (Communication) COM(2017) 572 final, 2.

[663] The economic importance in The European Commission in its own evaluation reports revealed that the compliance of competition and transparency had saved more than it had cost for both economic operators and contracting authorities, but the overall of savings was small – just 4-5% of the value of evaluated contracts. For details see Commission, 'Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation' (Staff Working Paper) SEC(2011) 853 final.

[664] As this measuring difficulty has been acknowledged in measuring the performance of the EU single markets, so the author perceives it is also in existence in public procurement markets. See also European Parliament (Directorate-General for Internal Policies), 'Towards Indicators for Measuring the Performance of the Single Market' <https://publications.europa.eu/en/publication-detail/-/publication/c2428f18-a473-47b6-8f6f-69fb9fd2520c> .

[665] Julia A. Sohrab, 'The Single European Market and Public Procurement' (1990) 10 Oxford Journal of Legal Studies 522, 537.

fundamental principle for EU law's *legal coherence*. Considering the competition's legal effectiveness in preventing tacit collusion that use *debriefing* for its *formalisation* and *stabilisation* in the repeated game, this research argues that TFEU provisions on free movement should be reviewed.

It is also argued that removing a legal and bureaucratic hindrance to free movement cannot leapfrog the political, economic, cultural and language barriers that remain in place that limit cross-border public procurement.[666] This is based on a market report revealed by the Commission that the actual level of *direct* cross-border public procurement within the EU remains very low,[667] while the *indirect*[668] cross-border procurement is usually high.[669] This could partly result from the contracting authority's preference for economic operators who speak the same language and are not geographically remote for easy communication or country-specific requirements.[670]

3.1.1. Free movement of goods

EU legal framework on the single market is devoted to eliminating market barriers to trade in goods and services and business, labour, and capital between Member States. Accordingly, creating a single market for the free movement of goods and services between the Member States is the primary motivation of EU law. One way in which EU legislation promotes this single market is through the coordination of the procurement among its Member States, hence, the EU's regulation of Member States' procurement activities above certain financial thresholds through various EU procurement directives.[671] This approach aims to lead to a greater *openness* of public procurement markets and is *not* simply for its own sake of eliminating national practices that directly or indirectly restrict access to public contracts across the EU.[672]

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[666] Abby Semple, para 2.07.
[667] Direct cross-border public procurement refers the situation where the successful tenderer is *not* located in the same country with the contracting authority and is not domestically owner (emphasis noted). See Commission, 'European Semester Thematic Factsheet: Public Procurement' 22 November 2017 <https://ec.europa.eu/info/sites/info/files/file_import/european-semester_thematic-factsheet_public-procurement_en_0.pdf> accessed 10 June 2019.
[668] Indirect cross-border public procurement refers to situation where the successful tenderer is based in the same country as the contracting authority and is a subsidiary of a foreign company. See ibid.
[669] Between 2009 and 2015, the levels of direct cross-border procurement have generally been increasing both as a share of total value of contracts awarded (from 2.5% to 3.5%) and as a share of the total number of contracts awarded (1.5% to 2%). See ibid.
[670] See ibid.
[671] The EU procurement directives includes the a new Concession Directive (the Public Sector Directive), Utilities Directive 2014/25 (the Utilities Directive) and Concessions Directive (a new Concession Directive).
[672] Sue Arrowsmith, *The Law of Public and Utilities Procurement*, paras 3-01 to 3-03.

The EU legislation also attempts to employ public procurement as a *strategic* tool to increase economic efficiency for the entire EU single market.[673]

The specific rules on the free movement of goods can be found in Article 34 TFEU, which prohibits quantitative restrictions on imports and *all* measures that have an equivalent effect between the Member States,[674] including direct or indirect, actual, or prospective limits on the free movement of goods. When applying the definition of 'equivalent effect' to public procurement, it could be argued that all measures that restrict the participation of economic operators from different Member States in the contracting authority's country should be prohibited as it falls within Article 34.

For example, in Case C-296/15 *Medisanus d.o.o. v Splošna Bolnišnica Murska Sobota*,[675] the contracting authority had imposed a *national* origin requirement on medical products but did not add the words 'or equivalent to the stated condition'. The CJEU held that to be a violation of Article 34 because only economic operators in the contracting authority's Member State could fulfil this origin marking requirement. That requirement in the specification directly restricted other economic operators in the other Member States from importing products to fulfil the contracting authority's needs. Academic scholars agree that requirements in Case C-296/15 *Medisanus* are examples of measures that have an 'equivalent effect' to quantitative restrictions. The adoption of those measures by the contracting authority will significantly affect cross-border procurement activities within the EU single market.[676]

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[673] Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules*, 112-13; Commission, 'Single Market Act Twelve levers to boost growth and strengthen confidence 'Working together to create new growth" COM/2011/0206 final; Commission, 'Europe 2020 A Strategy for Smart, Sustainable and Inclusive Growth'.

[674] The CJEU has widely defined the concept of measures that have 'equivalent effect' by referring to 'all trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'. See Case 8-74 *Procureur du Roi v Benoît and Gustave Dassonville* EU:C:1974:82, [1974] ECR 1974-00837, paras 1-3. For example, despite not imposing the quantitative restrictions, such as quotas, national rules, or policies in terms of packing, quality and safety of products could in effect prevent the imports that fail to meet those requirements for goods between Member States.

[675] In Case C-296/15 *Medisanaus*, the national legislation of Slovenia requirs that hospitals to be supplied as a matter of priority with medicinal products obtained from national plasma. The CJEU believes that 'by not adding the words 'or equivalent' after imposing the national origin requirement, the hospital may not only have deterred economic operators with analogous medicinal products from taking part in the tendering procedure, but also have impeded the flow of imports in trade between Member States by reserving the contract for medicinal products derived from Slovenian plasma exclusively to the Institute'. Therefore, in so doing, the hospital has failed to comply with Article 34 TFEU. See Case C-296/15 *Medisanus d.o.o. v Splošna Bolnišnica Murska Sobota* ECLI:EU:C:2017:431, [2017] Digital reports (Court Reports - general), paras 64-77 (Case C-296/15 *Medisanus*).

[676] Sue Arrowsmith, *The Law of Public and Utilities Procurement*, para 4-05.

The CJEU has adopted an approach other than a traditional literal rule interpretation [677] and a purposive approach[678] to examine the 'equivalent effects' of various measures across the single markets, including those throughout the procurement procedures. One of the rules of statutory interpretation adopted by the CJEU is the *de minimis* rule, which the CJEU generally uses to interpret competition provisions under the TFEU that may hinder market access under Article 34.[679]

In terms of its application to public procurement, the CJEU had an option to use *the de minimis* rule in Case 45/87 *Dundalk*, but chose not to, due to the significance of the public procurement and the nature of the industry.[680] That judicial stance suggests that a potential effect on market access under Article 34 TFEU should *only* relate to general procurement policies affecting *all* public buyers with a *substantial* impact on imports rather than an individual contract.[681]

In the same Case 45/87 *Dundalk*, the CJEU also identifies that Article 34 on the free movement of goods should apply to public contracts for services if those include such a clause specifying the technical specifications for goods required for the performance of public contracts of services.[682] The CJEU considered a clause stipulating that the materials used must be certified as complying with a national technical standard is liable to impede imports.[683] Because such a clause may cause economic operators utilising materials equivalent to those certified as complying with the relevant national standards to refrain from tendering.[684]

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[677] Literal rule is the primary rule of statutory interpretation, under which the Courts interpret the words in statutes in a plain, literal, and ordinary sense. They interpret the words of the statute in a way that is used commonly by all. The statutes should be construed in such a manner as though there is no other meaning except the literal meaning. See also Gurjar, Ekta, 'Literal Rule: A Tool for Statutory Interpretation' < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2002873 > accessed 27 June 2019.

[678] The purposive approach is an approach to statutory and constitutional interpretation under which common law courts interpret an enactment (i.e., a statute, part of a statute, or a clause of a constitution) considering the purpose for which it was enacted. See further Marco P. Falco, 'The "Purposive" Approach to Statutory Interpretation: What Does it Mean?' (*Lexology*, 7 November 2016) <https://www.lexology.com/library/detail.aspx?g=eed6e7d0-fdb6-4a52-97aa-4642e534872c > accessed 27 June 2019.

[679] Case C-405/98 *Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP)* EU:C:2001:135, [2001] ECR I-01795. See Sue Arrowsmith, *The Law of Public and Utilities Procurement*, para 4-23. See also Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (4th edn, Oxford University Press 2013), chp5. Peter Oliver, *Oliver on Free Movement of Goods in the European Union* (Stefan Enchelmaier and Peter Oliver eds, 5th edn, Hart 2010), paras 6.17-18.

[680] Case 45/87 *Commission of the European Communities v Ireland* EU:C:1988:435 ECR, [1988] 1988-04929 (Case 45/87 *Dundalk*).

[681] Sue Arrowsmith, *The Law of Public and Utilities Procurement*, para 4-24.

[682] Case 45/87 *Dundalk*, para 27.

[683] ibid, paras 12-19.

[684] ibid, paras 12-19.

3.1.2. Freedom of establishment and the freedom to provide services

In addition to Article 34 TFEU, other provisions in the TFEU that regulate public procurement are found in Articles 49 and 50 of the TFEU, which provide the freedom of establishment and supply services, respectively. Specifically, Article 49 TFEU prohibits government measures that hinder EU citizens (individuals and companies) from setting up businesses or doing their activities when their business is established. Article 56 prohibits the restriction of provision of services in respect of the 'nationals of the Member States who are established in a Member States other than that of person for whom the services are intended'.

In the public procurement regime, Articles 49 and 56 of the TFEU protect EU citizens against the contracting authority's measures that *directly* hinder the access to public contracts.[685] The Articles also hold the contracting authority liable for their *indirect* discriminatory and specific non-discriminatory measures.[686] In Case C-231/03 *Coname*, the CJEU similarly appeared to introduce a specific *de minimis* exemption to the public procurement applying the establishment's free movement (Article 49) and freedom to provide services (Article 56), but again opted not to define this rule.[687] The issue concerning the *exemption* of public services *concessions* from the enforcement of free movement rules was granted given the *special circumstances* resulting from a very modest economic interest at stake and the effects on the fundamental freedoms that were too uncertain and indirect.[688]

3.2. Obstacles to Ensuring Open Competition by A Procurement Scheme

To recap briefly, Section 4 of Chapter 2 explored the argument that public procurement is a mechanism comparable with the auction mechanism used to achieve the most efficient welfare allocation.[689] Specifically, public procurement could be a strategic lever to achieve the most

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[685] Case C-360/89 *Commission of the European Communities v Italian Republic* EU:C:1992:235, [1992] ECR I-03401.
[686] Case C-3/88 *Commission of the European Communities v Italian Republic* EU:C:1989:606, [1989] ECR I- 4035. Case C-87/94 *Walloon Buses*.
[687] Though the PSD does *not* provide a *de minimis* threshold, the expression used by the CJEU in Case C-231/03 *Coname* is *broad* enough to deal with all contracts that fall *outside* the scope of the PSD. It is also clearly that the availability of a *de minimis* threshold relates to the type of contract at issue. For further discussion, see Peter Trepte, *Public Procurement in the EU: A Practitioner's Guide*, 23.
[688] The CJEU held that 'because of the special circumstances, such as a very modest economic interest at stake, it could reasonably be maintained that an undertaking located in a Member State other than that of the Comune di Cingia de' Botti would have *no* interest in the concession at issue'. And accordingly, 'the effects on the fundamental freedoms concerned should therefore be regarded as too uncertain and indirect to warrant the conclusion that they may have been infringed'. See Case C-231/03 *Coname*, para 20.
[689] The figure indicates that public procurement accounts for more than 15% of the Gross Domestic Product (GDP) in OECD countries. OECD, 'Competition in Bidding Markets', 23. As for the Member States of European

efficient use of public investments in crucial sectors[690] or a policy instrument to realise a more innovative,[691] sustainable,[692] and competitive economy. For that matter, the economist promotes the free movement in the EU single market concerning its *social welfare* for both the country of origin and of receiving in the long term.[693] Accordingly, Section 4 of Chapter 2 reasoned that the procurement rules shall respect *economic efficiency* as one of their main objectives, specifically for the *best value for money about a tender* or *welfare-maximising for a society*.

However, Section 4 of Chapter 2 presented that it is *ideal* to contract with a tenderer with the best value for money who is also the most efficient tenderer with the maximum social welfare considering the *market failure*.[694] The previous economic brief recommended that excessive transparency reveals a tendency to enhance the market structure that has generated the *restrictive* effects;[695] this makes the express collusion simpler and formalises the tacit collusion in the repeated game. To that point, the market players possibly utilise debriefing with the intention to develop the transparency level of specific public procurement markets for those collusive purposes.

In ensuring coherence in law enforcement,[696] the principle of competition may be understood as entailing at least three requirements for a more competition-oriented procurement scheme at both the EU and the national level following free movement.[697] Otherwise, even if the contracting authority fully complied with the PSD, their activities would still entail the risk of

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Union, the corresponding figure of EU GDP has decreased slightly since 2009, when it was estimated at 20%; in 2010 the percentage fell to 19.7% and in 2011 it fell still further to 19%. Commission, 'Annual Public Procurement Implementation Review 2013' SWD(2014) 262 final, 5.

690 Public investment, taking up around 14% of the EU GDP, is spent through public procurement, making it a fundamental element of the investment ecosystem, when facing increasing global competition. See Commission, 'Making Public Procurement Work in and for Europe' (Communication) COM(2017) 572 final 2.

691 Despite the lack of empirical evidence on implementation effectiveness, the use of public procurement as a policy instrument for innovation has been by proposed by plenty of inquiries and reports at both the EU and UK level. See Luke Georghiou and others, 2-3.

692 Integrating resource-efficiency, energy-efficiency, and economic considerations. See Commission, 'Making Public Procurement Work in and for Europe' (Communication) COM(2017) 572 final 2.

693 Abby Semple, para 2.08.

694 Omer Dekel, 243-44.

695 Simply applying procedural rules, in accordance with the PSD, cannot achieve the aim of public procurement, that is open and effective competition, without an awareness of the anticompetitive market structure. See also Commission, 'Green Paper on the modernisation of EU public procurement policy' COM(2011) 15 final, para 3.2.

696 Coherence in EC law cannot be presupposed as the case of the state law, it must *de facto* exist, as other sources of the system's validity are *not* present (CJEU cannot apply the law of facts and so lacks the necessary competence by which it could contextualise the rule as the precedent). That means EU law must be coherent in order to be recognised as a legal system. Dorota Leczykiewicz, 'Why Do the European Court of Justice Judges Need Legal Concepts?' (2008) 14 European Law Journal 773, 779-85.

697 Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules* 237.

consolidating or even aggravating the market structure that has restrictive effects on the competition:[698] first, protection of parallel competition between economic operators and second, avoidance of abusing a dominant position by economic operators when they exercise a selling power running *against* the contracting authorities.[699]

Those *two* purposes are a standard application of EU competition rules in public procurement settings. The third one is to protect competition as an institution,[700] distinguished from the previous standard applications of the EU competition rules.[701] However, some restrictions to the theoretical maximum potential competition are either implied by procedures or duly required by substantive rules to a certain degree for that respect.[702] This leads to the fact that even though the procurement scheme has respected those requirements for free movement, it seems *unlikely* to maximise the *theoretical* competition.

Unfortunately, it seems complicated to fight the problem of tacit collusion with the traditional mechanism of the EU competition rules, let alone the procurement scheme.[703] This subsection of the thesis argues that the EU procurement scheme seems unable to change that situation by using its principle of competition embedded in Article 18(1) PSD because of the *obstacles* presented below. To be more precise, the following section examines the principle of competition in Article 18(1) PSD relating to its *applicability* to debriefing under Article 55 PSD. To conclude, a procurement scheme may require competition instruments to contain those collusive behaviours and monitor market concentration despite their controversial relationship in law enforcement.[704]

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[698] Simply applying procedural rules in accordance with the PSD cannot achieve the aim of public procurement, that is, open and effective competition, without an awareness of the anticompetitive market structure. See also Commission, 'Green Paper on the modernisation of EU public procurement policy' COM(2011) 15 final, para 3.2.

[699] Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules* 203.

[700] Case C-95/04 P *British Airways plc v Commission of the European Communities* EU:C:2006:133, [2006] ECR I-02331, para 125. Joined cases C-468/06 to C-478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE* EU:C:2008:180, [2008] ECR I-07139, para 74.

[701] Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules* 203.

[702] ibid 247.

[703] Carmen Estevan de Quesada, 235-36.

[704] It is suggested that the EU public procurement rules stand out as a legal instrument separated from the EU competition rules by scholars. For more details, see Albert Sanchez-Graells, 'Competition and Public Procurement'. Commission, 'Green Paper on the modernisation of EU public procurement policy' COM(2011) 15 final, paras 3.2-3.3. Grith Skovgaard Olykke, 180. See more discussion in the next subsection.

Article 18(1) PSD particularly claims that the contracting authority's activities concerning the procurement design in case of *artificially* narrow competition among economic operators due to the *procedural* nature of that legal instrument as discussed by the next subsection. On that point, this provision requires the competition instruments to regulate the economic operator's collusive practices for social welfare-maximising. In addition, Article 18(1) PSD incorporates a *subject* element by providing the terminology of *intention*, making its measurement and justification in debriefing enforcement more difficult considering the legal coherence in *all* procurement processes. Furthermore, the ambiguous terms of Article 55 PSD entitle the contracting authority to a *broad* scope for using *discretionary* power in disclosing the proceedings (i.e., minutes, records, and documents of the competitive tendering process), which simply increase the transparency required for the repeated game.

3.2.1. Uncertain dimensions of the procurement competition

The original obstacle is the economic dimensions of the principle of competition in a procurement process considering its *coherence* with the free movement established by the TFEU as a general principle.[705] The EU procurement law sets out the principle of competition for its transposition to the award procedures for public contracts by developing the *essential* criteria for interpreting the free movement under the TFEU.[706] *Whether* a procurement scheme has respected that coherence within the EU legal system can be assessed by inspecting the doctrine of *consistent* interpretation applying to the construction of concerned legislation itself.[707] The statement above seems proven in Case 19/00 *SIAC* when the CJEU allows a *widened* scope for interpreting the principle of competition in the public procurement regime at its discretion.[708] That judicial stance examines competition from the *external* perspective of the procurement scheme,[709] focusing on the competitive dynamics of markets.

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[705] Case 249/85 *Albako Margarinefabrik Maria von der Linde GmbH & Co. KG v Bundesanstalt für landwirtschaftliche Marktordnung* EU:C:1987:245, [1987] ECR 2345, para 16. Takis Tridimas 5. Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules* 13.

[706] Council Directive (EC) 71/305, recital 9; Council Directive (EC) 77/62, recital 2. Council Directive (EC) 88/295, recital 6. Council Directive (EC) 89/440, recital 14. Council Directive (EC) 92/50, recital 20. Council Directive (EC) 93/36, recital 14. Council Directive (EC) 93/37, recital 10. Council Directive (EC) 2004/18, recitals 2 and 46. Council Directive (EC) 2004/17, recitals 40 and 55.

[707] Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules* 237.

[708] Case 19/00 *SIAC Construction Ltd v County Council of the County of Mayo* ECLI:EU:C:2001:553, [2001] ECR I-07725, paras 34 and 93. Also see Case T-345/03 *Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Commission of the European Communities* EU:T:2008:67, [2008] ECR II-00341, para 143. Case C-450/06 *Varec*, para 43.

[709] Albert Sanchez-Graells describes the requirements of competition principle in public procurement from both an internal and external perspective. From *internal* perspective, completion requirements have an *exclusively* internal goal, namely, focused on providing value for money to the public purchaser and to avoid discrimination among participants in each tender. A *broader* conception of the principle of competition involves the external perspective

In contrast, second paragraph of Article 18(1) PSD provides that '[t]he design of the procurement shall *not* be made with the *intention* of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of *unduly* favouring or *disadvantaging* certain economic operators. This provision confines competition between economic operators within the procurement procedure, which is very likely to *overlook* distortion on the competition dynamics. Under a *literal* interpretation, Article 18(1) PSD entails whether competition was narrowed by examining the contracting authority's *intention* of unduly favouring or disadvantaging certain economic operators. In compliance with that economic dimension in Article 18(1) PSD, Article 55(3) PSD, in terms of *debriefing*, reiterates fair competition among the economic operators from the *internal* perspective of its application. That internal perception pursues the best value for money for the contracting authority *while* overlooks the social welfare beyond the procurement setting over the EU framework.

Article 55(3) PSD imposes a duty to withhold certain information upon the contracting authorities and simultaneously entitles a discretionary power to decide what to withhold in their debriefing. The contracting authority can make such decisions at its discretion by considering several legal interests resulting from the release of specific information. In the same way, the decided Case C-450/06 *Varec* allows the body responsible for the review procedure to exercise discretionary power in withholding certain information. Based on that judgement, the contracting authority in charge 'must be able to decide that the information in the file relating to such an award should *not* be communicated to the parties or their lawyers' if that is *necessary* to ensure the protection of 'fair competition or the legitimate interests of the economic operators' according to EU law.[710]

This means that frequent strategic requests for debriefing for the same effects with express communication to reinforce the repeated interactions will not fall into the scope of Articles 18(1) and 55(3) PSD in a procurement mechanism. Because of the oligopolistic public procurement markets, its symmetry and concentration could influence economic operators' behaviours, such

of public procurement with a goal to guarantee the market behaviour of the public buyer does *not* distort the competitive dynamics. For more discussion on this approach, see Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules* 108.

[710] Case C-450/06 *Varec*, para 43.

as coordinating at contracting authority's expense from now onwards. That further weakens the contracting authority's opportunity to obtain the *best value for money* in the long run. The society welfare will decline accordingly because public procurement lacks its instrumental function for the public sector.

3.2.2. Questionable rationales for the proof of intent

Under a literal interpretation, Article 18(1) PSD attempts to capture the contracting authority's *intention*, such as to *exclude* the procurement from the scope of the PSD, instead of the *performance* or *outcome* concerning the design of procurement under the PSD. The use of the term 'intention' makes it challenging to explain and enforce *coherently* across the Member States considering its *subjectivity*. It is admitted that the provision and its interpretation in practice have distorted the competition for a fair market order due to its subjective use of the term 'intention'.[711]

One concern about the contracting authority's *intention* in Article 18(1) PSD is the *liability body* for the burden of *proof* and the *causality* between that intention and a specific behaviour or outcome – *who* should take those burdens, and to *which* standard are those subjects? The burden of proof for intention now rests with economic operators who have *limited* access to the evidence of an accurate picture of the tender at issue to prove the intention of the contracting authority. That dilemma is evident when the contracting authority, having all materials at hand, considers the tender as *not* falling into the scope of the PSD and *not* subject to publication requirements.

Furthermore, it can be observed that the proof of *intent* is a *stricter* standard of proof in *most* jurisdictions, which distinguishes the burden of proof for criminal liability from that for civil liability as a general principle. For example, English law considers intention or foresight, i.e., the element of *mens rea*, proved when the factfinder infers it from *all* evidence to a standard set by law, that a particular fact is actual.[712]

On that point, EU procurement debriefing shall protect economic operators' opportunity for obtaining the evidence *sufficient* for their awareness of their position that they have been or possibly have been *unduly* disadvantaged in general transposition. The proof of intention is

[711] Albert Sanchez-Graells, 'A Deformed Principle of Competition? – The Subjective Drafting of Article 18(1) of Directive 2014/24' in Grith S Ølykke and Albert Sánchez Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (1st edn, Edward Elgar Publishing 2016)accessed 05 July 2017, 6–11.
[712] Criminal Justice Act 1967, s 8(b).

subject to a strict standard in terms of the economic operators considering their already *vulnerable* position to acquire evidence in the procurement procedure. In the example of *mens rea* above, a strict standard for the proof of intention in the criminal law in the English legal system typically requires the reference from all the evidence inferring a particular fact. Article 55(2)(d) PSD seems reasonable in that viewpoint since it almost discloses all the proceedings on request from the economic operators.

However, the rationale behind the entire disclosure of the proceedings in Article 55(2)(d) PSD for reaching the standard of the burden of intent imposed by the principle of competition is *defective*. There are alternatives to enforce fair and open competition that take *fewer* social costs than disproportionate transparency compliance considering economic efficiency. From a normative standpoint, the proper design of a procedure is to fashion rules that *efficiently* enforce the substantive law to minimise the social costs for enforcement.[713] At that point, the procurement scheme as a procedural instrument shall not enforce the principle of competition in a method that increases the cost of social costs, especially the cost of error (i.e., the subjective element of intention in Article 18(1)) PSD and the cost of procedures used to reduce that error (i.e., disproportionate transparency compliance by Article 55(2)(d)) PSD.

3.2.3. On-request debrief stabilising the repeated game

Another obstacle is a theoretical *drawback* arising from three requirements for free movement in EU primary law. The first *two* requirements for free movement are the standard application of EU competition rules to ensure parallel competition between economic operators under Article 101 TFEU and to prevent economic operators' abuse of a dominant position against contracting authorities under Article 102 TFEU.[714] The third respect concerns the protection of competition as an institution,[715] apart from the standard applications of the EU competition rules.[716] However, some restrictions to the theoretical maximum potential competition are either implied by procedures or duly required by substantive rules to a certain degree for that respect.[717] That leads to the fact that even though the procurement process has respected those requirements for free movement, it seems unlikely to maximise the *theoretical* competition.

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[713] Robert G Bone 143.
[714] Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules* 203.
[715] Case C-95/04 P *British Airways plc v Commission of the European Communities*, para 125. Joined cases C-468/06 to C-478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE*, para 74.
[716] Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules* 203.
[717] ibid 247.

Returning to the EU procurement process, the procurement directives have traditionally stated the critical significance of open competition and applied the principle of transparency in procurement procedures for that purpose.[718] The CJEU also considers *transparency* an effective tool to accomplish economic efficiency accordingly.[719] In terms of debriefing, transparency enforced by the on-request debrief design overlooks the public procurement markets' features that *already* restrict the competition, such as transparency, concentration, non-complexity and symmetry. Furthermore, the on-request debrief in Article 55(2)(d) PSD allows tenderers' *frequent* requests to disclose the tender proceedings related to other tenderers, further increasing market transparency and polishing the anticompetitive market structure.

In Subsection 2.3, Chapter 3, it is argued that the Commission has imposed unnecessary transparency requirements for on-request debrief *without* due care beyond what the objective for integrity needs. The terminologies thereof remain *unclear* about the contents to be disclosed, lacking necessary conditions to justify the *relationship* between the tenderers, who make the request, and information they request to be disclosed in Article 55(2)(d) PSD. For example, it is questionable whether tenderers can request the disclosure of the documents concerning a specific negotiation or dialogue with the tenderer other than the applicant or the winner.

That said, absolute transparency is also detrimental to economic efficiency from a normative perspective. Subsection 4.1, Chapter 2 argued that excessive transparency compliance in Article 55(2)(d) PSD places *extra* administrative burdens on the contracting authority, which *inevitably* increases the social costs of the procurement procedure. Contracting authority are responsible for withdrawing specific information in line with Article 55(3) PSD *before* notification since the conduct and progress of negotiations and dialogue during competitive procedures *always* contain commercially sensitive information for qualitative selection. The release of such information could prejudice the legitimate commercial interest of a particular economic operator or fair competition among competitors in breach of Article 55(3) PSD.

[718] Council Directive (EC) 71/305, recital 9; Council Directive (EC) 77/62, recital 2. Council Directive (EC) 88/295, recital 6. Council Directive (EC) 89/440, recital 14. Council Directive (EC) 92/50, recital 20. Council Directive (EC) 93/36, recital 14. Council Directive (EC) 93/37, recital 10. Council Directive (EC) 2004/18, recitals 2 and 46. Council Directive (EC) 2004/17, recitals 40 and 55.
[719] Carmen Estevan de Quesada, 229.

It is anticipated in Section 4 of Chapter 4 that an improper release of information is highly potential in cases where, for example, the economic operator could *not* exercise their fundamental rights to procurement, such as the right to designate information as the confidential or contracting authority has *failed* to *properly* perform the confidentiality duties, such as to properly *remove* or *amend* certain elements *before* releasing such information at hand. That precarious setting could *inevitably* frustrate private participant's motivation for further tendering competition. The procedural rules that have created more administrative burden for the public authority to act efficiently are *undesirable*

In respect of the repeated game, that featured market structure inevitably motivates the economic operators to pursue collusive practices either directly or tacitly for a long-term benefit. To some extent, the on-request debrief can create a legitimate channel for the tenderers to collude without express communication. Specifically, when a tenderer requests disclosure of the conduct and progress of negations and dialogue in Article 55(2)(d) PSD with tenderers, the contracting authority sends the applicant a standstill letter. In that situation, the applicant can obtain information required for repetitive coordination by tactically using the on-request debrief without worrying about *social costs*, such as the consequences of breaking the EU competition law.

Suppose one tenderer strategically make it possible, then other rejected tenderers who did *not* require such information to apply for a review or pre-contractual remedies are very likely to ask for *identical* or *similar* information from the standpoint of principle of equal treatment in Article 18(1) PSD. The contracting authority is obliged to take actions to remedy these *disadvantaged* rivals, or through other alternative solutions, to create a fair playing ground.[720] In that respect, the repetitive requests for notification of proceedings might become standard for tenderers to participate in a debriefing.

In other words, debriefing can produce the *same* effect as the communication in terms of its contribution to the formalisation and stabilisation of collusion. Those coordinated behaviours by tenderers as a selling power will *disfavour* the contracting authorities and *waste* the public funds entrusted to them by putting them in a *weak* negotiating position at the *very* beginning of the procurement process.[721] In a repeated game, that situation becomes *more* detrimental to the

[720] Abby Semple, para 2.21.
[721] Joined Cases C-21/03 and C-34/03 *Fabricom*.

economic efficiency in the long term, especially when demand is similar or even singular in public procurement markets.

3.3. Instruments against Collusive Behaviours from A Competition Kit

The EU competition and procurement rules contribute to the economy and society by constructing a long-term market competition from economists' viewpoint.[722] To be precise, the EU competition rules aim to realise the economist's prospect for competition to maximise the *consumer* welfare by encouraging competitive behaviours of market players across the EU single market.[723] In comparison, the EU procurement rules regulate the contracting authority's behaviours in managing the public funds on behalf of society to increase economic efficiency.[724]

From the viewpoint of the CJEU, the EU public procurement law is a legal tool *separated* from the EU competition law generally.[725] The EU competition law could impact procurement in *two* means either regulate the contracting authority with a dominant position attempting to enter a partnership against the competition or those economic operators inclined to collude.[726] The TFEU rules provide traditional *behavioural* instruments to prohibit the agreements, decisions and concerted practices detrimental to competition by Article 101 or prevent unilateral facilitating practices by a dominant market power by Article 102.[727] Article 102 is an *essential* companion of Article 101.[728]

It is relatively easier to capture the evidence either of cartels,[729] cooperation agreements and concerted practices under Article 101(1) by establishing the information exchange following

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[722] Catriona Munro, 352.
[723] Competition rules normally embrace the views of economists on competition in respect of the performance, that is whether or not they have advanced the main objective of consumer welfare-maximising by encouraging competitive behaviours of market players. Phillip E. Areeda and Herbert Hovenkamp 100a.
[724] The figure indicates that public procurement accounts for more than 15% of the Gross Domestic Product (GDP) in OECD countries. OECD, 'Competition in Bidding Markets' 23. As for the Member States of European Union, the corresponding figure of EU GDP has decreased slightly since 2009, when it was estimated at 20 %; in 2010 the percentage fell to 19.7% and in 2011 it fell still further to 19%. Commission, 'Annual Public Procurement Implementation Review 2013' SWD(2014) 262 final, 5.
[725] Case C-113/07 P *SELEX*, para 102. See also, Albert Sanchez-Graells, 'Competition and Public Procurement'. Commission, 'Green Paper on the modernisation of EU public procurement policy' COM(2011) 15 final, paras 3.2–3.3. Grith Skovgaard Olykke, 180.
[726] Catriona Munro, 353.
[727] Richard Whish and David Bailey 180-82.
[728] For further discussion see also Ekaterina Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart Publishing 2010); Ariel Ezrachi, *Article 82 EC: Reflections on Its Recent Evolution* (Hart Publishing 2009).
[729] The Commission has summarised several violations of the EU competition rules (e.g., cartels) in procurement procedures. For example, 'Lunch coupons case' in Italy (or the French case 'Lycées de l'Ile-de-France'). See Commission, 'Green Paper on the modernisation of EU public procurement policy' COM(2011) 15 final, para 3.2.

EU competition rules. By contrast, to prevent tacitly coordinated oligopolies in the procurement market from an EU competition perspective is also stressful since behavioural instruments from a competition kit impose a *heavy* burden of proof.[730] It is challenging to prove coordination without express communication or agreement, considering unnoticeable communication methods or their *causations* to coordinated practices. At that point, those coordinated practices do not automatically fall under the *scope* of the EU competition rules other than carefully considering the *ample* market conditions that formalise and stabilise such coordination.[731] In this respect, to construct unilateral facilitating practices must be challenged by Article 102 TFEU.

3.3.1. Is procurement of economic nature?

EU competition rules apply to procurement on the condition that either the economic operator or contracting authority in question qualified as 'undertakings' and the procurement activities are 'economic' under Articles 101 and 102 TFEU. It then compares the regulation of collusive behaviours or abuse of dominant position in the same circumstances in the public procurement markets with those in *any* other kind of the EU market.[732] The CJEU manifests its judicial stance on the application of competition rules to procurement activities on a case-by-case analysis, which generally starts with *correlated* definitions of 'undertakings' and 'economic activity' thereunder.

In the previous precedents, the CJEU has noted that an activity that falls within the exercise of public powers is not economic in nature, and, so, in carrying out that activity, the organisation is not an undertaking.[733] In that respect, the CJEU held in Case C-113/07 *SELEX* that competition rules do not apply to tendering procedures since Eurocontrol's technical standardisation and the acquisition of prototypes relating to that standardisation is not an economic activity. Therefore, Eurocontrol was not an undertaking.[734]

However, it has been argued that the competition rules could possibly apply when undertakings may be dominant or wish to enter into a partnership on which competition law could *control*

[730] Carmen Estevan de Quesada, 234.
[731] ibid, 232.
[732] Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules* 204.
[733] Case 107/84 Commission v Germany [1985] ECR 2655, paras 14-15. Case C-364/92 SAT Fluggesellschaft [1994] ECR I-43, para 30. Case C-49/07 MOTOE [2008] ECR I-0000, para 24.
[734] Case C-113/07 P *SELEX*, paras 75-107.

though the CJEU does *not* sufficiently clarify the statement.[735] In the late Case C-205/03 *FENIN*, Federación Española de Empresas de Tecnología Sanitaria (FENIN) submitted a complaint to the Commission that Sistema Nacional de Salud (SNS) that runs the Spanish national health system were in a dominant position for medical goods and equipment in that country and that they had abused that position by delaying payment of their debts.[736]

In Case C-205/03 *FENIN,* the SNS management bodies provided some services free of charge.[737] For that matter, Advocate General Poiares Maduro provides opinions in using the principle of *solidarity* concerning whether a provision of *subscribed* healthcare is an economic activity. In support of the Court of First Instance, he holds that the SNS operates according to the principle of solidarity in that it is funded from social security contributions and other State funding and provides services free of charge to its members based on *universal cover*, and that the SNS management bodies do *not*, therefore, act as undertakings in their activity of managing the health system.[738]

He reaffirms that the characteristic feature of economic activity consists of offering goods and services on a given market, and there is no need to dissociate the purchasing goods from the subsequent use to conclude if competition rules apply to one and not the other.[739] Despite that, he admits that it is difficult to specify the circumstances in which that principle of solidarity will result in an activity being classified as non-economic in nature.[740] For that concern, he chooses *not* to assess the application of competition rules to procurement according to the principle of solidarity if the contracting authority *only* charges particular customers or otherwise provides services wholly or partly in competition with private operators.[741]

3.3.2. Have concerted practices captured the repeated game?

In the viewpoint of economists, tacit collusion is a typical coordinated setting of supra-competitive prices and the rational outcome of economic activities based on the available data and market structure in specific oligopolistic markets.[742] In the EU competition rules

[735] Catriona Munro, 353-56.
[736] Case C-205/03 P *FENIN*, para 4.
[737] ibid, para 8.
[738] ibid, para 8.
[739] Catriona Munro, 356.
[740] Case C-205/03 P *FENIN*, para 1.
[741] Catriona Munro, 356.
[742] Richard Whish and David Bailey 180-82. Antonio Capobianco 54.

regime, it is submitted that without entering into agreements, such collusion generally falls *outside* Article 101(1) TFEU as not satisfying the fundamental element of '*agreement*' thereof for its establishment.[743] However, it is far from clear whether coordinated behaviours of economic operators generally fall outside Article 101(1) TFEU if there is no information exchange. EU competition rules are expected to provide more concerns on regulating those behaviours in the procurement mechanism, for example, whether *parallel behaviours* violate the EU competition law.[744]

In a perfect competition, each firm 'takes' the price from the market, and society obtains an optimum output level at the lowest possible price.[745] However, if there are oligopolies in the markets, the competition picture is completely different. In the theory of *oligopolistic interdependence*, a profit-maximising oligopolist can restrict output and increase the price of its goods or services accordingly.[746] In comparison with a perfect competition, oligopolists obtain those supra-competitive profits by parallel behaviours to unduly favour themselves but disadvantage consumers.[747] As a result, society is deprived of the output that the oligopolists have suppressed.[748]

Based on that featured market structure, there is no doubt that oligopolists could coordinate their behaviours without entering into an agreement or being a party to engage in *concerted practices* prohibited by Article 101(1) TFEU.[749] The CJEU considers that Article 101(1) TFEU does not prohibit those parallel behaviours since it *lacks* the fundamental element of 'agreement' or 'concerted practices'.[750] Specifically, the core concept of 'agreement' under Article 101(1) in

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[743] Richard Whish and David Bailey 552-54. Antonio Capobianco 48. Giorgio Monti, *EC Competition Law* (Cambridge University Press 2007) 334.

[744] The Commission has summarised several violations of the EU competition rules (e.g., cartels) in public procurement procedures. For example, 'Lunch coupons case' in Italy (or the French case 'Lycées de l'Ile-de-France'). See Commission, 'Green Paper on the modernisation of EU public procurement policy' COM(2011) 15 final, para 3.2.

[745] Richard Whish and David Bailey 571-78.

[746] See detailed discussion in ibid 571-78.

[747] ibid 573.

[748] ibid 571-78.

[749] Article 101 TFEU provides that the behaviours shall be prohibited as incompatible with the internal market: 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States, and which have as their object or effect the prevention, restriction, or distortion of competition within the internal market (…).'

[750] Case 48/69 *Imperial Chemical Industries Ltd. v Commission* EU:C:1972:70, [1972] ECR 1972-00619, para 64. See also Joined cases 96-102, 104, 105, 108 and 110/82 *NV IAZ International Belgium and others v Commission* EU:C:1983:310, [1983] ECR 1983 -03369. For the further discussion see also Richard Whish and David Bailey 115-19.

the EU competition rules does not include parallel behaviours despite typical oligopolies.[751] In Case 172/80 *Gerhard Züchner v Bayerische Vereinsbank AG*, the CJEU interprets the core concept of 'agreement' as not covering the parallel behaviour that is a characteristic of oligopolies.[752]

Similarly, parallel behaviours cannot be by themselves qualified as concerted practices that fall under Article 101(1) TFEU despite establishing a concerted practice does not require reaching out an 'agreement'. In Case 48/69 *Dyestuffs*, the CJEU *defined* a concerted practice as 'a form of coordination between undertakings which, without having reached the stage where an agreement so-called has been concluded, knowingly substitutes practical cooperation between them for the risk of competition'.[753] At that point, Article 101(1) TFEU prohibits the concerted practices since those are such to facilitate deviation detection and, in doing so, to make the punishment of deviations easier.[754]

In that respect, those oligopolists seem 'innocent' of a concerted practice by simply reacting to each other. It is argued that 'although article 85 of the Treaty prohibits any form of collusion that distorts competition, it does not deprive economic operators of the right to adapt themselves *intelligently* to their competitors' existing and anticipated conduct'. In other words, the parallel behaviours *cannot* become the *sole* indicator of concerted practices except that their existence is the *exclusive* plausible explanation for the concerned conducts.[755] In Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *A. Ahlström Osakeyhtiö and others v Commission of the European Communities*, for instance, the system of price announcements cannot be explained as concerted practices if otherwise understood as a compromise between customer's desire to know input prices in advance or the producer's desire to maximise profits for improving market competition.[756] In Case T-442/08 *CISAC*, the

[751] Case C-172/80 *Gerhard Züchner v Bayerische Vereinsbank AG* EU:C:1981:178, [1981] ECR 1981 02021, paras 13-14. Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *A. Ahlström Osakeyhtiö and others v Commission of the European Communities* EU:C:1993:120, [1993] I-01307, para 71.
[752] Case C-172/80 *Gerhard Züchner*, paras 13-14. Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *A. Ahlström Osakeyhtiö*, para 71.
[753] Case 48/69 *Dyestuffs*, para 64.
[754] Kai-Uwe Kühn, Carmen Matutes and Benny Moldovanu, 'Fighting Collusion by Regulating Communication between Firms' (2001) 16 Economic Policy 169, 183.
[755] Commission Decision of 12 December 2012 Case COMP/39.847 — E-BOOKS (Commitments Decision) [2012] C 9288, paras 70-81.
[756] Case Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *A. Ahlström Osakeyhtiö*, paras 71-79.

General Court acknowledged that parallel behaviours could be evidence of a concerted practise only if no plausible alternative explanation exists.[757]

Due to the *lack* of proof of communication,[758] the construction of 'a concerted practice' in Article 101 TFEU is more complex in practice in terms of the character of parallel behaviours under Article 101 waiting to be solved. However, the CJEU seems unprepared to conclude what *indicators* could qualify such parallel behaviours as concerted practices under Article 101(1), but instead chooses to analyse on a case-by-case basis. Yet, the judicial stances have presented as somewhat *inexplicit* and *incoherent* in its case-law.

It can be observed that one *primary* indicator that distinguishes the application of Article 101(1) TFEU to one parallel behaviour but not the other is that the contested coordination is by no means through competition. In Case 48/69 *Dyestuffs*, the CJEU concerns parallel conduct that is strong proven *deviance* from the 'normal conditions of the market' concerning 'nature of the products, the size and number of the undertakings, and the volume of the said market'.[759] However, the CJEU has not provided other opinions about how one or more usual market conditions lead to that conclusion.

The existence of a concerted practice cannot be easily justified by the questioned behaviours *without* taking account of the evidence generally upon specific features of the market for the concerned products, as the CJEU suggests.[760] In the latter cases, the General Court upheld the Commission's finding that,[761] due to the oligopolistic nature of a specific market, 'the Commission should be particularly vigilant to ensure that the competition which does exist is

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[757] Case T-442/08 *International Confederation of Societies of Authors and Composers (CISAC) v Commission* EU:T:2013:188, [2013] Court Reports - general, paras 96-102.

[758] Collection of evidence as the proof of the exchange of information is a well-known problem in the enforcement of competition law (or antitrust law). For instance, establishment of 'conspiracy monopolies' is difficult with a lack of proof of 'conspiracy'. See Herbert Hovenkamp, *Federal Antitrust Policy* (4th edn, West Publishing 2011) 310.

[759] Case 48/69 *Dyestuffs*, paras 65-68 (emphasis added).

[760] The judgement of Case 48/69 *Dyestuffs* provides that the existence of a concerted practice 'can *only* be correctly determined if the evidence upon which the contested decision is based is considered, *not in isolation*, but general speaking, account being taken of the *specific features of the market* in the products in question (emphasis added).' See ibid, paras 65-68.

[761] The General Court stated that: '(…) as regards the oligopolistic nature of the sugar market in Great Britain, the Commission's argument that whereas, in an oligopolistic market, it is possible for each operator to acquire *ex post* all the information necessary to understand the commercial policy of the others, the fact remains that uncertainty as to the pricing policies which the other operators intend to practise in the future constitutes the main stimulus to competition in such a market must be accepted (…).' See Joined cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle plc, British Sugar plc and Napier Brown & Co. Ltd v Commission* EU:T:2001:185, [2001] ECR II-02035, para 46. See also upheld appeal Case C-194/99 P *Thyssen Stahl AG v Commission* EU:C:2003:527, [2003] ECR I-10821.

not restricted in such market'.[762] At that point, the oligopolistic nature of the concerned market seems to be another indicator of the existence of a concerted practise other than those indicators that describe suspicious deviant conducts case by case.

In fact, the CJEU has rarely recognised certain 'muted' parallel behaviours by oligopolists as the concerted practices in a *price-fixing* case in its Case 48/69 *Dyestuffs.*[763] It is argued that a price-fixing case is typical if the parallel behaviours '*enable those concerned to attempt to stabilize prices* at a level different from that to which competition would have led, and to consolidate established positions to the *detriment of effective freedom of movement of the products in the common market and of the freedom of consumers to choose their suppliers*.' [764] However, the CJEU went against its judgement in the latter case, providing that 'parallel pricing behaviours in an oligopoly producing homogeneous goods will *not* be sufficient evidence of a concerted practice'.[765] Despite the uncertainty, the judgement reveals that a price-fixing case cannot be relied on alone to justify a concerted practice without contextual analysis.

Moreover, a price-fixing case does not merely concern actions for a price increase, which requires those oligopolists to eliminate the prior uncertainty as to what each other is expected to do. Article 101 forbids such parallel conducts if it determines a coordinated course of actions relating to a *price* increase and eliminates *prior* uncertainty about the *essential* elements of that action.[766] For example, in Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85

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[762] The Commission stated that 'in a tightly oligopolistic market, price leadership is not exceptional since where there is only a small number of competitors, it is – in comparison with a non-oligopolistic market – easier for each of them *ex post* to perceive on the market what the others have done on it. However, the existence of such an oligopolistic market, in which competition for structural reasons tends to be limited to a certain extent, does not allow companies to go further and *ex ante* actively coordinate their future pricing policy. On the contrary, the existence of uncertainty as to the pricing intentions of the companies on markets of the described kind is the main stimulus to competition. As the Court of Justice made clear in Hoffmann-La Roche (205), in markets where competition is already limited, the Commission must be particularly vigilant to ensure that the competition which does exist is *not* restricted.' See Commission Decision (EC) of 14 October 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty Case IV/F-3/33.708 - British Sugar plc, Case IV/F-3/33.709 - Tate & Lyle plc, Case IV/F-3/33.710 - Napier Brown & Company Ltd, Case IV/F-3/33.711 - James Budgett Sugars Ltd (notified under number C(1998) 3061) [1999] OJ L 76/1, para 87.

[763] The judgement of Case 48/69 *Dyestuffs* provides that: 'by its very nature, then, a concerted practice does not have all the elements of a contract but may *inter alia* arise out of coordination which becomes apparent from the behaviour of the participants. Although parallel behaviour may not by itself be identified with a concerted practice, it may however *amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market*, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market (emphasis added)'. See Case 48/69 *Dyestuffs*, paras 65-68.

[764] ibid, paras 65-68 (emphasis added).

[765] Commission Decision (EEC) 84/405 of 6 August 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.350 - zinc producer group) [1984] OJ L 220/27, para 75.

[766] Case 48/69 *Dyestuffs*, para 118.

and C-125/85 to C-129/85 *A. Ahlström Osakeyhtiö and others v Commission of the European Communitiesi,* the Court considered that making information available to *third* parties did *not* contribute to a *prior* elimination of *uncertainty* about future conducts of competitive rivals.[767] Those elements relating to prior uncertainty could include, but are *not* limited to, the *amount* and *subject matter* of production or the *date* and *place* of a price-fixing.[768]

The CJEU has provided an indicator for qualifying concerted practices within the meaning of Article 101, such as *contacts* between undertakings on desirable price changes or *information exchange* that reinforces such contacts prior to price changes.[769] One critical *indicator* that signifies parallel behaviours as concerted practices is that the contested coordination is achieved by *communication* rather than competition.[770] However, the case-law has not offered a *broad* explanation or certain essential elements for assessing either contacts or information exchange that stabilises such contacts as doing so in a tacit manner, such as by using debriefing. In this regard, such indicators are not concrete for discussing its application to the debriefing since those overlook the equivalent effects to communication on competition in the oligopolistic procurement markets, as the repeated game presents.

To sum up, it is admittedly far-fetched to anticipate that the usual coordinated setting of supra-competitive prices is likely to become an abuse instead of a rational outcome coming out of oligopolistic markets from the economic standpoint.[771] EU case-law has reasoned indicators that qualify parallel conducts in the oligopolistic market as concerted practices, such as a course of action to increase the price and eliminate the prior uncertainty in a price-fixing case. It is submitted that one parallel behaviour cannot *self-reliantly* lead to solid evidence of the existence of the concerted practices.

However, some uncertainty remains regarding how those instruments justify coordinated behaviours as concerted practices in the competition rules, not sufficiently referring to their application in the EU procurement markets. Besides, it is noticed that those cases have not recognised the economic studies that debriefing can generate the same effect with

[767] Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *A. Ahlström Osakeyhtiö*, paras 59-65.
[768] Case 48/69 *Dyestuffs*, para 118.
[769] Commission Decision (EEC) 84/405 of 6 August 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.350 - zinc producer group) [1984] OJ L 220/27, para 76 (emphasis added).
[770] Article 101 TFEU Guidelines, para 59.
[771] Richard Whish and David Bailey 180-82. Antonio Capobianco 54.

communication as the repeated game presents. It is argued that the concerted practices in Article 101(1) TFEU *cannot* be used as an effective instrument to capture the repeated interactions where *unfettered* debriefing may generate restrictions on the competition in the game-theoretic model.

3.3.3. Have unilateral facilitating practices incorporated debriefing?

Article 101(1) TFEU provides *another* instrument to address that issue – trying otherwise to qualify the repeated requests for debriefing by unsuccessful tenderers as 'facilitating practices'. The unilateral facilitating practices are such activities that increase transparency or modify the market environment,[772] making it easier for firms to coordinate their behaviours on price, subject matter, or quantity to benefit from tacit collusion. In those cases, unilateral facilitating practices may not have actual collusive effects, but they *continuously* have increased the potential for generating such effects.[773]

Despite the single or main buying power in the relevant market, the contracting authorities are ordinarily unable to maneuverer the countervailing market power against economic operators.[774] The contracting authority has always been placed in a weaker negotiation position in a *smaller* scale procurement market (e.g., electronic commerce)[775] or a *stable* sectoral procurement market (e.g., security and defence,[776] construction,[777] education and healthcare[778])

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[772] Article 101 TFEU Guidelines, para 79. It states that 'tight oligopolies can facilitate a collusive outcome on the market as it is easier for fewer companies to reach a common understanding on the terms of coordination and to monitor deviations. A collusive outcome is also more likely to be sustainable with fewer companies. With more companies coordinating, the gains from deviating are greater because a larger market share can be gained through undercutting. At the same time, gains from the collusive outcome are smaller because, when there are more companies, the share of the rents from the collusive outcome declines. Exchanges of information in tight oligopolies are more likely to cause restrictive effects on competition than in less tight oligopolies and are not likely to cause such restrictive effects on competition in very fragmented markets. However, by increasing transparency, or modifying the market environment in another way towards one more liable to coordination, information exchanges may facilitate coordination and monitoring among more companies than would be possible in its absence'.

[773] Phillip E. Areeda and Herbert Hovenkamp 1407b.

[774] Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules* 65-69.

[775] Pedro Telles, *Public Contracts Regulations 2015 - Regulation 21 [updated]*

[776] The defence and security sector adopts higher thresholds for the award procedures of public contracts (i.e., EUR 443,000 for supply and service contracts) and more stringent requirements for selection criteria. See EU Directive on Defence and Security Procurement, art 8 (as amended by Article 1 of Commission Regulation (EU) 2017/2367). Hereinafter referred as the EU Directive on Defence and Security Procurement. See also, Article 58(1) of the PSD provides a general standard for selection criteria: '[s]election criteria may relate to: (a) suitability to pursue the professional activity; (b) economic or financial standing; (c) technical or professional abilities'. Besides, EU legislators sets out detailed rules concerning the above-mentioned issues in the field of defence and sensitive security as provided in Article 39 to 42 of the EU Directive on Defence and Security Procurement.

[777] Catriona Munro, 359-60.

[778] Case C-205/03 P *FENIN*, para 4.

to award a public contract within the limited period, especially in a concentrated market where few economic operators are available for selection.[779] Furthermore, the standard award procedures, i.e., open and restricted procedures in most cases,[780] barely permit the contracting authority to negotiate in a more robust position against economic operators.

To recap briefly, the previous discussion about the auction theory argues that accumulated bidders can exercise collective market power *against* public buyers in the auction markets, which is prevalent in the procurement mechanism.[781] Those collusive effects may be exaggerated by entering multimarket contracts if bidders are conglomerates, joint ventures or alliances that operate and interact in several markets.[782] In that case, those oligopolists are more likely to increase *transparency* by facilitating practices within the featured procurement markets that have certain conditions.[783] Those unilateral facilitating practices to increase transparency by collective dominance further intensify the concentrated market feature, especially of the demand-side, such as security standards, market symmetry[784] and non-complexity.[785]

Based on that premise, it can be observed that determining the facilitating practices shall otherwise be challenged by Article 102 TFEU *within* the scope of application. The *concept* of collective dominance applies to the tacitly coordinated oligopolies, which refers to a joint or collective dominant position as 'undertakings'.[786] Article 102 prohibits the abuse of dominant positions precisely in the same circumstances in the public procurement markets as same as in

[779] Carmen Estevan de Quesada, 238.
[780] *Open competition* remains the most common type of procedure. The value of contracts awarded following this type of procedure accounted for 51% of the value of all contracts awarded and published in 2011 (4% more than in the previous year), representing approximately 75% of all contract award notices (2% more than in the previous year). The second most popular procedure in terms of its share of the total value of contracts published is the restricted procedure (21% of the total value, against 22% reported in 2010, although only 7% of CANs). Commission, 'Annual Public Procurement Implementation Review 2013' SWD(2014) 262 final, 11.
[781] Catriona Munro, 352-53.
[782] Dimitrios Konstadakopulos, 221-23.
[783] Those sectoral public procurement markets are typically stable with relevant conditions (e.g., higher barriers to entry or weaker competitive position of public buyers). See Carmen Estevan de Quesada 231.
[784] The market symmetry depends on data such as costs, demand, market shares, product range capacities. Greater transparency means such data may be extensively and frequently circulated by the publication of procurement documents (e.g., contract notices and contract award notices) or by the communication of rejected reasons (e.g., debriefing) within the scope of this research. See ibid, 238.
[785] The public procurement markets usually are less complex as goods or services required by public procurers are simply specific (e.g., concerning quality or security standards) according to procedural requirements. That trend otherwise promotes the homogeneity of suppliers, such as their cost structures and thus reinforces the market symmetry. See ibid, 238.
[786] Joined cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission of the European Communities* EU:T:1992:38, [1993] ECR II-01403, para 358.

any other part of the EU single market.[787] The recital (25) of European Market Regulation (EMR) specifies the comparable instrument, non-coordinated behaviours by undertakings having a dominant position in the oligopolistic market structures. Like the problem for qualifying the concerted practices in Article 101(1) TFEU, there remains a *tricky* practice problem to capture tacitly coordinated oligopolies under Article 102 TFEU due to the *lack* of evidence.[788]

The exchange of information is a typical facilitating practice that artificially increases the transparency of the market,[789] essential to act for a tacitly collusive oligopoly, taking account of the oligopolistic nature of the market.[790] Those indicators, such as the exchange of information or the oligopolistic nature of the market, cannot sorely demonstrate a violation of Article 101(1) TFEU. The Commission chose not to object to the accessibility of cumulative industry data *generally* if they do not identify the retail sales of the individual members in tight oligopolies.[791] Specifically, the Commission objected to the communication to the *extent* that such aggregate industry data relating to *specific geographic areas product breakdowns* or *time periods* amount to identify the *exact sales volume* of specific rivals directly or indirectly.

Likewise, the CJEU is concerned about the extent to which such exchange of information could, either directly or indirectly, identify individual players as a result, on a case-by-case basis, concerning certain characteristics, such as the subject matter, prices or retail sales.[792] Considering a *highly concentrated oligopolistic* market on which competition is already reduced, the CJEU objected to the exchanges of precise information at short intervals in the Case T-34/92 *Fiatagri UK Ltd and New Holland Ford Ltd v Commission*. The CJEU considers that exchanged

[787] Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules* 204.
[788] Carmen Estevan de Quesada, 235.
[789] ibid, 236. See also Richard Whish and David Bailey 581.
[790] Article 101 TFEU Guidelines, para 79.
[791] Commission Decision (EEC) of 17 February 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty IV/31.370 and 31.446 - (UK Agricultural Tractor Registration Exchange) OJ L 68/19, para 16. The Commission did not 'in principle objected to the *availability* of these aggregate industry data because they do not identify the retail sales of the individual members of the Exchange'. However, the Commission objected to the '*exchange* of aggregate industry data to the *extent* that in respect of specific geographic areas product breakdowns or time periods, (…) there is a high risk that even aggregate data will allow, directly or indirectly, the identification of the *exact sales volume* of individual competitors' (emphasis added).
[792] The General Court upheld the decision of the Commission, concerning the opinion towards the oligopolistic nature of the market, stating that 'general use, as between main suppliers, of exchanges of precise information at short intervals, identifying registered *vehicles* and the *place* of their registration is, on a *highly concentrated oligopolistic* market (…) and on which competition is as a result already greatly reduced and exchange of information facilitated, likely to impair considerably the competition which exists between traders' (emphasis added). See Case T-34/92 *Fiatagri UK Ltd and New Holland Ford Ltd v Commission* EU:T:1994:258, [1994] ECR II-00905, para 91.

information facilitates identifying the registered *vehicles* and the *place* of their registration, which likely further considerably impairs competition between traders. Those *factors* – to *what* extent the exchange of information, directly or indirectly – are likely harm competition can be used to control collusive oligopoly facilitated by debriefing when the competition rules apply procurement for open competition.

4. Conclusion

In Section 4 of Chapter 2, this thesis explored the criteria for maximising social welfare by relying on EU legal instruments, such as those on competition, procurement rules and general principles of EU law, to prevent collusive oligopoly caused by the coordinated behaviours for repeated interactions by abusing debriefing. Subsequently, further discussions in this chapter argued that the PSD imposes higher transparency on debriefing in order to stimulate *open competition* across the EU single market for the coherence of the EU legal system.[793] However, through a discussion of the weaknesses in the PSD, the chapter highlights that the legal instrument has failed to deter coordination, collusion or improper practices of economic operators in the *oligopolistic-featured* public procurement markets.[794] It is however to be noted that these behaviours are regulated and evaluated by EU competition law.

In further analysis within the chapter, it is argued that the economic analysis of law demonstrates the phenomenon that economic operators have the potential to use debriefing to strategically request information which they can subsequently use to engage in tacit collusive or coordinated oligopolies. Specifically, this chapter introduces the oligopoly theory that features the oligopolistic public procurement markets since that is a significant condition that allows the opportunist to repeatedly interact for tacit collusion in game theory. That economic analysis provides a stronger argument on the design of debriefing towards efficient allocation of social welfare rather than against, and, thus, it premises the subsequent legal study with a theoretical basis. Accordingly, regulatory debriefing can be understood as a set of rules tailored to authenticate and compensate for the loss of economic operators by procedural and remedies rules to realise the most efficient allocation.

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[793] It is admitted that some transparency rules set out in the PSD, despite their pro-competition purpose, allow increasing risk of tacit collusion in oligopolistic public procurement markets. See Carmen Estevan de Quesada, 229.

[794] The Guidelines for the application of Article 101 of the TFEU have identified the characteristics of the oligopolistic markets essential for acting in tacit collusion in markets. Those characteristics include transparency, concentration, non-complexity, symmetry, and stability. See Article 101 TFEU Guidelines, para 77.

The founding principle of TFEU, the free movement of goods and services, unconditionally applies to EU procurement directives, which is pivotal in promoting cross-border economic activities for the EU internal market.[795] That fundamental principle also provides a legal *basis* for developing both sets of *competition-oriented* public procurement and competition rules that ensure fair and effective competition regarding the specific part of the EU single market. Although the CJEU considers EU public procurement rules as a legal tool separated from EU competition rules generally,[796] they build on a long-term market competition contributing to the economy and society from economists' viewpoint.[797]

However, those EU procurement rules cannot ensure social welfare is maximised since there remain obstacles to effective enforcement. First, Article 18(1) provides uncertain dimensions of the competition incoherent with the open competition established by the TFEU rules of free movement since they simply observe the contracting authority's behaviours concerning competition between suppliers.[798] In that respect, they cannot functionally prevent private participants from facilitating tacitly collusive oligopoly, and thus, they impair the competition between the public buyers and buyers. Second, Article 18(1) provides a problematic subjective element for generally determining the principle of competition, which imposes a heavy burden to prove such 'intent'. However, the provisions and precedents have not concluded guidance about *who* should take those burdens and to which *standard* those are subject in principle. Third, even though the oligopolistic nature of markets already prejudices the competition, the repeated game implies that the regulatory on-request debrief provides unlimited transparency and encourage market players to stabilise the tacit collusive oligopoly.

Using the EU competition instruments to prevent *tacitly* coordinated oligopolies in the procurement market from an EU competition perspective is also stressful since behavioural

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[795] Article 34 TFEU prohibits quantitative restrictions and measures having an equivalent effect, covering both direct and indirect restrictions on free movement. The CJEU has then adopted an approach to scrutinise the effect of various measures taken in the Member States rather than their formal designation or stated purpose, which also has been applied to examine the restrictions within procurement procedures.

[796] Case C-113/07 P *SELEX*, para 102. See also Albert Sanchez-Graells, 'Competition and Public Procurement'. Commission, 'Green Paper on the modernisation of EU public procurement policy' COM(2011) 15 final, paras 3.2-3.3. Grith Skovgaard Olykke, 180.

[797] Catriona Munro, 352.

[798] Competition in the context of public procurement can be considered from both an internal and external perspective, referring to the achievement of value for money by public buyers using such award procedures (i.e., internal perspective) and intense competition in market dynamics for the whole society (i.e., external perspective). See also Albert Sanchez-Graells, *Public Procurement and the EU Competition Rules* 108.

instruments from a competition kit impose a heavy burden of proof.[799] According to EU case-law, to apply the competition instruments, those procurement activities in the case must be primarily assessed regarding their economic nature. In terms of specific behaviour instruments from a kit, those coordinated practices lack the crucial elements of 'agreement' or 'communication' to evidently qualify as cartels,[800] cooperation agreements and concerted practices in Article 101(1) TFEU.

In addition, the CJEU has provided some indicators for identifying the concerted practices, though, especially in a *price-fixing* case, those are far from precise and constantly need to describe the repeated interactions in economics. Nevertheless, it is submitted that one parallel conduct, even if debriefing falls under its meaning, is unlikely to demonstrate the existing concerted practices. At that point, those coordinated practices do not automatically fall under the scope of EU competition rules other than carefully considering the ample market conditions that formalise and stabilise such coordination.[801]

This research also reviews the tool of unilateral facilitating practices by collective dominance exercised by mass bidders against the public buyers accordingly, as presented by the auction theory prevalent in the procurement mechanism.[802] Similar to the problem for qualifying the concerted practices in Article 101(1) TFEU, to capture tacitly coordinated oligopolies under Article 102 TFEU is also tricky considering the problem of evidence.[803] The exchange of information is a typical facilitating practice that artificially increases the transparency of the market,[804] essential to act for tacitly collusive oligopoly.[805] Nevertheless, the precedents have indicated the CJEU would not object to the exchange of information if, to an extent, it can identify individual players, either directly or indirectly, on a case-by-case basis. Those *factors* and to *what* extent the exchange of information, directly or indirectly, is likely to harm competition can be used to control collusive oligopoly facilitated by debriefing when the competition rules apply.

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[799] Carmen Estevan de Quesada, 234.
[800] The Commission has summarised several violations of the EU competition rules (e.g., cartels) in procurement procedures. For example, 'Lunch coupons case' in Italy (or the French case 'Lycées de l'Ile-de-France'). See Commission, 'Green Paper on the modernisation of EU public procurement policy' COM(2011) 15 final, para 3.2.
[801] Carmen Estevan de Quesada, 232.
[802] Catriona Munro, 352-53.
[803] Carmen Estevan de Quesada, 235.
[804] ibid 236. See also Richard Whish and David Bailey 581.
[805] Article 101 TFEU Guidelines, para 79.

CHAPTER 6

Conclusion

1. Summary of the Research

This is a concluding chapter for a thesis exploring transparency in public procurement, especially debriefing, considering EU Parliament and Council's 2014 public procurement package devoted to increasing transparency for competition and fairness. Despite that, such legislative reform has been challenged by scholars, such as Sue Arrowsmith, Albert Sanchez-Graells, and Carmen Estevan de Quesada. That enhanced transparency compliance with uncertain administrative discretion is entitled to doing so has caused several *concerns*, especially the restrictive effects on competition across the EU's single market in part of public procurement. That reveals the uncertainty about what transparency measures are proportional to the devised *objectives* in terms of a particular debriefing process with effects to avoid adverse effects of competition while ensuring fairness. The debriefing is designed to provide participants with access to a review of the contract award decision or to apply for effective remedies before a contract's conclusion. In a critical enquiry into debriefing, this thesis takes an objective-oriented approach by using interdisciplinary studies, including administrative procedure, competition, and data protection law to observe *three* objectives for regulating debriefing – integrity, fairness, and economic efficiency. The rest of this chapter revisits the main research questions, summarizes the thesis' answers, provide the recommendations for the further research and finally, concludes the chapter.

The thesis identified *four* of the most relevant research questions regarding concerns over debriefing design in the EU legal system for public procurement: (i) what should be the debriefing objectives under the EU public procurement system, and are they justifiable in economic theories? (ii) has debriefing ensured the integrity of the EU public procurement system by properly using applicable mechanisms in compliance with the general principles of EU law, such as promoting greater transparency or formulating effective access to a monitoring system? (iii) has debriefing respected the rights of unsuccessful bidders in the public procurement process, particularly the rights of defence and right to review and effective remedies entitled by the fundamental rights and general principles at the EU level? accordingly, how have those rights been balanced with the rights of confidentiality? (iv) has debriefing

unduly disadvantaged certain tenderers under Article 18(1) PSD by allowing tacit collusion or improper behaviours among tenderers in public procurement markets, which otherwise breaches the EU competition rules, such as Article 101 TFEU?

Using *doctrinal*, economic *normativism* and *positivism* research methods, Chapter 2 identified *three* objectives for designing debriefing in respect of its legal effectiveness in the enforcement of the PSD and the RD, respectively—integrity, fairness, and economic efficiency. Chapter 2 explained the *concept* of objectives and broke them down into elements, components, and criteria for measurement, 'personalised' for examining the EU procurement debriefing within the EU legal system. Those regulatory objectives are critical since they compose the specialised *coordinate system* for designing and enforcing debriefing for the EU procurement effectiveness by perceiving the *positive* and *negati*ve effects of transparency in achieving those objectives. Before that, the general principles of EU public procurement law, such as competition, transparency, or equal treatment, are often considered objectives for whole procurement activities rather than a kit of instruments to be tailored in precise phases. Those legal practices direct a *vast* or *full-scaled* disclosure directly in compliance with transparency, competition, or equal treatment, directly or indirectly, dismissing infringement against other *legitimate* rights endorsed by EU law.

For a detailed objective-achievement evaluation, the thesis focuses on *three* themes mainly relevant to debriefing for an *interdisciplinary* examination across EU law and economics, specifically *Integrity Tools Analysis*, *Procedural Fairness Balance,* and *Collusive Oligopoly Control* in Chapters 3, 4 and 5, respectively. Chapter 3 explored legal rules and cases formulating debriefing under the PSD and the RD, by which it identifies debriefing obligations borne by the contracting authority. Those debriefing obligations include general notification and on-request debrief in Article 55 PSD and the automatic debrief in Article 2a(2) RD, which otherwise are attributed to integrity tools for examination, especially the *transparency* and the *monitoring mechanism*. Chapter 4 assessed transparency as an *underwritten* element to procedural fairness that should support a *balanced* relationship between confidentiality rights and other procedural rights endorsed by EU case-law and CFR for due process. The chapter reviewed transposed procedural rights from the primary EU case-law and Articles 41 and 47 CFR to the secondary PSD and the RD within the EU legal system for *coherence*, especially, defence rights. the right to review the contract award decisions and to effect remedies. Chapter 5 demonstrated that *aggerated* transparency level provides the same effects with collusion without express communication or agreements in the collusive oligopoly structure. In that respect, debriefing

can achieve the same outcomes as collusion since oligopolies might indirectly increase market transparency by strategically using this procedure. For that concern, Chapter 5 reviewed the fundamental principle of free movement and competition rules, Articles 101 and 102 TFEU, searching for behavioural instruments from the EU competition kit to see if it captures the above-mentioned repeated game.

2. Findings of the Research

2.1. Objectives for the EU Procurement Debriefing

Research *question one* focused on debriefing objectives for the EU public procurement system and the justifiable economic theories that arise when the Commission only identifies general goals for regulating the EU procurement and remedies system. Those legislative goals for *two* legal systems have *not* been picked for directing a specific procedure such as debriefing within those systems. Nevertheless, scholars have debated about the *desired* purposes of debriefing enforcement but leave room for further exploration. For instance, Sue Arrowsmith stresses that debriefing requirements should enable unsuccessful tenderers to monitor the procurement process, such as deciding whether to make a legal challenge, and the relevant provisions must be interpreted in line with this aim. Another example is the need to ensure unsuccessful tenderers receive information necessary to review the contracting authority's decisions and defend their rights, as argued by Albert Sanchez-Graells.

Despite being somewhat valuable for those objectives, transparency brings various concerns in procurement debriefing, considering a specific objective or even a particular element, component, or criterion for the same objective. It is argued that transparency fashions specific objectives as a strategic legal instrument (e.g., an integrity tool) or a *micro* component of procedural fairness, instead of a 'one-size' objective fitting all procurement activities, such as debriefing. To ensure integrity, Section 2 of Chapter 2 advised the *character* of debriefing as combos of integrity tools, namely the enhanced transparency compliance and a monitoring mechanism despite the altered contribution to the EU procurement and remedies system, respectively. In other words, Section 2 of Chapter 2 deems debriefing a procedural requirement for higher transparency that exposes how the public body reached its contract award decision in the PSD. Alternatively, debriefing is a monitoring mechanism in the RD that ensures aggrieved applicants have access to a review for that decision and remedies for damages, if applicable.

Section 3, Chapter 2 distinguishes the substantial and procedural fairness advise, with the latter a concept for examination, which explains *why* equal treatment using *core* elements of substantive fairness *cannot* be a realistic objective, but a general principle. This section informs the critical element of procedural fairness for debriefing, that is, due progress, which requires respect for the unsuccessful participant's procedural rights and a balance between those rights with confidentiality due to the adversarial nature of proceedings in EU law. Furthermore, fairness is an overarching principle of EU data protection law, which can act as a factor to associate substantive protections in those fields for improving debriefing fairness in regulated public procurement.

For economic efficiency, Section 4, Chapter 2 introduces *two* examination criteria: social costs of procedures that weigh its potential costs and benefits and Pareto-optimality describing the maximum social welfare. This section endorses the Pareto-optimality model to signify the potential social welfare loss and to reflect the excessive transparency for its contribution to cartels and concerted practices or collusive oligopoly structure in a repeated game. There are several implications from auction theory that adopts aggregating social welfare in a long-term model, such as oligopolies' nature of the market, reminding the regulatory debriefing of tacit collusion or coordinated practices in a repeated game. In that respect, debriefing can be understood as a set of rules tailored to authenticate and compensate for the loss of economic operators by procedural and remedies rules for efficient allocation.

2.2. Integrity Tools for the Procurement and Remedies

Research question 2 asks about the *position* of debriefing in ensuring the integrity of EU public procurement and the compliance of *customised devices* with general principles of the EU law. Despite being attributed to integrity tools, Chapter 3 reveals the different *functions* of debriefing by its contribution to the *overall* integrity of the PSD and the RD. The EU procurement rule, especially the PSD, enforces debriefing in part of the enhanced transparency requirements for overall integrity, considering its procedural nature. It is noticeable that the principle of transparency enshrined in the PSD owes its origin to the general principles of EU case-law, arising from a collateral obligation to the principles of non-discrimination and equal treatment. The CJEU states that transparency obligations shall serve on the ground of concerns, such as equal treatment, non-discrimination, or undistorted competition conditions for the EU procurement in a specific context rather than in independent enforcement.

In that regard, the contracting authority shall be cautious in ensuring the principle of equal treatment in the practice of general notification because the CJEU interprets that with elements of substantive equality. To attain substantive equality is realistic as the total benefit of public procurement can be more evenly allocated among the different units of society. For that concern, this research tends to understand equality as an instrument to advance other objectives of the EU procurement system, i.e., integrity and economic efficiency, since it does not create intrinsic values of public procurement by itself but improves different values. Based on that premise, its importance can only be justified on a proportional basis if, for example, a late-submitted tender could be accepted or rejected subject to comparing long-term and short-term efficiency.

Likewise, current research also considers that Article 55(2) PSD has demanded *ample* disclosure of information for the on-request debrief, either considering the *inexplicit wording* of this provision or a *broad discretion* entrusted to the contracting authority. Article 55(2) PSD provides an *unclear* attitude about the *question* of whether an on-request debrief is a *supplementary* obligation to general notification since it should have been communicated *primarily* and *proactively* by the contracting authority in the general notification. If *yes*, it is accountable to interpret general notification in Article 55(1) PSD as requiring *full* disclosure of unsuccessful reasons available for debriefing on request instead of those necessary for economic operators to initiate the review procedure – indeed, to decide whether to apply for the review or remedies. If *not*, however, whether applicants can request to be notified of *more* rejection reasons *than* what is provided in the general notification is sufficient for access to effective review or remedies is *not* clear since this hypothesis *cannot* explain the disclosure of the winner's name.

Similarly, Article 55(2)(d) PSD allows almost a *full* disclosure of proceedings at the request of any tenderer, including the winner, without limiting the scope for that disclosure to the conduct and progress related to the applicant's negotiation and dialogue. That route inevitably overlaps other transparency obligations in the PSD, such as Article 53 PSD of the electronic availability of procurement documents. However, debriefing obligations are distinguished from other transparency obligations under the PSD, which somewhat explains why comparable rules in Article 2a(2) RD do *not* incorporate a *complete* set of transparency rules for the review procedure. Article 55(2)(d) PSD otherwise significantly increases abusive risks using *discretionary power*, leading to excessive disclosure. *Two questions* can determine the use of discretion on a *proportionate* basis. First, whether the extent of the disclosure only allows unsuccessful or unselected tenderers

to decide whether to initiate a proceeding for review or remedies. Second, whether that sort of information relates to a contract award decision on the request of the economic operators following Article 55(2)(d) PSD, which shall also be *unprocurable* on the grounds of indents (a) and (b) thereof.

In comparison, the RD enforces the automatic debrief by communicating information merely *necessary* for deciding to apply for either the review or remedies as a first step towards procurement integrity. In that respect, Article 2a(2) RD provides unsuccessful applicants with procedural guarantees since the automatic debrief triggers the standstill period essential to an effective oversight mechanism for the EU procurement activities. However, the wording of that provision also does not constraint the duration for the most extended standstill period at the EU level before the Member States' transposition. Also, more relevant precedents are expected to guide the contracting authorities on allocating time for the automatic debrief, considering the time-consuming proper examination of all available information at hand and a decision to withhold certain information. The author believes that immediate access to a monitoring system will enable economic operators to obtain sufficient information that suffices them to appreciate whether the award decision is *unlawful* under EU procurement rules.

2.3. Balances between the Procedural Rights and Confidentiality

Research question 3 asks about the procedural fairness of debriefing considering the rights entitled to interested parties in procurement, such as the right to be heard, obligation to give unsuccessful reasons, and the right to review and effect remedies, and a balance with the rights of confidentiality. Since securing access to a monitoring system is the *first* step towards its effectiveness, a review of the transposed procedural rights related to debriefing is necessary for compliance with the general principle of EU law and the CFR for coherence. Those relevant procedural rights were transposed from Article 41 on the right to good administration, Article 47 on the right to an effective remedy and a fair trial under the CFR, to Article 55 PSD and Article 2a(2) RD. The CJEU has consistently presented opinions towards those CFR fundamental rights in its precedents concerning EU administrative procedure, which illuminate their development of judicial practices for debriefing when applicable. To begin with, the author identifies those undefined matters in EU case-law that interprets the right to good administration, namely the scope of economic operators to the defence right and standards for administrative acts or decisions on unsuccessful reasons.

The Code[806] entitles individuals whose rights or interests are involved in the defence rights, while the CJEU only permits the persons adversely affected by a decision. Article 55 PSD takes *two* scopes under its indents: (1) for general notification and (2) for on-request debrief. In comparison, Article 2a(2) RD does not use the terms of 'unsuccessful' as in Article 55(2) or 'adversely affect' in line with Article 41(2)(a). Instead, it defines the candidate or tenderer as a 'concerned' subject to the communication of reasons. Different treatments are ambiguous since candidates can be deemed 'concerned' only if they have not been informed of the selection decisions. In that respect, only the contract award decisions can trigger the automatic debrief, while selection or exclusion decisions fall outside the scope of provisions. Furthermore, economic operators who have been excluded from participation in a procurement procedure shall not be notified of unsuccessful reasons under Article 55(1) PSD and Article 2a(2) RD. Those settings are deficient in protecting defence rights first hand.

The CJEU reveals *two* main legislative aims of providing the duty to give unsuccessful reasons in administrative proceedings. *First*, the adversely affected parties can ascertain the grounds to what extent they can expect that it is *worthwhile* to apply for review or remedies. *Second*, the judiciary may examine the effectiveness of the administrative decisions by reviewing the *elements* of decisions presented in the statement of reasons following the different legal routes for assessment. The former aim concerns the knowledge of the economic operators to exercise the defence rights, while the latter concerns the applicability of judicial review by a competent judicature having jurisdiction. The CJEU's judicial stance on the objective standard of the reasons given subject to the judicial review, points out that the contracting authority does not need to present subjective elements of the award or selection decision by its statement of reasons. The CJEU otherwise requires unsuccessful reasons to be justified as *reasonable,* so as to enable the EU judicature to understand the contested decision and, therefore, verify its compliance with EU law for public procurement. In addition, the CJEU requires that those objective reasons for justification be clear from a strict *proportionality* test when *excluding* certain economic operators from the procurement process on the grounds of equal treatment or transparency. To recap briefly, Article 55(2)(d) PSD fails a proportionality test by allowing the awardee to request debriefing and any tender to access almost full disclosure of unrelated proceedings, which makes the administrative act challenging.

[806] The European Code of Good Administrative Behaviour.

Second, the review body can either choose to review the effectiveness of the contract award decisions or award an appropriate remedy (Article 47). Article 47 has not been advised as an express instrument to regulating the review procedure, but as 'an *aid*' for interpreting general rules of EU law. Under the right to effective judicial protection, the CJEU aims to provide the interest parties with an actionable procedural right based on the assumption that it is 'worthwhile applying to the court having jurisdiction'. The author identifies the *critical* information the economic operator needs to understand before applying for the review or interim measures or setting aside the unsuccessful decisions. As for the grounds of ineffectiveness and the specific derogations, the economic operators can *easily* acquire the relevant information without communicating the reasons. The economic operator concerned, who requests the communication of unsuccessful reasons before the standstill period, only needs to ascertain whether the situation potentially falls under Article 2d(1)(b) RD or not, regardless of the result of a decision of such a review body.

If the candidate or tenderer has understood that the concluded contract is *not* possibly deemed ineffective according to Article 2d(1)(b) RD, it is clear that they may obtain other remedies under the RD. Any tenderer or candidate deemed to be 'concerned' in Article 2a(2) RD can apply for the pre-contractual remedies as soon as the standstill period begins and does not need to decide upon which type of remedy they may claim for before the standstill period. This indicates a *de jure* that communication of the reasons does not serve the tenderer's understanding of the possibility of declaring ineffectiveness, *but* for obtaining the pre-contractual remedies. Despite that, the economic operators who understand their positions in applying for remedies do not need sufficient information to enable them to identify a specific sort of remedy before initiating an application.

The effectiveness of the procedural rights by itself is an *indicator* for due process, an element to procedural fairness, which otherwise requires a dynamic balance between those procedural rights with confidentiality in terms of debriefing. Confidentiality rights include the right to trade and business secrets set as a general principle of EU case-law, the right to designate information as confidential arising from common law before being introduced into EU law and the rights of data subjects owing its origin from the CFR and TFEU. Considering fairness as a connecting factor to employ enforcement mechanisms from different fields of EU law, namely the fundamental rights, public procurement and data protection, this research examines *methods* to

balance *due process*. In most cases, the information to be notified in Article 55(2) PSD is associated with the confidence in applying for effective remedies.

Article 21 PSD on confidentiality at the level of EU law follows a discussion about the right to protect business or trade secrets established by the CJEU as a general principle. In terms of its application in debriefing, there remains uncertainty about the definition of business or trade secrets and the relevant approaches to justifying the contracting authority's actions or decisions on disclosure. The research, therefore, explores the TSD for a standard definition of 'trade secrets': (i) the information is secret in the sense that it is not, (ii) it has commercial value because it is secret and (iii) it has been subject to reasonable steps to maintain its secrecy. In UK practices, Information Tribunal describes trade secrets as specifically requiring a technical and industrial nature in a narrower scope than that in the TSD. Moreover, Section 43(2) FOIA covers the commercial prejudice exemption that is qualified when the public's interest in disclosure outweighs the interest in remaining confidential. For instance, there is a strong public interest in the case of non-disclosure where the investment is likely to have a potential impact on the competitive position of the tender concerned, such as the financial model to be withheld.

The principle of good administration of EU law also requires a balance between the compliance of the adversarial principle and the competing requirement for the protection of business secrets. Regarding its application in debriefing, the CJEU merely allows the *minimum* disclosure of information required to ensure effective access to legal remedies needed for the adversarial principle. However, the CJEU reminds the contracting authority that confidentiality is a *priority* duty, such as preserving the fundamental rights of a third party or safeguarding a vital public interest, before ensuring adversarial principle. Specifically, the CJEU should be more cautious relying on either the defence rights in Article 41(2)(a) CFR or the obligation to give reasons in Article 41(2)(c) CFR when it rules on the lawfulness of administrative acts or decisions during debriefing. Different legal foundations may lead to different explanations in balancing the confidentiality with other procedural rights in specific debriefing situations. Considering the requirements of defence rights, Article 55(2) PSD does *not* need to require the notification of the *name* of the selected tenderer since it is the contracting authority that the unsuccessful applicants file a complaint against, rather than a potential awardee.

Article 21(1) PSD obliges the contracting authority to secure the confidentiality of information designated by economic operators as confidential on a mandatory basis. Nevertheless, the

provision adopts a problematic method to provide an open interpretation of 'confidential aspects of tenders' for the contracting authority to determine within their discretion instead of specifying those confidential aspects. Besides, the contracting authority shall be aware of the difference between the scope of 'confidential aspects' in Article 21(1) and 'legitimate commercial interests' in Article 55(3). Information falling under the latter scope does not essentially meet the condition 'forwarded by economic operators which have been designated as confidential' – for the absolute exemption set out in Article 21. In Article 21(1), the expression of forwarded can be understood as equal to 'obtained' in section 41 of FOIA. Veolia ES Nottinghamshire v Limited Nottinghamshire County Council [2010] EWCA Civ 1214; [2012] PTSR 185 provides a clue that Rix LJ is not prone to take a *narrow* view by considering that the information can be understood as 'forwarded' by an economic operator if such information originates from that economic operator. By contrast, in the UK's common law, the Information Tribunal believes that once information is included in a contract, rather than only as a part of a tender document, it becomes *mutual*.

The mandatory enforcement of e-procurement in public procurement is not simply introducing electronic tools, which also allows the integration of *data-based* approaches throughout the procurement process. The situation triggers the application of the EU's data privacy law considering their substantive protection on the rights of the data subjects while collecting and processing personal data in e-procurement. One noticeable concern arises when tenderers or candidates are natural persons or legal representatives of a company (i.e., legal person), since *all* the conditions under the exclusion grounds (Article 57 PSD), selection criteria (Article 58 PSD) and contract award criteria (Article 67 PSD) are designed to evaluate the personal aspects of tenderers or candidates, when they are natural persons, or their legal representatives, when they are legal persons. In those circumstances, the contracting authority shall be cautious about disclosing personal data in debriefing. Another matter that raises concerns is when unsuccessful reasons for the rejection of the request to participate or the tender and characteristics and relative advantages of the tender selected in Article 55(1) and (2) PSD include the personal data concerning the employees and end-user customers subcontractors of the tenderer or candidates. That case is common since the selection criteria in Article 58(4) PSD may relate to technical and professional ability with requirements indicating necessary human and technical resources and experience to perform the contract to an appropriate quality standard.

2.4. Competition Instruments against Collusive Oligopoly

Research question 4 asks the function of debriefing in contributing to tacit collusion or coordination among economic operators in oligopolistic-featured public procurement markets and their compliance with the free movement, the EU procurement and competition rules. That concern arises when, as the research has previously noticed, PSD has imposed *higher* transparency requirements on debriefing, which amounts to the *same* effects with tacit collusion or coordination on the procurement market with oligopolistic nature in economics. That economic analysis in Section 2, Chapter 5 provides a stronger argument on the design of debriefing towards efficient allocation of *social welfare* rather than against, and thus premises the subsequent legal study with a theoretical basis. Although the CJEU considers EU public procurement rules as a legal tool *separate* from EU competition rules, they build on a long-term market competition contributing to the economy and society from the economist's viewpoint. However, the principle of competition in Article 18(1) PSD cannot deter coordination, collusion, or improper practices by oligopolies to restrict competition, which EU competition law considers in compliance with free movement.

There are several obstacles by the EU procurement rules to ensuring *open competition* set out by free movement enshrined in the TFEU when applied in a procurement regime. First, Article 18(1) PSD provides uncertain dimensions of the competition incompatible with the open competition established by the TFEU free movement rules. They simply observe the contracting authority's behaviours concerning competition between suppliers. In that respect, they cannot functionally prevent private participants from facilitating collusive oligopoly and thus impair the competition between the public and private buyers. Second, Article 18(1) PSD provides a problematic subjective element for determining the principle of competition, which imposes a heavy burden to prove 'intent'. However, the provisions and precedents have not concluded guidance about who should take those burdens and to which standard those are subject. Third, even though the oligopolistic nature of markets already prejudices the competition, the repeated game implies regulatory on-request debrief has *absolute* transparency and encourages market players to *stabilise* the tacit collusive oligopoly. By its the granted *scope* for arbitrary acts or decisions, Article 55(2) PSD could facilitate a *malicious* tenderer to *repeatedly* request information for tacit coordination in a lawful method. To that, the blurred wording of Article 55(2) PSD shall be reduced to a *minimum* before balancing competing interests on a case-by-case basis.

Despite ambiguous applicability and inconsistent clarity, Subsection 3.2, Chapter 5 provides another perspective from the EU competition rules that provides a kit of behavioural instruments to prevent tacitly coordinated oligopolies. According to EU case-law, to apply competition instruments, those procurement activities in the case must be primarily assessed about their *economic nature*. As regards to the available behaviour instruments from that kit, it is noticed that they lack the crucial elements of 'agreement' or 'communication' to *evidently* qualify either cartel, cooperation agreements or concerted practices in Article 101(1) TFEU. The CJEU has provided some indicators for identifying the concerted practices, though, especially in *a price-fixing case*, but those are far from precise and constantly describe the repeated interactions in economics. One parallel conduct, even if debriefing falls under its meaning, is unlikely to indicate the existing concerted practices. In other words, those coordinated practices do not automatically fall under the scope of EU competition rules other than carefully considering the many market *conditions* that formalise and stabilise such coordination.

This research also reviews the tool of unilateral facilitating practices by collective dominance exercised by mass bidders against the public buyers, accordingly, as presented by the auction theory prevalent in the procurement mechanism. As with the problem for qualifying the concerted practices in Article 101(1) TFEU, to capture tacitly coordinated oligopolies under Article 102 TFEU is also tricky considering the problem of evidence. The exchange of information is a typical facilitating practice that artificially increases market transparency, which is an essential element to tacitly collusive oligopoly. Nevertheless, precedents have indicated that the CJEU would not object to the exchange of information if, to an extent, it can identify individual players, either directly or indirectly, as a result on a case-by-case basis. Those factors, to what extent the exchange of information, directly or indirectly, might harm competition, can be used to control collusive oligopoly facilitated by debriefing when competition rules apply procurement for open competition.

In conclusion, this thesis provides a unique standpoint to observe the *tensions* between transparency and competition and sensible tactics to balance them. In this case, the thesis proves that debriefing has consolidated objectives created by the regulatory EU directives for its transitional adaption, i.e., the PSD and the RD. That is because debriefing overlaps the award and the review procedures for public procurement, respectively regulated by those *two* directives. That character makes the regulatory debriefing stand out as a particular apparatus with the formulated objectives rather than a 'one-size fits all' adaption when transposing the

principle of transparency into procedural requirements for legal effectiveness within the procurement system. In tackling those tensions, this thesis takes an objective-oriented approach by designing a specialised *coordinate system* to observe and achieve the defined objectives. This coordinate system provides integrity tools, procedural rights, data subject rights, confidentiality, and competition instruments using interdisciplinary studies across EU law and economic theories, such as the game, auction, and collusive oligopoly. That coordinate system with the designed objectives directs a creative blueprint to EU procurement practitioners who have implemented debriefing without giving solid attention to tensions between transparency and competition.

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