Effective remedies in public procurement

Bugeja, Joe

DOI:
10.33612/diss.785024415

Effective Remedies in Public Procurement: The Case for Enhanced Harmonisation

Joseph Bugeja

Financial support for the printing of this thesis was kindly provided by
Rijksuniversiteit Groningen

Printed by: Ridderprint BV, Ridderkerk, the Netherlands

ISBN: 978-94-6483-422-2

university of groningen

Effective Remedies in Public Procurement: The Case for Enhanced Harmonisation

PhD thesis

to obtain the degree of PhD at the
University of Groningen
on the authority of the
Rector Magnificus Prof. Dr. Ir. J.M.A. Scherpen
and in accordance with
the decision by the College of Deans.

This thesis will be defended in public on

Thursday 5 October 2023 at 16.15 hours

by

Joseph Bugeja

born on 23 April 1969
in Attard, Malta

Supervisors

Prof. L.W. Gormley
Prof. H.D. van Romburgh

Assessment Committee

Prof. G.P. Mifsud Bonnici
Prof. A.L.B. Colombi Ciacchi
Prof. G.W.A. van de Meent

DEDICATION

To my wife Valerie, my daughter Phyllisienne and my son Daniel, for their love, unfailing support and patience.

ABSTRACT

Public procurement is becoming an increasingly important tool of economic growth, mainly due to the increased role of the public procurement's contribution to the Gross Domestic Product ("GDP") of world economies. Public procurement law and policy embrace the principles and procedures that guide contracting authorities and entities that purchase works, goods or services on the market.

Public procurement law is intended to ensure that public funds are spent efficiently, that quality is ensured, while obtaining the best price possible. Fair, non-discriminatory, competitive, transparent and value for money tendering processes contribute to a country's economic development and sound financial management. In return, contracting authorities and economic operators reap economic benefits as well, besides contributing to boost international trade in goods, services and the purchase of works, thus increasing economic growth.

Directive 89/665/EEC[1] and Directive 92/13/EEC[2], as further amended by Directive 2007/66/EC[3] ("Remedies Directives") are the available EU legal instruments to ensure that effective remedies are available in the Member States in instances where an aggrieved bidder who has participated in a public procurement process seeks redress. The Remedies Directives, being minimum Directives, leave a lot of discretion available to the Member States, which coupled with the principle of judicial autonomy, leads to differences in providing effective remedies to injured bidders across the Member States. The Remedies Directives aim to coordinate the judicial remedies in the Member States as much as possible with the ultimate aim being to reach uniform application, legal certainty and effective remedies in the Member States.

Besides providing effective remedies, the domestic laws of the Member States need to ensure that necessary checks and balances are adopted and maintained, such that decisions taken by

[1] Council Directive (EEC) 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L 395/30 (Directive 89/665/EEC).
[2] Council Directive (EEC) 92/13 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1992] OJ L 76 (Directive 92/13/EEC).
[3] Directive (EC) 2007/66 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 (Directive 2007/66/EC).

the contracting entities are reviewed expeditiously to avoid further risks of possible award decisions infringing public procurement legislation.

At the moment, public procurement remedies and review bodies are essentially governed by the various national laws of the Member States of the EU, but EU law requires the Member States to offer at least certain remedies, whilst granting national systems discretion in determining and enforcing such remedies.

Therefore, following an examination of the Remedies Directives, this thesis seeks to answer the question whether there is scope for further harmonisation of the award of damages by the Member States' national courts and whether there is scope for further streamlining the review bodies in the Member States which award these remedies. Given that this necessity has been affirmed, namely that there is scope for further harmonisation of the heads of damages and the review bodies, changes are being proposed to the aspects of award of damages and review bodies in the Remedies Directives, including the consolidation of the three Remedies Directives into one Directive. These proposed changes are the result of a comparative study of remedies in public procurement law in four Member States namely Malta, Italy, the Netherlands and France, and also by the examination of CJEU jurisprudence.

This thesis argues that equal judicial protection is imperative in the Single European Market, so that all aggrieved bidders are treated equally, no matter in which jurisdiction they wish to challenge decisions they regard as unlawful. In order to achieve effectiveness, equivalence and uniformity in the remedies provided, it is also being suggested that it would be preferable to ensure protection at EU level by means of a regulation rather than by means of the current Remedies Directives which leave too much discretion open to the Member States, to the disadvantage of claimants.

TABLE OF CONTENTS

TABLE OF LEGISLATION

Dutch Legislation

Aanbestedingswet [Dutch Public Procurement Act], 2012 <https://wetten.overheid.nl/BWBR0032203/2019-04-18#Deel4_Hoofdstuk4.4>
Burgerlijk Wetboek (BW) Boek 6 [Dutch Civil Code] (1992) <https://wetten.overheid.nl/BWBR0005289/2020-07-01#Boek6_Titeldeel3_Afdeling1_Artikel162>
Wetboek van Burgerlijke Rechtsvordering [Dutch Code of Civil Procedure] <https://wetten.overheid.nl/BWBR0001827/2021-07-01#BoekEerste_TiteldeelTweede_AfdelingVeertiende_Artikel254>

European Union Legislation

'Charter of Fundamental Rights of the European Union' Official Journal C 326, p. 391–407
'Commission interpretative communication on concessions under Community law' Official Journal C 121, p. 2–13
'Commission interpretative communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement' Official Journal C 333, p. 12–26
'Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, 2006/C 179/02' Official Journal C 179/2, p. 2–7
'Commission Staff Working Document Evaluation Of The Modifications Introduced By Directive 2007/66/EC To Directives 89/665/EEC And 92/13/EEC Concerning The European Framework For Remedies In The Area Of Public Procurement/ Refit Evaluation Accompanying the document 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' SWD/2017/013 final
'Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts' (1989) Official Journal L 395, p. 33–35
'Council Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors' (1992) Official Journal L 76, p. 14–20
'Directive 2007/66/EC of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (Text with EEA relevance)' (2007) Official Journal L 335, p. 31–46
'Directive 2014/23/EU of the European Parliament and of the Council on the award of concession contracts Text with EEA relevance' (2014) Official Journal L 94, p. 1–64
'Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance (public sector)' Official Journal L 94, p. 65–242
'Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC Text with EEA relevance (utilities sector)' Official Journal L 94, p. 243–374
'Explanatory Note - Utilities Directive Definition of Exclusive or Special Rights on Directive 2004/17/EC' European Commission

'Explanatory Note – Contracts Involving more than one Activity on Directive 2004/17/EC' European Commission
'Explanatory Note on Competitive Dialogue on Directive 2004/18/EC' European Commission
'Explanatory Note on Framework Agreements on Directive 2004/18/EC' European Commission, 16 February 2016
'Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement' Official Journal C 333, p. 27–41
'Treaty on European Union' Official Journal of the European Communities C 325/5; 24 December 2002
'Treaty on the Functioning of the European Union' Official Journal C 326, p. 47–390; 26 October 2012

French Legislation

Code de justice administrative [CJA] [Code of Administrative Justice]; <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070933?tab_selection=all&searchField=ALL&query=justice+administrative&page=1&init=true>
Code de la commande publique [CCP] [Public Procurement Code]; <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000037701019?tab_selection=all&searchField=ALL&query=code+de+la+commande&page=1&init=true>
Décret n° 2016-360 du 25 mars 2016 relatif aux marchés publics [Decree No. 2016-360 of March 25, 2016 relating to public procurement], [Journal Officiel de la Republique Francais [J.O.] [Official Gazette of France], 25th March 2016; <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000032295952/2019-03-31/?isSuggest=true>
Décret n° 2016-361 du 25 mars 2016 relatif aux marchés publics de défense ou de sécurité [Decree No. 2016-361 of March 25, 2016 relating to public defense or security contracts], [Journal Officiel de la Republique Francais [J.O.] [Official Gazette of France], 25th March 2016; <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000032296743/2019-03-31/?isSuggest=true>
Décret n° 2016-86 du 1er février 2016 relatif aux contrats de concession; [Decree No. 2016-86 of 1st February, 2016 relating to concession contracts], [Journal Officiel de la Republique Francais [J.O.][Official Gazette of France], 1st February 2016; <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000031963717/2020-10-12/>
L'ordonnance no 2015-899 du 23 juillet 2015 relative aux marchés publics [Ordinance no. 2015-899 of 23rd July, 2015 relating to public procurement], [Journal Officiel de la Republique Francais [J.O.][Official Gazette of France], 23rd July 2015; <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000030920376/2020-10-12/>
Loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique; [Law No. 2016-1691 of December 9, 2016 on transparency, the fight against corruption and the modernization of economic life], [Journal Officiel de la Republique Francais [J.O.] [Official Gazette of France], 9th December 2016 <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000033558528/?isSuggest=true>
N° 678 Sénat du 29 juillet 2020 [<N° 678 Senate of 29th July 2020>], Proposition de loi portant réforme de la responsabilité civile [Bill reforming civil liability], Journal Officiel de la Republique Francais [J.O.] [Official Gazette of France], 29th July 2020; <https://www.senat.fr/leg/ppl19-678.pdf>
Ordonnance n° 2016-65 du 29 janvier 2016 relative aux contrats deconcession [Ordinance no. 2016-65 of January 29, 2016 relating to concession contracts], [Journal Officiel de la Republique Francais [J.O.] [Official Gazette of France], 29th January 2016; <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000031939947/2019-03-31/?isSuggest=true>
Projet de Réforme de la Responsabilité Civile Mars 2017 [Civil Liability Reform Project] (Ministère de la Justice), Chapitre IV – Les effets de la responsabilité, Section 1- Dispositions communes aux

responsabilités contractuelle et extracontractuelle, Sous-section 1 - Le préjudice réparable (Articles 1235-1238) [Provisions common to contractual and extra-contractual liability, Sub-section 1 - Reparable damage (Articles 1235-1238)]; <http://www.justice.gouv.fr/publication/Projet_de_reforme_de_la_responsabilite_civile_13032017.pdf>

International Agreements

World Trade Organisation - Revised Agreement on Government Procurement

Italian Legislation

Codice Civile (CC) [Italian Civil Code] <https://faolex.fao.org/docs/pdf/ita197336.pdf>
Decree no 50/2016, Codice dei contratti pubblici [Code of Public Contracts] [Italy]
Decreto legislativo 31 marzo 2023, n. 36 Codice dei contratti pubblici in attuazione dell'articolo 1 della legge 21 giugno 2022, n. 78, recante delega al Governo in materia di contratti pubblici (G.U. n. 77 del 31 marzo 2023 - S.O. n. 12)
Legislative Decree No.36/2023 (new Public Contracts Code)
Legislative Decree number 104/2010 (the Code of the Administrative Trial)

Maltese Legislation

Chapter 12 of the Laws of Malta, Code of Organisation and Civil Procedure
Chapter 16 of the Laws of Malta, Civil Code
Chapter 174 of the Laws of Malta, Financial Administration and Audit Act – abrogated
Chapter 601 of the Laws of Malta, Public Finance Management Act

Maltese Subsidiary Legislation

Subsidiary Legislation 174.04 of the Laws of Malta, Public Procurement Regulations 2010 - abrogated
Subsidiary Legislation 601.01 of the Laws of Malta, General Financial Regulations 2017
Subsidiary Legislation 601.03 of the Laws of Malta, Public Procurement Regulations 2016
Subsidiary Legislation 601.05 of the Laws of Malta, Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations
Subsidiary Legislation 601.07 of the Laws of Malta, Public Procurement of Contracting Authorities or Entities in the fields of Defence and Security Regulations
Subsidiary Legislation 601.08 of the Laws of Malta, Emergency Procurement Regulations
Subsidiary Legislation 601.09 of the Laws of Malta, Concessions Contracts Regulations

TABLE OF CASES

Court of Justice of the European Union (CJEU) Case Law

AFCon Management Consultants, Patrick Mc Mullin and Seamus O'Grady v Commission of the European Communities [2005] ECR II-00981
Agraz and Others v Commission [2008] ECLI:EU:T:2008:497 not published
Agriconsulting– Europe SA v European Commission (C-198/16 P) [2017] ECLI:EU:C:2017:784 not yet published (Court Reports - general)
Alcatel Austria AG and Others, Siemens AG Österreich and Sag-Schrack Anlagentechnik AG v Bundesministerium für Wissenschaft und Verkehr (C-81/98) [1999] ECR I-07671
Andrea Francovich and Danila Bonifaci and others v Republic of Italy (C-6/90 and C-9/90) [1991] I-05357
Andrea Francovich v Italian Republic (C-479/93) [1995] ECR I-03843
Arkkitehtuuritoimisto Riitta Korhonen Oy, Arkkitehtitoimisto Pentti Toivanen Oy and Rakennuttajatoimisto Vilho Tervomaa v Varkauden Taitotalo Oy (C-18/01) [2003] I-5321
Bayerischer Rundfunk and Others v GEWA - Gesellschaft für Gebäudereinigung und Wartung mbH (C-337/06) [2007] I-11173
Brasserie du Pecheur SA v Republic of Germany and The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others (C-46/93 and C-48/93) [1996] I-1029
Bundesdruckerei GmbH v Stadt Dortmund (C-549/13) [2014] ECLI:EU:C:2014:2235 published in the electronic Reports of Cases (Court Reports - general)
Club Hotel Loutraki AE and Others v Ethnico Symvoulio Radiotileorasis and Ypourgos Epikrateias (C-145/08) and Aktor Anonymi Techniki Etaireia (Aktor ATE) v Ethnico Symvoulio Radiotileorasis (C-149/08) (C-145/08 and C-149/08) [2008] I-04165
Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others v Provincie Drenthe (C-568/08) [2010] I-12655
Commission of the European Communities v Federal Republic of Germany (C-503/04) [2007] I-06153
Commission of the European Communities v French Republic (C-327/08) [2009] I-00102
Commission of the European Communities v Kingdom of Spain (C-444/06) [2008] I-02045
Commission of the European Communities v Portuguese Republic (C-275/03) [2004], EU:C:2004:632
Commission of the European Communities v Portuguese Republic (C-70/06) [2006] I-00001
Commission v Austria (C-212/02) [2004] ECLI:EU:C:2004:386 Not yet published
Connexxion Taxi Services BV v Staat der Nederlanden (Ministerie van Volksgezondheid, Welzijn en Sport) and Others (C-171/15) [2016] ECLI:EU:C:2016:948 published in the electronic Reports of Cases (Court Reports - general)
Consorci Sanitari del Maresme v Corporació de Salut del Maresme i la Selva (C-203/14) [2015] published in the electronic Reports of Cases (Court Reports - general)
Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others (C-453/99) [2001] ECR I-6297
Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH (C-54/96) [1997] I-04961
Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v Bundesrepublik Deutschland (C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94) [1996] ECR I-04845
Espace Trianon SA and Société wallonne de location-financement SA (Sofibail) v Office communautaire et régional de la formation professionnelle et de l'emploi (FOREM) (C-129/04) [2005] ECR I-07805
European Commission v Ireland (C-455/08) [2009] I-00225

European Union Intellectual Property Office v European Dynamics Luxembourg SA and–Others (C 376/16 P) [2018] ECLI:EU:C:2018:299 published in the electronic Reports of Cases (Court Reports - general)
Forposta SA and ABC Direct Contact sp. z o.o. v Poczta Polska SA (C-465/11) [2012] ECLI:EU:C:2012:801 published in the electronic Reports of Cases (Court Reports - general)
Galileo International Technology LLC and Others v European Commission (T-279/03) [2006] II-01291
Gerhard Köbler v Republik Österreich (C-224/01) [2003] ECR I-10239
Grossmann Air Service v Austria (C-230/02) [2004] ECR I-01829
Helmut Müller GmbH v Bundesanstalt für Immobilienaufgaben (C-451/08) [2010] I-02673
Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Stadt Wien (C-92/00) [2002] ECR I-05553
Impact v Minister for Agriculture and Food and Others (C-268/06) [2008] ECR I-02483
Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission of the European Communities (C-352/98) [2000] I-05291
Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary (222/84) [1986] 01651Swedish VIII/00597 Finnish VIII/00621
Metallgesellschaft Ltd and Others (C-397/98), Hoechst AG and Hoechst (UK) Ltd (C-410/98) v Commissioners of Inland Revenue and HM Attorney General (C-397/98 and C-410/98) [2001] ECR I-01727
Ministe–o dell'Interno v Fastweb SpA (C-19/13) [2014] published in the electronic Reports of Cases (Court Reports - general)
MT Højgaard A/S and Züblin A/S v Banedanmark (C-396/14) [2016] ECLI:EU:C:2016:347 published in the electronic Reports of Cases (Court Reports - general)
Orizzonte Salute - Studio Infermieristico Associato v Azienda Pubblica di Servizi alla persona San Valentino – Città di Levico Terme –nd Others (C-61/14) [2015] ECLI:EU:C:2015:655 published in the electronic Reports of Cases (Court Reports - general)
Pfleiderer AG v Bundeskartellamt (C-360/09) [2011] ECR I-05161
Rosalba Palmisani v Istituto nazionale della previdenza sociale (INPS) [1997] (C-261/95) ECR I-4025
Safa Nicu Sepahan Co. v Council of the European Union (T-384/11) [2014] ECLI:EU:T:2014:986 published in the electronic Reports of Cases (Court Reports - general)
Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein (C-424/97) [2000] ECR I-05123
Santex SpA v Unità Socio Sanitaria Locale n. 42 di Pavia, and Sca Mölnlycke SpA, Artsana SpA and Fater SpA (C-327/00) [2003] ECR I-01877
Stadt Graz v Strabag AG and Others (C-314/09) [2010] I-08769
Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna (C-26/03) [2005] I-00001
The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd (C-5/94) [1996] ECR I-02553
Traghetti del Mediterraneo SpA v Repubblica Italiana (C-173/03) [2006] ECR I-05177
Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern (C-432/05) [2007] I-02271
Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others (222/86) [1987] 04097 Swedish IX/00223 Finnish IX/00225
Universale-Bau AG, Bietergemeinschaft v. Entsorgungsbetriebe Simmering GmbH (C-470/99) [2002] ECR I-11617
Vakakis kai Synergates - Symvouloi gia Agrotiki Anaptixi AE Meleton, formerlyVakakis International - Symvouloi gia Agrotiki Anaptixi AE v European Commission (T-292/15) [2018] ECLI:EU:T:2018:103 not yet published (Court Reports - general)
Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v Fondiaria Sai SpA (C-296/04) and Nicolò Tricarico (C-297/04) and Pasqualina Murgolo (C-298/04) v Assitalia SpA (C-295/04 to C-298/04) [2006] ECR I-06619

Vorabentscheidungsersuchen des Bundesvergabeamtes): Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT) gegen Österreichische Autobahnen und Schnellstraßen AG (ÖSAG) (C-315/01) [2003] I-06351

Dutch Case Law

Court of Maastricht, 28 August 2003, ECLI:NL:RBMAA:2003:AI1604
Court of the Hague, 8 May 2009, ECLI:NL:RBSGR:2009:BI3892
Supreme Court 19 June 2015. Pub electr ECLI:NL:HR-2015:1683
Supreme Court, 22 April 2022, ECLI:NL:HR:2022:627
The Hague Appeal Court 22, September 2015, pub electr ECLI:NL:GHDHA:2015:2466

EFTA Court Case Law

Fosen-Linjen AS, supported by Næringslivets Hovedorganisasjon (NHO) v AtB AS (E-7/18) [2019]
Fosen-Linjen v AtB (E-16/16) [2017] [2017] EFTA Ct. Rep. 617

English and Welsh Case Law

Alstom Transport v Eurostar International Ltd [2010] EWHC B32 (Ch) (Vos J.)
European Dynamics SA v HM Treasury [2009] EWHC 3419 (TCC) Case No: 2009-TCC (Mr Justice Akenhead)
Mears Ltd v Leeds City Council [2011] EWHC 40 (QB) Case No: HQ10X03878 (The Hon. Mr. Justice Ramsey)
Nuclear Decommissioning Authority v Energy Solutions EU Ltd (now called ATK Energy EU Ltd) [2017] UKSC 34
Nuclear Decommissioning Authority v Energy Solutions EU Ltd (now called ATK Energy EU Ltd) [2015] EWCA Civ 1262

European Court of Human Rights

Klass and Others v Germany, (1978) Series A no 28
Leander v Sweden (1987) Series A no 116

French Case Law

Conseil d'État (CE), 13 mai 1970, n° 74601, Monti c/ Commune de Ranspach - publié au recueil Lebon [State Council, 13th May, 1970, No. 74601, Montic/ Commune de Ranspach - published in the Lebon collection], [Journal Officiel de la Republique Francais [J.O.][Official Gazette of France], [13th May 1970] <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000007640326?tab_selection=cetat&searchField=NUM_DEC&query=74601&page=1&init=true&dateDecision=>
Conseil d'État (CE), 26 janvier. 1973, n° 84768, Ville de Paris c/ Driancourt – Publié au receuil Lebon; [State Council, 26th January 1973, n°84768, City of Paris c/ Driancourt – Published in the collection Lebon], [Journal Officiel de la Republique Francais [J.O.][Official Gazette of France], [26th January 1973] <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000007645197>
Conseil d'État (CE), 18 juin 2003, n° 249630, Groupement d'entreprises solidaires ETPO Guadeloupe, Société Biwater et Société Aqua TP - mentionné aux tables du recueil Lebon[State Council, 18th June, 2003, No. 249630, Groupement d'entreprises solidaires ETPO Guadeloupe, Société Biwater and Société Aqua TP - mentioned in the tables of the Lebon collection], [Journal Officiel de la Republique Francais [J.O.][Official Gazette of France], [18th June 2003] <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000008139005?tab_selection=cetat&searchField=NUM_DEC&query=249630&page=1&init=true&dateDecision=>

Conseil d'État (CE), 10 mai 2006, n° 288435, Société Schiocchet - Mentionné dans les tables du recueil Lebon [State Council, 10th May, 2006, n° 288435, Société Schiocchet - Mentioned in the tables of the Lebon collection], [Journal Officiel de la Republique Francais [J.O.] [Official Gazette of France], [10th May 2006]
<https://www.legifrance.gouv.fr/ceta/id/CETATEXT000008255724/>

Conseil d'Etat (CE), 16 juillet 2007, n° 291545, Société Tropic Travaux Signalisation - Publié au recueil Lebon [State Council, July 16, 2007, n° 291545, Société Tropic Travaux Signalisation - Published in the Lebon collection], [Journal Officiel de la Republique Francais [J.O.] [Official Gazette of France], [16th July 2007];
<https://www.legifrance.gouv.fr/ceta/id/CETATEXT000018744539?isSuggest=true>

Conseil d'État (CE), 11 mai 2011, n° 347002, Société Rebillon Schmit Prevot - Publié au recueil Lebon; [State Council, May 11, 2011, n° 347002, Société Rebillon Schmit Prevot - Published in the Lebon collection], [Journal Officiel de la Republique Francais [J.O.] [Official Gazette of France], [11th May 2011]
<https://www.legifrance.gouv.fr/ceta/id/CETATEXT000023997044/>

Conseil d'État (CE), 1 juin 2011, n° 346405, Société KONE - Publié au recueil Lebon [State Council, 26th January, 1973, n°84768, City of Paris c/ Driancourt – Published in the collection Lebon], [Journal Officiel de la Republique Francais [J.O.] [Official Gazette of France], [1st June 2011];
<https://www.legifrance.gouv.fr/ceta/id/CETATEXT000024115582/>

Conseil d'État (CE), 23 janvier 2012, n° 346970, Commune de Six-Fours-les-Plages - Publié au recueil Lebon[State Council, 23rd January, 2012, No. 346970, Municipality of Six-Fours-les-Plages - Published in the Lebon collection], [Journal Officiel de la Republique Francais [J.O.] [Official Gazette of France], [23rd January 2012]
<https://www.legifrance.gouv.fr/ceta/id/CETATEXT000025284563>

Conseil d'État (CE), 7 mai 2013, n° 364833, Département de Paris - unpublished, [State Council, 7th May, 2013, n° 364833, Department of Paris - unpublished], [Journal Officiel de la Republique Francais [J.O.] [Official Gazette of France], [7th May 2013], par. 6
<https://www.legifrance.gouv.fr/ceta/id/CETATEXT000027397730/>

Conseil d'État (CE), 4 avril 2014, n° 358994, Département de Tarn-et-Garonne - Publié au recueil Lebon; [State Council, April 4, 2014, No. 358994, Department of Tarn-et-Garonne - Published in the Lebon collection], [Journal Officiel de la Republique Francais [J.O.] [Official Gazette of France], [4th April 2014]
<https://www.legifrance.gouv.fr/ceta/id/CETATEXT000028823786/>

Conseil d'État (CE), 17 juin 2015, n° 388596, Société Philip Frères - Mentionné dans les tables du recueil Lebon [State Council, 17th June, 2015, n° 388596, Société Philip Frères - Mentioned in the tables of the Lebon collection], [Journal Officiel de la Republique Francais [J.O.] [Official Gazette of France], [17th June 2015], par. 6
<https://www.legifrance.gouv.fr/ceta/id/CETATEXT000030750275/>

Conseil d'État (CE), 20 janvier 2016, n° 394133, Derichebourg Polyurbaine - Mentionné dans les tables du recueil Lebon [State Council, 20 January 2016, n° 394133, Derichebourg Polyurbaine - Mentioned in the tables of the Lebon collection, para. 7], [Journal Officiel de la Republique Francais [J.O.] [Official Gazette of France], [20th January 2016], par. 7;
<https://www.legifrance.gouv.fr/ceta/id/CETATEXT000031938415/>

Conseil d'Etat (CE), 3 juin 2020, n° 428845, BEAH - Mentionné dans les tables du recueil Lebon;
<https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-06-03/428845>

Conseil d'État (CE), 10 juin 2020, n° 431194, Ministère de la défense - Mentionné dans les tables du recueil Lebon, [State Council, 10th June, 2020, n° 431194, Ministry of Defense - Mentioned in the tables of the Lebon collection], [Journal Officiel de la Republique Francais [J.O.] [Official Gazette of France], [10th June 2020], para 3 and 6
<https://www.legifrance.gouv.fr/ceta/id/CETATEXT000041986881/>

Conseil d'Etat (CE), 20 novembre 2020, n° 428156, Association Trans'Cub et autres - Mentionné dans les tables du recueil Lebon;
<https://www.legifrance.gouv.fr/ceta/id/CETATEXT000042545455?tab_selection=all&searchFiel d=ALL&query=428156+&page=1&init=true>

Italian Case Law

Cassazione Civile, Sez. II., 11 marzo 2016, n. 4718 (Pres. Matera, rel.Falabella)
Cassazzione Civile, Sez. I, 21 giugno 2016, n. 12812 (ud. 12/04/2016, dep. 21/06/2016)
Cassazione Civile, Sez. Lavoro, 9 maggio 2018, n. 11165
Cassazzione Civile, Sez. Lavoro, 15 ottobre 2018, n. 25727 (ud. 13/06/2018, dep. 15/10/2018)
Consigilio di Stato, Sez. V. 15 novembre 2019, n. 7845
Consiglio di Gustizia, AMM. Sicilia, 15 ottobre 2020, n. 914
Consiglio di Stato Sez. VI, 13 settembre 2021, n. 6268
Consiglio di Stato, Sez. VI, 13 settembre 2021, n. 6298 (Pres. Volpe, Est. Simeoli)
Tribunale di Torino, sentenza, 11 ottobre 2021 n. 4523/2021
Cassazione Civile, Sez. Lavoro, 21 gennaio 2022, n.1884/2022 (ud. 21/12/2021, dep. 21/01/2022)
Cassazione Civile, Sez. VI,17 febbraio 2022, n. 5231

Irish Case Law

FP McCann Limited v The Department for Regional Development [2020] NIQB 51 COL11257 (Colton J)

Maltese Case Law

Anthony Baldacchino noe vs. Chairman tal-Korporazzjoni Enemalta et, Civil Court (First Hall), 11 October 2006, Case no: 1721/1996/1/PS
Anthony Bezzina noe vs. Direttur tal-Kuntratti et, Court of Appeal (Superior Jurisdiction), 26 June 2009, Case no: 170/2002/1
Avukat Peter Fenech noe vs. Dirpartiment tal-Kuntratti, Court of Appeal (Superior Jurisdiction), 29 April 2016, Case no: 977/2009/1
B.Grima & Sons Ltd. vs. Transport Malta et, Court of Appeal (Superior Jurisdiction), 11 August 2014, 222/2014/1
Bonnici Brothers Limited et vs. Direttur tal-Kuntratti, Court of Appeal (Inferior Jurisdiction), 29 April 2015, Case no. 12/2012/AE
Bonnici Brothers Limited et vs. Dipartiment tal-Kuntratti, Court of Appeal (Inferior Jurisdiction), 7 October 2016, Case no: 12/2012/1/AE
Bonnici Brothers Limited et vs. Direttur Tal-Kuntratti, Court of Appeal (Inferior Jurisdiction), 29 April 2015, Case no: 12/2012/EG
Carmelina Busuttil vs. Salvatore Muscat, Civil Hall (First Court), 28 October 1998
Cateressence Limited et vs Id-Direttur Tal-Kuntratti noe et, Court of Appeal (Superior Jurisdiction), 14 February 2017, Case no: 380/2016
Cherubino Limited vs Id-Direttur (Ġenerali) tal-Kuntratti et, Court of Appeal (Superior Jurisdiction), 6 February 2015, Case. no: 426/2014
Clentec Limited vs. Direttur tal-Kuntratti et, Court of Appeal (Inferior Jurisdiction), 27 October 2015, Case no: 49/2012/AE
Daniela Debattista noe vs. JK Properties Ltd, Court of Appeal (Inferior Jurisdiction), 7 December 2005, Case no: 840/2004/1
De Tigne Limited vs Lorna Micallef, Court of Appeal (Inferior Jurisdiction), 10 January 2007, Case no: 353/2002/1
Denfar & Zoqdi Construction Ltd vs. Direttur Tal-Kuntratti Et, Civil Court (First Hall), 8 October 2004, Case no: 2794/1998/1/GV
Design & Technical Resources Limited et vs Id-Direttur Generali Tal-Kuntratti et, Court of Appeal (Inferior Jurisdiction), 19 December 2017, Case no: 7/2013

Design & Technical Resources Ltd et vs The Director General (Contracts), Court of Appeal (Inferior Jurisdiction), 19 December 2017, Case no: 8/2013
Design Solutions Limited vs. Direttur Tal-Kuntratti Et, Civil Court (First Hall), 23 October 2018, Case no: 692/2015/AF
Design Solutions Limited vs. Direttur tal-Kuntratti et, Court of Appeal (Inferior Jurisdiction), 29 November 2012, Case no: 32/2011/RCP
Design Solutions Limited vs. Direttur Tal-Kuntratti et, Court of Appeal (Superior Jurisdiction), 29 April 2015, Case no: 32/2011/1
Dipartiment tal-Kuntratti et vs. Anthony Borg, Court of Appeal (Superior Jurisdiction), 26 June 2015, Case no: 778/2004/1
Direttur Tal-Kuntratti vs. Office Electronics Limited, Civil Court (First Hall), 22 October 2004, Case no: 707/1998/1/NC
Domain Academy Ltd vs. Direttur tal-Kuntratti, Court of Appeal (Superior Jurisdiction), 25 September 2015, Case no: 184/2015/1
Dr Jose Herrera noe vs. Gaetano Debattista et noe, Civil Court (First Hall), 21 April 2004, Case no: 1699/1995/1/PS
Dr. Francis B. Vassallo noe vs. Direttur tal-Kuntratti, Court of Appeal (Inferior Jurisdiction), 8 January 2010, Case no: 19/2009/PS
Elettronica Veneta S.p.A. vs. Direttur tal-Kuntratti, Civil Court (First Hall), 10 January 2011, Case no: 837/2009/GCD
Elia Grixti vs. Mark Grech, Civil Court (First Hall), 3 April 1998, Case number 222/98/NVA
Francine Mercieca et noe vs. Direttur Generali (Kuntratti), Civil Court (First Hall), 5 December 2014, Case no: 1770/2014/1
Francis Caruana vs. Joseph Vella, Civil Hall (First Court), 28 January 1983
Frank Portelli noe vs. Onor. Michael Falzon, Civil Court (First Hall), 18 May 2001, Case no: 78/1991/1/SD
Frankie Fava vs. Enemalta Corporation, Civil Court (First Hall), 10 July 2008, Case no: 1005/2007/GCD
Gio Maria Grima vs. Gregorio Zammit, Court of Appeal, 5 March 1937
Intermarket Stationery Limited vs. Direttur tal-Kuntratti, Court of Appeal (Superior Jurisdiction), 29 April 2015, Case no: 375/2014/1
J.F Security and Consultancy Services Ltd vs. Dipartiment Tal-Kuntratti et, Court of Appeal (Inferior Jurisdiction), 28 March 2014, Case no: 30/2012/JF
Joe Micallef & Son Express Skip Services Limited vs Id-Direttur Tal-Anzjani U Kura Fil-Komunita, et, Court of Appeal (Superior Jurisdiction), 27 June 2014, 89/2014/1
Koperattiva Ghawdxija Indafa Pubblika vs. Kunsill Lokali Nadur, Court of Appeal (Inferior Jurisdiction), 17 May 2012, Case no: 36/2011/RCP
L-Avukat Kenneth Grima noe vs. Direttur tal-Kuntratti, Court of Appeal (Superior Jurisdiction), 28 June 2013, Case no: 115/2013/1
L-Avukat Peter Fenech noe vs. Dipartiment tal-Kuntratti, Civil Court (First Hall), 14 February 2012, Case no: 977/2009/JZM
Lino Chircop vs. Direttur tal-Kuntratti, Court of Appeal, 30 March 2001, Case no: 1536/98/RCP
Maureen Anne Fabri et vs. Global Capital Financial Management Limited, Civil Court (First Hall), 8 May 2014, Case no: 694/2013/JRM
MTR Contracting Limited vs Id-Direttur Tal-Kuntratti et, Court of Appeal (Superior Jurisdiction), 28 June 2013, Case no: 64/2013/1
Perit Joseph Boffa vs. John A. Mizzi, Court of Appeal (Superior Jurisdiction), 21 June 2005, Case no: 285/1994/2
Phillip Seguna et vs. Kunsill Lokali Zebbug, Court of Appeal Civil (Superior Jurisdiction) 3 October 2008, Case no: 934/1998/1
Pillow Space Frame Limited vs. Direttur Generali tal-Kuntratti, Court of Appeal (Superior Jurisdiction), 7 August 2013, Case no: 176/2013/1

Projekte Global Limited vs. Kunsill Lokali Marsaskala, Court of Appeal (Superior Jurisdiction), 7 October 2014, Case no: 253/2014/1
Rockcut Limited vs. Bord Ta' Revizjoni Dwar Il-Kuntratti Pubblici et, Court of Appeal (Inferior jurisdiction), 29 November 2012, Case no: 43/2011/RCP
SaniClean Joint Venture vs. St Vincent de Paul Long Term Care Facility et, Court of Appeal (Superior Jurisdiction), 20 July 2020, Case. no. 97/2020
Steelshape Limited vs. Direttur tal-Kuntratti et, Court of Appeal (Superior Jurisdiction), 7 August 2013, Case no: 175/2013/1
United Equipment Company (UNEC) Ltd vs Id-Direttur Tal-Kuntratti et, Court of Appeal (Inferior Jurisdiction), 10 July 2012, Case no: 5/2012/RCP
V.J. Salomone Pharma Limited vs Id-Direttur Tad-Dipartiment Tal-Kuntratti et, Court of Appeal (Inferior Jurisdiction), 29 April 2015, Case no: 53/212/EG
Vassallo Builders Limited vs. Serracino Inglott Peter Profs. Rev, Civil Court (First Hall), 2 October 2001, Case no: 513/1996/1/RCP
Vassallo Concrete Services Ltd. C46055 vs. Direttur Generali Tal-Kuntratti, Civil Court (First Hall), 4 October 2011, Case no: 64/2011
Virtu Holdings Limited vs. Gozo Channel (Operations) Limited et, Court of Appeal (Superior Jurisdiction), 14 December 2018, Case no: 290/2018
Virtu Holdings Limited vs. Gozo Channel (Operations) Limited et, Court of Appeal (Superior Jurisdiction), 11 March 2019, Case no: 290/2018
WM Environmental Limited vs. Kunsill Lokali Bormla et, Court of Appeal (Superior Jurisdiction), 11 November 2014, Case no: 294/2014/1
Zammit & Cachia Limited vs. Hix Limited, Court of Appeal (Inferior Jurisdiction), 17 February 2003, Case no: 750/2000 /1

ACKNOWLEDGEMENTS

I wish to thank Professor Dr L.W. (Laurence) Gormley, MA MSc, Emeritus Professor of European Law, University of Groningen, for his erudite advice throughout the writing of this thesis, for his encouragement, his incisive insights even on the minute details, for always being available to assist me and for reading and reviewing the thesis. But most of all, I wish to thank him for his dedication and academic contribution to the knowledge and dissemination of EU law and for his selfless love to impart his knowledge to the thousands of students who had the opportunity to learn from him, with me being one of these students and with whom I had the privilege to work. May God bless you and ad multos annos!

A word of thanks also goes to Prof. Dr. H.D. (Huib) van Romburgh, Emeritus Professor European and Dutch Public Procurement Law, for his learned insights and suggestions on the subject of the thesis and for his availability to read and review the thesis.

Last but not least, I wish to thank Prof. Dr Jeanne Pia Mifsud Bonnici, Professor in European Technology Law and Human Rights, University of Groningen, for introducing me to the Faculty of Laws at the University of Groningen and to Professor Gormley, for her encouragement and support to pursue further studies at this University and for her right disposition to share her knowledge on the subject.

To you all, special thanks, much appreciation and gratitude for the opportunity of a unique experience.

LIST OF ABBREVIATIONS

European Union Legislation

Council Directive (EEC) 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L 395	Directive 89/665/EEC / the Public Sector Remedies Directive
Council Directive (EEC) 92/13 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sector [1992] OJ L 76	Directive 92/13/EEC / the Utilities Remedies Directive
Directive (EC) 2007/66 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.	Directive 2007/66/EC
Directive 89/665/EEC, Directive 92/1/3/EEC and Directive 2007/66/EC	Remedies Directives
European Convention on Human Rights	ECHR
Treaty on European Union	TEU
Treaty on the Functioning of the European Union	TFEU

Maltese Legislation

Civil Code, Chapter 16 of the Laws of Malta	Maltese Civil Code
Public Procurement Regulations 2016	Regulations

Other

Collegio Consultivo Tecnico	CTT
Court of Justice of the European Union	CJEU
Ethniko Simvoulio Radiotileorasis (National Radio and Television Council)	ESR
European Court of Justice	ECJ
European Economic Area	EEA
European Union	EU
Gross Domestic Product	GDP
Member States	MS
National Anti-Corruption Authority	ANAC
Nuclear Decommissioning Authority	NDA
Public Contracts Review Board	PCRB
The European Court of Human Rights	ECtHR

METHODOLOGY

The research question will be explored in terms of European Law and the domestic laws of selected Member States, namely Malta, Italy, France and the Netherlands, by comparing and contrasting elements of the different legal regimes.

First, the thesis will review the Remedies Directives, in particular the aspects of the heads of damages and the formation of the Member States review bodies, with a view to identifying what the present legal scenario is, and what challenges arise through the lack of harmonisation.

Then the thesis will review, through the principal case-law of the Court of Justice of the European Union, the landmark CJEU judgments on the award of damages. As a result of this analysis, the main heads of damages emanating from CJEU jurisprudence will be identified.

From the European law level, attention then turns to an examination of the domestic laws on heads of damages and review bodies in selected Member States, namely, Malta, Italy, France and the Netherlands.

Having analysed damages and review bodies from the viewpoints of European Law and of these Member States, amendments will be proposed to the Remedies Directive in the light of the available best practices, in order to achieve more effective remedies. Due account will also be taken of the literature on procurement law in making these proposals.

In sum, the thesis will focus on EU secondary legislation, case-law of the CJEU and case-law of the domestic courts of selected Member States, and the literature on the subject; through comparisons and contrasts, and eliciting best practices. Finally, it will propose amendments to the Remedies Directives with a view to enhancing effective remedies in the Member States in the area of public procurement.

THE RESEARCH QUESTION

This thesis will attempt to answer and seek solutions to the following question:

- Is there scope for further harmonisation measures of the current Remedies Directives with a view to achieve effective remedies?

This question will be analysed by reference to two other subsidiary questions:

- Is there space for harmonisation of public procurement law on damages and thus curtail the Member States' judicial autonomy in this area?
- Is there scope to harmonise further the review bodies in the Member States in order to achieve more effective remedies?

As a consequence of the lack of harmonisation, with deleterious effects on effective remedies, how can one ensure swiftness and enforceability of judicial decisions? How can one ensure the principles of non-discrimination, uniformity, equivalence and legal certainty when there is a plethora of review bodies (each with its own procedures) across the Member States? Should procedural autonomy be curtailed?

It is a noted fact that the Remedies Directives allow wide discretion for Member States in view of the principle of procedural autonomy of the Members States and thus the Remedies Directives establish a minimum level of protection. The Remedies Directives tend more to coordinate rather than set the proper ground for more harmonisation. This thesis aims to suggest ways on how to improve the effectiveness of EU legislation on public procurement and thus contribute to the enhancement of the internal market. Lack of effectiveness of EU law can also serve as a non-tariff barrier for a fully functioning internal market in public procurement. Failure to provide effective remedies constitutes also an important non-tariff barrier in the internal market which will hamper its further integration.

On the other hand, the principle of effectiveness dictates that a tenderer/candidate cannot be faced with excessive and non-uniform bureaucratic procedures dealing with remedies, that militate also against the principle of legal certainty.

Thus, the thesis will seek to answer this basic question, namely, whether there is scope for further harmonisation measures with a view to achieve more effective, simpler, uniform, and rapid application of remedies.

INTRODUCTION

Following the amendments to the Remedies Directives, Internal Market and Services Commissioner Charlie McCreevy stated:

> I am pleased that this Directive has been adopted so rapidly. We need effective procedures for seeking review in all EU member states in order to make sure that public contracts ultimately go to the company which has made the best offer. By strengthening national review procedures in line with this Directive, businesses will have stronger incentives to bid for public contracts anywhere in the EU.[4]

The divergent legal protection systems of the Member States and the narrow implementation by not going beyond the express requirements of European Union law had led, and is at times leading, aggrieved tenderers/candidates to refrain from seeking redress and file actions to recover the costs in view that they do not consider the review procedure to be worthwhile, namely they are not convinced that they will get an effective remedy.

This work, based on analytical research, seeks to provide solutions on how to "strengthen" review procedures through the achievement of better coordination, leading to uniform remedies in all Member States. The ultimate aim is to harmonise remedies procedures as much as possible both at first instance level and at appeal level respectively. Yet this enhanced convergence will tend to impact on the procedural autonomy of Member States. The achievement of this aim depends on whether Member States are willing to shed more of their sovereignty in this sphere in order to achieve more streamlined procedures with the resultant effect being more effective remedies.

Partial harmonisation as well as failure to comply or incorrect application of the Directives can have a negative economic impact on the smooth running of the internal market, and to European integration, mainly because partially harmonised rules can leave intact non-tariff barriers which form a major obstacle to trade in the internal market.

Various authors have espoused the difficulty of having uniformity of application in view of disparities in the legal traditions and legal procedures of Member States. But one cannot ignore

[4] 'Public Procurement: Commission welcomes adoption of Directive improving rights of rejected bidders' (European Commission, IP/07/1700, 15 November 2007).
<https://ec.europa.eu/commission/presscorner/detail/en/IP_07_1700> accessed 19 April 2023

the huge negative economic and legal effects that the partial harmonisation of public procurement rules has and will have on the integration and functioning of the internal market, especially because of the significant share that public procurement represents in the GDP of the various Member States. Preferential national treatment, what in international economic law, namely the law of the World Trade Organisation, is referred to as the national treatment principle, leads to discriminatory practices across Member States, resulting in loss of trade opportunities and the like.

If one had to take the example of the EU's *common commercial policy*, one would observe that the EU has succeeded - to a certain extent - in speaking with one voice with respect to international trade matters both with third countries through Free Trade Agreements and other trade agreements, but also supranationally with the World Trade Organisation. Therefore, one would ask, if the EU has relatively succeeded in the international trade scenario, why does it look so impossible to succeed internally? If this is so impossible, should the EU elevate the public procurement legislation to another level, namely that of being an exclusive competence of the EU?

Do the procedures envisaged in Directives 89/665 EC and Directive 92/13, (as amended by Directive 2007/66/EC) offer enough legal safeguards in order to achieve non-discriminatory, transparent, effective and expeditious reviews of public contracts? The Remedies Directives are intended to coordinate the review systems of Member States and to instil a level of common standards. Yet questions remain about this approach. Should the procedural autonomy allowed by the Directives be replaced by more uniform and harmonised review bodies and procedures across Member States? Should Member States be left with a lot of discretionary power with respect to remedies? Should one qualify and harmonise what is to be meant by remedies, such as whether foregone profits or lost opportunities should be included or otherwise? Is there scope in abandoning procedural autonomy in order to harmonise the types of damages to be awarded and the judicial forum?

The lack of effective and rapid remedies (*ergo* the case for more harmonisation) will deter the business operators of Member States from submitting tenders in various procurement markets. Effective, competitive and harmonised redress procedures are paramount in order to achieve fairness, a level playing field and to rekindle the faith of business operators and the general public in further opening up of the public procurement market.

The thesis addresses the research question/s through the following chapters:

Chapter 1 of this thesis gives a comprehensive review of the Remedies Directives, followed by Chapter 2 on the Maltese legal scenario with respect to public procurement, with particular focus on the Maltese law of damages and review bodies in the field of public procurement.

Chapter 3 examines the aspect of the heads of damages which are awarded by the CJEU through a number of CJEU judgments, followed by Chapter 4 which analyses the heads of damages in three Member States, namely Italy, France and the Netherlands. Here, the author conducted a compare and contrast exercise of the heads of damages of the said three Member States which will serve as a basis for proposals to the Remedies Directives.

Chapter 5 focuses on the harmonisation of review bodies, through a comparative assessment of the Maltese, French and Dutch review systems, with the scope of outlining the various review bodies of the Member States.

Finally, taking also into consideration the best practices identified in the Member States under study in this thesis, Chapter 6 proposes concrete changes to the Remedies Directives, in the fields of heads of damages and review bodies respectively, carefully suggesting ways of how to achieve further harmonisation while respecting the general principle of judicial autonomy. Consideration will also be given on whether there should be a consolidation of all three Remedies Directives so that the heads of damages and the formation of the review bodies will be streamlined both for the public sector/utilities sectors, as well as for concessions. This in view of general principles of uniformity, equivalence and legal certainty.

The divergencies in the domestic laws of the Member States do not augur well for aggrieved tenderers/candidates with the result that at times aggrieved tenderers/candidates refrain from seeking redress in view that they do not have high expectations of the review procedure, namely they are not convinced that they will get an effective remedy. Therefore, more streamlining of the Member States laws on remedies will better incentivise businesses to bid for public contracts in the internal market. Through more participation in tendering processes, there will be more competition, fairness, transparency, non-discrimination and value for money, given that there will be more legal certainty and consistency in the application of the public procurement rules. The end result would be better procedures that will provide for timely and effective correction of unfair/unjust awards. Enhanced harmonisation will provide the much-needed incentive for businesses in the Member States to increase their faith in the public

procurement process, with the effect being more participation and therefore more competitive tenders.

CHAPTER 1: THE REMEDIES DIRECTIVES

1.1. Introduction

Ibi ius, ibi remedium. The Remedies Directives, Directive 89/665/EEC, Directive 92/1/3/EEC and Directive 2007/66/EC aim to ensure that Member States afford remedies in the field of public procurement. The preamble to Council Directive 89/665/EEC already sets the tone on what is intended in terms of remedies, namely that for them to have 'tangible effects' they must be 'effective and rapid'.[5] Effectivity and rapidity have become even more important today given that public procurement is increasingly becoming an important sector of the EU's economy.

The preamble laments that in some Member States there is either the 'absence of effective remedies' or the 'inadequacy' of such remedies.[6] Today we may have moved from the situation where remedies were absent, but whether the remedies are 'adequate' and 'effective' enough is a very live issue, as is whether the harmonisation of remedies in the Member States will be more conducive to effective remedies, thus increasing tenderers' faith in the tendering processes.[7]

The current Directives dealing with remedies in connection with the public procurement process are the following:

i) Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts;

ii) Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors; and

iii) Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

[5] Directive 89/665/EEC, Preamble.
[6] ibid.
[7] ibid.

Directive 2007/66 has in particular introduced a standstill period, provisions pertaining to ineffectiveness of public contracts, time limits, and alternative penalties.

The Remedies Directives provide aggrieved economic operators with three possible remedies, namely:

i) interim measures including suspension of the procedure,
ii) the setting aside of decisions taken unlawfully, and
iii) damages granted to the person harmed by the infringement.[8]

The Remedies Directives have been described by Bovis as comprising 'three fundamental principles: the principle of effectiveness, the principle of non-discrimination and the principle of procedural autonomy'.[9] On the other hand, Arrowsmith has commented on the importance of legal remedies in the field of public procurement and the increased importance of such remedies when the subject of public procurement is assuming more relevance in modern economies:

> Under general principles of EU law, Member States must provide effective legal remedies to providers for enforcing the EU procurement rules. In practice, however, in the early days of the EU procurement regime many states did not comply with this requirement and remedies that did exist were little used, in part because of legal uncertainty. In these circumstances, and because of the perceived importance of legal remedies in procurement, in the late 1980s/early 1990s the EU adopted specific directives to regulate procurement remedies in relation to contracts covered by the co-ordination directives.
>
> (….)
>
> These Remedies Directives apply to any alleged violations of EU law in award procedures governed by the Public Sector Directive or the Utilities Directive. Inter alia, they require Member States to provide specific types of remedies to aggrieved firms, namely interim measures, the setting aside of unlawful decisions and damages; and they also lay down rules on forum and procedure

[8] ibid. Article 1.
[9] Christopher H. Bovis, *EU Public Procurement Law*, Elgar European Law, (Edward Elgar Publishing 2007) 371.

> for bringing claims. The remedies that they provide were strengthened further by a directive adopted in 2007 (…)[10]

In a study led by the University of Nottingham under the project leadership of Professor Sue Arrowsmith, it was observed that the:

> Damages are not regulated in detail and their formulation does not contribute much to the creation of a clear legal situation and even generates doubts on some points. It is not even clear from these directives whether they require the possibility of an award on lost profit or not, which is of crucial importance for the efficiency of the remedy of damages. A high percentage of aggrieved tenderers do not consider it worthy of effort to initiate an action seeking to recover the costs of preparing a bid or participation in the procurement procedure. However, it is normally presumed in both theory and frequently in the case law of the Member States that tenderers under certain conditions can claim an award of lost profit for breach of the EU public procurement rules although this has been unclear from the outset.
>
> It is not clear from the wording of the Remedies Directives whether damages are available for all violations of the EU public procurement rules or whether other conditions apply. Article 2(1)(c) of the Remedies Directives indicates only that the Member States are obliged to award damages to persons harmed by the infringement. However, it is clear from the ruling of the European Court of Justice in C-275/03, *Commission v Portugal*, that it violates the Remedies Directive to make damages conditional on proof of intentional or negligent breach. The recent case C-314/09, *Stadt Graz,* is important as it seems to follow from this case that any breach in principle is sufficient ground for damages.[11]

Yet, since the *Stadt Graz v. Strabag AG and Others* judgment of 30 September 2010, the grounds of damages in public procurement have rapidly evolved, although in an inconsistent and uncertain fashion through jurisprudence of the CJEU and the Member States' national courts, as will become apparent.[12]

---

[10] Sue Arrowsmith, *The Law of Public and Utilities Procurement – Regulation in the EU and UK*, Vol 1 (3rd edn, Sweet & Maxwell 2014) 178.
[11] Sue Arrowsmith, Paula Bordalo Faustino, Baudouin Heuninckx, Professor Steen Treumer, and Professor Jens Fejø, *EU Public Procurement: An Introduction* (University of Nottingham, 2011) 295-296.
[12] Case C-314/09 *Stadt Graz v Strabag AG and Others* [2010] ECR I-8769.

1.2. Overview of Council Directive 89/665 (Public Sector)[13]

The Directive is applicable to contracts referred to in Directive 2014/24/EU of the European Parliament and of the Council, (1) unless such contracts are excluded in accordance with articles 7, 8, 9, 10, 11, 12, 15, 16, 17 and 37 of that Directive.[14] It also applies to concessions awarded by contracting authorities, referred to in Directive 2014/23/EU[15] of the European Parliament and of the Council, (2) unless such concessions are excluded in accordance with articles 10, 11, 12, 17 and 25 of that Directive.[16]

The preamble to Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts notes that the:

> opening up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; whereas for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement, or national rules implementing that law.[17]

Therefore, the drafters of the Directive have been very attentive in combining the principles of transparency and non-discrimination together with the corollary principles of effectiveness and celerity of the remedies to be provided, which principles are of utmost importance in order to achieve a fully functional internal market in public procurement.

In fact, Directive 89/665/EEC stipulates that the absence of effective remedies, or inadequacy of existing remedies 'deter community undertakings from submitting tenders in the Member State in which the contracting authority is established;'[18] Reference to this preoccupation with the level of 'effectiveness' of the remedies is also made by Bovis where he comments that:

> The absence or inadequacy of effective remedies at national level has a detrimental effect in the opening up of public procurement by deterring undertakings from participating in award procedures for public contract and

[13] Directive 89/665/EEC.
[14] Directive (EU) 2014/24/EU on public procurement and repealing Directive 2014/24/EU [2014] L 94/65.
[15] Directive (EU) 2014/23/EU on the award of concession contracts 2014/23/EU [2014] L 94/1.
[16] Directive 89/665/EEC, Article 1.
[17] Directive 89/665/EEC, Preamble.
[18] ibid.

> submitting tenders. The opening up of public procurement to Community-wide competition demands also a substantial increase in the levels of transparency at national level regarding the availability of redress to the supply side of the public procurement equation (tenderers and participants). Such increased levels of transparency must be accompanied by non-discriminatory measures introduced within national legal systems which provide interested parties with at least the same treatment in public procurement litigation, as in other forms of litigation.[19]

Directive 89/665/EEC, besides commending "effective" and "adequate" remedies, given the short duration of the award procedure, also stressed that review bodies should have the *vires* to take interim measures with a view to suspend the tendering process or the implementation of the contracting authority's decision, as the case may be. The short duration of the procedure also calls for urgency in the provision of remedies.

It is mandatory for Member States to ensure that the contracting authorities' decisions are reviewed "effectively" and rapidly:

> Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2004/18/EC, decisions taken by the contracting authorities may be reviewed effectively, and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law.[20]

Member States are obliged to 'ensure that the review procedures are available, under detailed rules which the Member States may establish'.[21] Yet, Directive 89/665/EEC is not mandatory with respect to the first review of the aggrieved tenderer, in fact, it states that 'Member States may require that the person concerned first seek review with the contracting authority',[22] in which case the Member State has to ensure that there is the 'immediate suspension of the possibility to conclude the contract.'[23] The emphasis on the immediate suspension of the contract emanates from the fact that if the contract is awarded and concluded with the preferred economic operator, despite the ongoing review proceedings, then the aggrieved economic

[19] Christopher H. Bovis, *The Law of EU Public Procurement*, (2nd edn, Oxford University Press 2015) 493.
[20] Directive 89/665/EEC, Article 1(3).
[21] ibid.
[22] ibid. Article 1(5), para 1.
[23] ibid.

operator will be denied an effective remedy. If there is no suspension of the conclusion of the contract, the aggrieved economic operator may have been granted the remedy, but certainly not an "effective" remedy, because the contract would have been concluded.

The element of "suspension" which is mentioned in Directive 89/665/EEC 'shall not end before the expiry of a period of at least 10 calendar days'.[24] The wording of the Directive could have been clearer and bolder in the sense that the suspension of the conclusion of the contract should endure until the final appeal is decided.

Directive 89/665/EEC establishes the measures that are to be taken by the Member States in order to ensure review procedures. The list of review measures in not exhaustive, and includes the following:

> (a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decisions taken by the contracting authority;
> (b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;
> (c) award damages to persons harmed by an infringement.[25]

In the Maltese Public Procurement Regulations 2016,[26] Regulation 90(3), there is a reference to article 2(1)(b) of Directive 89/665/EEC, whereby the first-instance Public Contracts Review Board (PCRB), is empowered to 'take such interim measures as it shall deem fit'.[27] Yet again, a reference to the setting aside or to ensure the setting aside of decisions is found in the provisions of the Public Procurement Regulations 2016 regulating specifically the area of pre-contractual remedies, namely:

[24] ibid. Article 1(5), para 3.
[25] ibid. Article 2(1).
[26] Public Procurement Regulations 2016, Subsidiary Legislation 601.03, Laws of Malta (Public Procurement Regulations 2016).
[27] ibid. Regulation 90(3).

> Prospective candidates and tenderers may, prior to the closing date of a call for competition, file a reasoned application before the Public Contracts Review Board:
>
> (a) To set aside or ensure the setting aside of decisions including clauses contained in the procurement document and clarification notes taken unlawfully at this stage or which are proven to be impossible to perform;[28]

Other powers in the field of remedies pertaining to the Maltese PCRB will be looked into later on.

Directive 89/665/EEC does not only provide that review procedures are to be "effective", but also that the decisions of the review body have also to be 'effectively enforced'.[29] The Directive stops short on how the decisions can be "effectively enforced" and given the principle of judicial autonomy of the Member States, it is left in the hands of each individual Member State on how to enforce the decision. In Malta, for instance, decisions may be enforced though a number of executive warrants which are provided for in the Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta.

Bovis, with respect to the issue of enforcement, refers to the principle of judicial autonomy, which principle needs to take into consideration the principles of equivalence and effectiveness of decisions:

> The exercise of national procedural autonomy must respect the principles of equivalence and effectiveness. Article 1(3) of the Remedies Directive imposed an obligation on the Member States to ensure, under their own detailed rules, that review procedures are accessible at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.
>
> The Member States are not obliged to make those review procedures available to any person wishing to obtain a public contract, but they may require that the

[28] ibid. Regulation 262(a).
[29] Directive 89/665/EEC, Article 2(8).

person concerned has been or risks being harmed by the infringement he alleges.[30]

(…)

[I]n the absence of (Union) rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from (Union) law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by (Union) law (principle of effectiveness).[31]

From the beginning it is important to distinguish between two situations. The *Telaustria* type of situation,[32] where co-ordinated rules on remedies were not applicable and the legal protection of individual rights derived directly from provisions of primary law, and the *Stadt Graz* type of situation,[33] where the applicable remedies are harmonised, meaning that the right to be awarded civil damages for infringements of public procurement law is specifically stipulated, thus not left to the discretion of the Member States.

(…)

[A] declaration that an application for damages, brought by the unsuccessful tenderer following the annulment of that decision by an administrative court, is well founded cannot – contrary to the wording, context and objective of the provisions of Directive 89/665 which establish the right to such damages –

[30] Case C-249/01, *Hackermuller*, [2003] I-6319, para 18.
[31] Case C-543/99, *Courage & Crehan*, [2001] I-6297, *para* 29; see also Case C-91/08, Wahl AG, [2010] I-2815, para 65.
[32] See Case C-324/98, *Telaustria and Telefonadress*, [2000] ECR I-10745.
[33] Case C-314/09, *Stadt Graz v. Strabag AG*, [2010] I-8769; see also Case C-249/01, *Hackermuller* (n17); Case C-213/07, *Michaniki*, [2008] I-9999 concerning the rule that the grounds for exclusion must be open to review and Case C-470/99, *Universale-Bau and Others*, [2002] ECR I-11617 and Case C-241/06*, Lammerzahl*, [2007] I-8415 concerning the compulsory content of a contract notice or of the tender documents. C-314/01, *Siemens AG Osterreich*, [2004] I-2549 requires that clauses of a tender invitation must be open to review.

> depend, for its part, on a finding that the contracting authority involved is at fault.[34] [35]

Directive 89/665/EEC also provides that when a review body is not judicial, its decision must always contain written reasons, and the decision of the non-judicial review body has to be subjected to the review of another review body 'which is a court or tribunal within the meaning of article 234 of the Treaty and independent of both the contracting authority and the review body'.[36]

In Malta, this judicial function is performed by the Court of Appeal (Superior Jurisdiction), presided by the Chief Justice and two other judges, as per regulation 284 of the Public Procurement Regulations 2016 whereby:

> Any party who feels aggrieved by a decision taken by the Review Board may appeal to the Court of Appeal as constituted in accordance with article 41(1) of the Code of Organisation and Civil Procedure by means of an application filed in the registry of that court within twenty calendar days from the date on which that decision has been made public.[37]

This provision in Malta's Public Procurement Regulations 2016 is in line with article 2(9) paragraph 2 of Directive 89/665/EEC whereby the members of the judicial independent body:

> shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.[38]

By contrast, the Maltese PCRB, which can be described as a quasi-judicial review body, comprises a chairperson and two permanent members, who are appointed by the Prime Minister for a three (3) year period, with the possibility of re-appointment.[39] Yet there is no security of

[34] *Stadt Graz* (n 12).
[35] Bovis (n 19) 498-500.
[36] Directive 89/665/EEC, Article 2(9)
[37] Public Procurement Regulations, Regulation 284.
[38] Directive 89/665/EEC, Article 2(9).
[39] Public Procurement Regulations 2016, Regulation 81(1).

tenure, and the members are not constitutionally appointed, as judges and magistrates are. Furthermore, the chairman and members of the PCRB, unlike judges and magistrates who have a constitutional appointment, 'shall not be precluded from the exercise of their profession, however, during the term of their appointment they shall be precluded from the exercise of their profession in cases before the Review Board.'[40]

This is not considered to be an adequate safeguard to secure the independence and impartiality of the members of the Maltese PCRB.

1.3. Overview of Directive 2007/66/EC of 11 December 2007 (Amending Directive)[41]

Following consultations with stakeholders, including contracting authorities and economic operators, aimed to ensure fairer and more competitive public procurement processes, Directive 2007/66/EC came into force which amended the prior Directives on Remedies. The rationale of Directive 2007/66/EC is to enhance the Member States domestic review procedures for aggrieved economic operators who have been prejudiced by a public contract which has been unfairly awarded. In line with this rationale, at the time of the coming into force of Directive 2007/66/EC, Commissioner Mc Creevy[42] commented that:

> I am pleased that this Directive has been adopted so rapidly. We need effective procedures for seeking review in all EU member states in order to make sure that public contracts ultimately go to the company which has made the best offer. By strengthening national review procedures in line with this Directive, businesses will have stronger incentives to bid for public contracts anywhere in the EU.[43]

Economic operators' rights have been substantially improved through this Directive, particularly:

- The contracting authorities have to abide by a standstill period of at least ten (10) days, so that aggrieved economic operators will have the necessary time to decide on whether to request the review of the decision which has awarded the public contract;

[40] ibid. Regulation 86.
[41] Directive 2007/66/EC.
[42] Internal Market and Services Commissioner.
[43] 'Public Procurement: Commission welcomes adoption of Directive improving rights of rejected bidders' (Commissione Europea, IP/07/1700, 15 November 2007)
The European Commission proposed the Directive in May 2006 (IP/06/601). An agreement at first reading between European Commission, Council and the European Parliament was reached in June 2007 (IP/07/861).

- If the standstill period is not observed, the public contract may be deemed "ineffective";
- If the public contract remains in force for overriding reasons relating to a general interest, then alternative penalties must be applied.

1.3.1. Standstill Period

For effective remedies to be achieved, Member States are not only obliged to provide review procedures, but also to allow 'sufficient time for effective review of the contract award decisions taken by contracting authorities'.[44] Thus, in terms of article 2a(2) of Directive 2007/66/EC, at least ten (10) calendar days have to be allowed before the contract is concluded following its award. These ten (10) days commence to run:

> from the day following the date of which the contract award decision is sent to the tenderers 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.[45]

In order to ensure that the standstill period is respected, Directive 2007/66/EC stipulates that when the tenderer or the concerned candidate are informed about the award decision, the said communication should contain the following two requisites *ad validitatem*:

i) A summary of the 'relevant reasons' in concise form;
ii) 'A precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph.'[46]

Article 2b of Directive 2007/66/EC provides for derogations from the standstill period. While article 2a refers to a standstill period with respect to the conclusion of contracts, article 2c relates to the time limits that need to be observed for:

[44] Directive 89/665/EEC, Article 2a(1).
[45] ibid. Article 2a(2).
[46] ibid.

> [A]ny 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. In the case of an application for review concerning decisions referred to in Article 1(1)(b) of this Directive that are not subject to a specific notification, the time period shall be at least 10 calendar days from the date of the publication of the decision concerned.[47]

Baker and Mc Kenzie refer to this legal obligation to comply with the standstill periods enshrined in Directive 2007/66/EC and observe that while the contracting entities may set the time limits for the receipt of tenders, such time limits 'may not be shorter than indicated in the EC directives on public procurement. In urgent cases where the time limits are impracticable, accelerated procedures may be followed.'[48]

In *Universale-Bau AG, Bietergemeinschaft*, the Court (Sixth Chamber) referred to the importance of having reasonable time-limits and observed that:

> Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, does not preclude national legislation which provides that any application for review of a contracting authority's decision must be commenced within a time-limit laid down to that effect and that any irregularity in the award procedure relied upon in support of such application must be raised within the same period, if it is not

[47] ibid. Article 2c.
[48] Baker & Mc Kenzie, *Remedies and Public Procurement Laws in Europe*, (3rd edn, Baker & Mc Kenzie, 2009) 11.

> to be out of time, with the result that, when that period has passed, it is no longer possible to challenge such a decision or to raise such an irregularity, provided that the time-limit in question is reasonable.[49]

In *Palmisani*, the Court (Fifth Chamber) held that the Member State has to satisfy reasonable time limits for there to be legal certainty:

> As regards the compatibility of a time-limit of the kind provided for in the Legislative Decree with the principle of the effectiveness of Community law, the setting of reasonable limitation periods for bringing proceedings satisfies that requirement in principle, inasmuch as it constitutes an application of the fundamental principle of legal certainty (see, in particular, Case 33/76 Rewe, cited above, paragraph 5).[50]

Article 2a (standstill period), article 2b (derogations from the standstill period) and article 2c (time limits for applying for review) characterise an important element of Directive 2007/66/EC, which has amended Council Directives 89/665/EEC and 92/13/EEC. One of the aims of the amending Directive 2007/66/EC has been to strengthen the effectiveness of the remedies through more legal certainty with respect to the time limits allowed by law for the remedies. The amending Directive 2007/66/EC embodies the various rulings of the European Court of Justice with respect to the standstill periods, which rulings have now been harmonised:

> Complete legal protection also requires that it be possible for the unsuccessful tenderer to examine in sufficient time the validity of the award decision. Given the requirement that the Directive must have practical effect, a reasonable period must elapse between the time when the award decision is communicated to unsuccessful tenderers and the conclusion of the contract in order, in particular, to allow an application to be made for interim measures prior to the conclusion of the contract.[51]

The rationale behind the standstill period as envisaged in the Remedies Directives, has been referred to by Treumer, as allowing the economic operator adequate time to decide on whether to proceed with the review of the award decision or otherwise:

---

[49] Case C-470/99, *Universale-Bau AG, Bietergemeinschaft v. Entsorgungsbetriebe Simmering GmbH*, [2002] ECR I-11617.
[50] Case C-261/95, *Rosalba Palmisani v Istituto nazionale della previdenza sociale (INPS)*, [1997] ECR I-4025.
[51] Case C-212/02*, Commission v Austria*, [2004] ECLI:EU:C:2004:386, para. 23.

> The standstill period should give the tenderers concerned sufficient time to examine the contract award decision and to assess whether it is appropriate to initiate a review procedure, cf. consideration 6 of the Preamble to the Directive. This rule is based on a principle developed in the case law of the Court of Justice and is of utmost importance for the effective enforcement of the public procurement rules.[52]

Treumer continues to discuss whether:

> [A] similar principle apply for contracts outside of the scope of the Public Procurement Directives. This issue has not been considered in the case law of the Court of Justice but it has been addressed in national case law and in the legislation of at least a few Member States.
>
> (…)
>
> It can be argued that a standstill period is also mandatory outside of the scope of the Public Procurement Directives. Individuals are entitled to effective judicial protection of the rights they derive from the Community legal order and the standstill period is a very important element in the creation of an effective remedies system.[53]

1.4. The principle of "ineffectiveness"

Besides the introduction of effective standstill periods, the amending Directive 2007/66/EC has also introduced three instances when a public contract is deemed to be ineffective 'by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such review body'.[54] The three (3) instances of an ineffective contract as envisaged by the Directive are the following:

i. If the contracting authority has awarded a public contract without prior publication of a contract notice in the EU's Official Journal without this being permissible in accordance with Directive 200/18/EC;

[52] Steen Treumer and Francois Lichere (eds.), *Enforcement of the EU Public Procurement Rules*, (1st edn, DJOF Publishing Copenhagen 2011) 48.
[53] ibid. 48-49.
[54] Directive 2007/66/EC, Article 2e.

ii. In cases where the tenderer has been deprived from resorting to review for pre-contractual remedies; and

iii. 'In cases referred to in the second subparagraph of article 2b(c) of this Directive, if Member States have invoked the derogation from the standstill period for contracts based on a framework agreement and a dynamic purchasing system'.[55]

The amending Directive 2007/66/EC further states that the consequences of a contract being considered ineffective shall be provided by national law.[56] Thus, while the Directive leaves a lot of discretion to the Member States' domestic law, yet it proposes a number of non-mandatory remedies, such as that national law may provide for retroactive (*ex tunc*) cancellation of the contract or 'limit the scope of the cancellation to those obligations which still have to be performed' (*ex nunc*).[57] Yet, Directive 2007/66/EC states that Member States have to provide for other penalties in terms of article 2e(2), namely the imposition of fines on the contracting entity or the shortening of the public contract's duration. So, interestingly, Directive 2007/66/EC does not provide for both penalties to be raised at the same time, but for alternative mandatory penalties.

Directive 2007/66/EC, leaves an exit clause for the Member States' independent review bodies, whereby they may not:

> consider a contract ineffective, even though it has been awarded illegally on the grounds mentioned in paragraph 1, if the review body finds, after having examined all relevant aspects, that overriding reasons relating to a general interest require that the effects of the contract should be maintained.[58]

However, Directive 2007/66/EC stops short of defining or in any way describing what are these 'overriding reasons', thus leaving too much discretion on the Member States, who may also give a wide interpretation to the term, with negative implications to public procurement policy. Or rather, the Directive 2007/66/EC attempts to define 'overriding reasons' in such vague language which in itself creates more legal uncertainty because once again Directive 2007/66/EC does not provide for a definition of what is deemed to be 'exceptional circumstances' and 'disproportionate consequences' '[e]conomic interests in the effectiveness

[55] ibid. Article 2d(1).
[56] ibid. Article 2d(2).
[57] ibid.
[58] ibid. Article 2d(3).

of the contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences.[59]

Directive 2007/66/EC stipulates what is not deemed to be an overriding interest, namely:

> However, economic interests directly linked to the contract concerned shall not constitute overriding reasons relating to a general interest. Economic interests directly linked to the contract include, inter alia, the costs resulting from the delay in the execution of the contract, the costs resulting from the launching of a new procurement procedure, the costs resulting from the change of the economic operator performing the contract and the costs of legal obligations resulting from the ineffectiveness.[60]

The Maltese Public Procurement Regulations 2016 adopt the test of the examination of 'all relevant aspects' in matters dealing with overriding reasons relating to a general interest, namely that:

> The Public Contracts Review Board may not consider a contract ineffective, even though it has been awarded illegally, on the grounds mentioned in regulation 277, if the Public Contracts Review Board finds, after having examined all relevant aspects, that the overriding reasons relating to a general interest require that the effects of the contract shall be maintained.[61]

1.5. Overview of Council Directive 92/13/EEC of 25 February 1992[62] (Utilities)

Directive 92/13/EEC applies to remedies in the field of utilities, subject to a few exclusions.[63] This Directive provides for review procedures which are slightly different from those outlined in Directive 89/665/EEC, and includes another ground namely:

> [M]easures other than those provided for in points (a) and (b) with the aim of correcting any identified infringement and preventing injury to the interests

[59] ibid. Article 2d(3), para 2.
[60] ibid. Article 2d(3), para 3.
[61] Public Procurement Regulations 2016, Regulation 280(2).
[62] Directive 92/13/EEC.
[63] ibid. Article 1 "This Directive applies to contracts referred to in Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (1), unless such contracts are excluded in accordance with art 5 (2), arts 18 to 26, arts 29 and 30 or art 62 of that Directive. Contracts within the meaning of this Directive include supply, works and service contracts, framework agreements and dynamic purchasing systems."

> concerned; in particular making an order for the payment of a particular sum, in cases where the infringement has not neem corrected or prevented.[64]

This ground can be exercised *in lieu* of interim measures of the setting aside of unlawful decisions.

Directive 92/13/EEC provides that a contract cannot be concluded:

> 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 tenderers 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.[65]

This standstill period is provided for in order to safeguard the tenderers'/candidates' right of appeal before a court of law which has to meet the criteria established under article 2(9)

[64] ibid. Article 2(1) "The Member States shall ensure that the measures taken concerning the review procedures specified in art 1 include provision for the powers:
either
(a) to take, at the earliest opportunity and by way of interlocutory procedure, interim measures with the aim of correcting the alleged infringement or preventing further injury to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a contract or the implementation of any decision taken by the contracting entity; and
(b) to set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the notice of contract, the periodic indicative notice, the notice on the existence of a system of qualification, the invitation to tender, the contract documents or in any other document relating to the contract award procedure in question;
or
(c) to take, at the earliest opportunity, if possible by way of interlocutory procedures and if necessary by a final procedure on the substance, measures other than those provided for in points (a) and (b) with the aim of correcting any identified infringement and preventing injury to the interests concerned; in particular, making an order for the payment of a particular sum, in cases where the infringement has not been corrected or prevented.
Member States may take this choice either for all contracting entities or for categories of entities defined on the basis of objective criteria, in any event preserving the effectiveness of the measures laid down in order to prevent injury being caused to the interests concerned;
(d) and, in both the above cases, to award damages to persons injured by the infringement.
Where damages are claimed on the grounds that a decision has been taken unlawfully, Member States may, where their system of internal law so requires and provides bodies having the necessary powers for that purpose, provide that the contested decision must first be set aside or declared illegal."

[65] Directive 92/13/EEC, Article 2a.

paragraph 2.[66] The Directive also provides an exhaustive list of derogations from the standstill period.[67]

The grounds of ineffectiveness of a public contract are the same grounds found in Directive 89/665/EEC.[68] The contents of article 2d and 2e of Directive 92/13/EEC are the same as article 2d and 2e of Directive 89/665/EEC.

The European Commission is empowered to notify the Member States, before a contract is concluded and if its deems that there is a serious infringement of European law on procurement, to notify the Member State concerned with the reasons for the infringement and solicits 'its correction by appropriate means'.[69] The Member State to whom the notification has been addressed has to inform the European Commission on whether the infringement has been corrected (or a reasoned submission[70] why no correction has taken place) or that the notice of the contract award procedure has been suspended.[71]

1.6. Revised Agreement on Government Procurement

The World Trade Organisation's 'Revised Agreement on Government Procurement',[72] to which the Member States are a party, provides that each World Trade Organisation Member who is a party to this plurilateral agreement has to provide corrective action or compensation for loss of damages suffered:

> [W]here a review body has determined that there has been a breach or a failure as referred to in paragraph 1, corrective action or compensation for the loss or

[66] ibid. Article 2(9) para 2.
[67] ibid. Article 2b.
[68] ibid. Article 2d(1).
[69] ibid. Article 8(1) and (2).
[70] Directive 92/13/EEC, Article 8(4): "A reasoned submission communicated pursuant to paragraph 3(b) may rely among other matters on the fact that the alleged infringement is already the subject of judicial review proceedings or of a review as referred to in art 2(9). In such a case, the Member State shall inform the Commission of the result of those proceedings as soon as it becomes known."
[71] Directive 92/13/EEC, Article 8(3): "Where notice has been given that a contract award procedure has been suspended in accordance with paragraph 3(c), the Member State concerned shall notify the Commission when the suspension is lifted or another contract procedure relating in whole or in part to the same subject matter is begun. That new notification shall confirm that the alleged infringement has been corrected or include a reasoned submission as to why no correction has been made."
[72] Entered into force on 6 April 2014.

damages suffered, which may be limited to either the costs for the preparation of the tender or the costs relating to the challenge, or both.[73]

Yet, while the Revised Agreement on Government Procurement mentions that the claim for damages may be limited to the costs of the preparation of the tender or the judicial costs, or both, through the choice of the word "may", it does not restrict the award of other types of damages.

1.7. Concluding remarks

During the *travaux preparatoire* on the draft Directive 89/665, at a point in time three grounds of action for damages were proposed, namely the cost of unnecessary studies, forgone profits and lost opportunities. The final text of the Directive, however, is silent and refers only generally to award of damages (article 2(1)(c)). Concerns have been expressed that the inclusion of forgone profits and lost opportunities could lead to speculative and wasteful litigation. Yet as shall be seen later on, these concepts of forgone profits and lost opportunities are finding their way, although in no coherent pattern, into the Court of Justice of the European Union ("CJEU") jurisprudence and into the jurisprudence of the Member States.

There are two observations relating to damages litigation in public procurement. Firstly, business operators are at times hesitant to bring a contracting authority before a court, since they want to maintain good relations in the future. Litigation between a tenderer and a contracting authority often results in an irrevocable break in their relationship.

Secondly, if damages are too greatly and too readily awarded, the contracting authority would find itself proceeding so extremely carefully as to seriously impede any public contract.

The Remedies Directives provide that Member States should establish judicial or administrative bodies responsible for the enforcement of public procurement processes. Member States, therefore, have a choice as to the forum and judicial procedures provided for hearing disputes or otherwise achieving the required result. In addition, they require that all decisions taken by bodies responsible for review procedures shall be effectively and rapidly enforced.

[73] World Trade Organisation, Revised Agreement on Government Procurement, Article XVIII, para 7(b) <https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf> accessed 19 April, 2023.

CHAPTER 2: The Maltese Public Procurement Remedies Scenario

In the Maltese public procurement remedies scenario, the Public Procurement Appeals Board (today the Public Contracts Review Board) came into existence through Legal Notice 98 of 2002. Prior to the establishment of the Public Contracts Appeals Board, whenever an aggrieved economic operator requested review of a decision taken by the Director of Contracts, such review was effected only by the Director himself and by the Contracts Committee, involved in the award of the particular tender. Therefore, you had the situation where the same persons who recommended the award of the tender, were the same persons who used to review their own decision. This certainly goes against the principle of *nemo iudex in causa propria* and other fundamental principles of modern public procurement law. This did not augur well for the fair and impartial administration of justice in the field of public procurement. Therefore, through the establishment of the Public Contracts Appeals Board, the Maltese legislator ensured a better independent review system.

The Maltese public procurement system, in fact, has been the subject of considerable criticism by the European Commission. For instance, in its annual report on Malta's progress in aligning with the *acquis communautaire*, the European Commission observed that:

> The judicial review system does not fulfil the requirements of the relevant EC Directives. A review of contracts other than those processes through the Department of Contracts is not guaranteed. The information available does not indicate that an effective review by a body independent of both the contracting authority and the contracting firm is provided.[74]

The European Commission thus directed its criticism at the lack of adequate review procedures available in Malta. No review has been available in the case of those public contracts which were not processed through the Department of Contracts except for the limited action which is available under article 469A of the Code of Organisation and Civil Procedure, which is the legal base available under Maltese law for the review of administrative action.[75] In its 1999

[74] Report Updating the Commission Opinion on Malta's Application for Membership of the European Union, 1999.
[75] Code of Organisation and Civil Procedure, Chapter 12, the Laws of Malta (Code of Organisation and Civil Procedure).

update of its Opinion, the European Commission concluded that Malta's Public Procurement Regulations corresponded only partially to the obligations of the *acquis communautaire*.

Further criticism continued in the years to follow. Yet again in 2001, the European Commission noted that Malta had 'to align its public procurement legislation as regards the remedies system and bodies governed by public law.'[76]

However, a notable change has been observed in the European Commission's Report, issued in October 2002, whereby the European Commission announced that:

> Malta has taken steps to improve the openness and transparency of its procurement legislation by adopting, in April 2002, a Regulation providing for the setting up of an independent Public Contracts Appeals Board. This will put an end to the current situation where the Department responsible for public procurement also hears complaints about the fairness or transparency of particular procurement processes. However, further alignment with the EC public procurement acquis is still needed and would improve the overall transparency of public procurement in Malta.
>
> (…)
>
> Malta has prepared regulations to complete alignment in public procurement to include local authorities and other bodies governed by public law and to align the tender procedures, but has not issued them yet. It has adapted the judicial review system to the requirements of relevant directives by setting up an

Article 469A(1) provides an exhaustive list of when "the courts of justice of civil jurisdiction may enquire into the validity of any administrative act or declare such act null, invalid or without effect:
(a) where the administrative act is in violation of the Constitution;
(b) when the administrative act is *ultra vires* on any of the following grounds:
(i) when such act emanates from a public authority that is not authorised to perform it; or
(ii) when a public authority has failed to observe the principles of natural justice or mandatory procedural requirements in performing the administrative act or in its prior deliberations thereon; or
(iii) when the administrative act constitutes an abuse of the public authority's power in that it is done for improper purposes or on the basis of irrelevant considerations; or
(iv) when the administrative act is otherwise contrary to law."
Furthermore, Article 469A(2) defines "administrative act" as an act which "includes the issuing by a public authority of any order, licence, permit, warrant, decision, or a refusal to any demand of a claimant, but does not include any measure intended for internal organization or administration within the said authority (…)".

[76] Report Updating the Commission Opinion on Malta's Application for Membership of the European Union 2001.

independent Public Contracts Appeals Board. By doing so, it has put on track the corresponding measure of the Action Plan.[77]

2.1. The Remedies under the Maltese Public Procurement Regulations 2016

2.1.1. The Public Contracts Review Board

In the area of public procurement, Malta's judicial system has adopted a mixed system of remedies, namely public law remedies and civil law remedies. The PCRB is a tribunal constituted under public law, which hears and provides for the following remedies:

i) Reasoned applications before the closing date of a Call for Competition;[78]
ii) Appeals/objections from decisions taken after the closing date for the submissions of a tender;[79]
iii) Applications concerning the ineffectiveness of a contract;[80] and
iv) Appeals/motivated objections from the decision of the director to cancel a contract.[81]

Any aggrieved party may appeal the decision of the Public Contracts Review Board to the Court of Appeal (Superior Jurisdiction).[82]

Under the Public Procurement Regulations 2010, which have since been abrogated, the Director of Contracts, had a quasi-judicial role, in view that the Director of Contracts was empowered to decide and grant pre-contractual remedies, following a decision taken prior to the closing date of the tender. In fact, the Director of Contracts used to have the power to grant the following pre-contractual remedies:

a. the taking of interim measures to correct an alleged infringement or preventing further damages to the interests concerned,

b. suspension of the procedure for award,

c. setting aside decisions that have been taken unlawfully, including the removal of discriminatory technical, economic or financial specifications,

[77] European Commission, Regular Report on Malta's Progress towards accession, 2002 COM (2002) 700 final.
[78] Public Procurement Regulations 2016, Regulations 262-269.
[79] ibid. Regulations 270-276.
[80] ibid. Regulations 277-282.
[81] ibid. Regulation 283.
[82] ibid. Regulation 284.

d. in the event of a cancellation of a call for tenders can order refund of the cost incurred by the tenderer and if tender is re-issued to obtain the tender free of charge.[83]

Aggrieved persons by a decision of the Director of Contracts could, on a point of law, through an application, appeal to the Court of Appeal (Superior Jurisdiction). This quasi-judicial power of the Director of Contracts of granting pre-contractual remedies no longer exists in the current Public Procurement Regulations 2016. This function has been delegated to the PCRB.

2.2. Composition of the Public Contracts Review Board

The PCRB is composed of the Chairman and two permanent members, one of whom acts as deputy-chairman.[84] The members are assisted by a secretary to the PCRB. All members of the PCRB are appointed by the Prime Minister following the advice of the Minister of Finance. The duration of the appointment is for three (3) years, and the members may be reappointed.

The fact that the members are appointed by the Prime Minister, and do not go through the checks and balances provided for the constitutional appointments of judges and magistrates, leaves much to be desired. Yet, the Regulations at one instance equiparate the PCRB members with judges in the sense that the members are disqualified from hearing a case 'in such circumstances as would disqualify a judge in a civil suit, and in such case the chairman or member shall be substituted by another member on the panel.'[85] Other grounds of disqualification of members include if the member is a member of the House of Representatives or of the European Parliament or of a Local Council, or of any other administrative board or tribunal or if he has a financial or other interest as is likely to prejudice his functions. If a member has a direct or an indirect interest in any contract which becomes the subject of a complaint, that member is duty bound to inform the chairman in writing of such interest, so that he will be precluded from hearing the case.

The PCRB members have no security of tenure. Furthermore, the PCRB members may be removed from their office by the Prime Minister for 'proved inability to perform the functions

[83] Public Procurement Regulations 2010, Subsidiary Legislation 174.04, Laws of Malta, Regulation 7(2).
[84] The composition and regulation of the PCRB is referred to in Regulations 80 to 94 of the Public Procurement Regulations 2016.
[85] Public Procurement Regulations 2016, Regulation 85.

of that office whether arising from infirmity of body or mind or any other cause or because of proven misbehaviour.'[86]

The PCRB hears and decides on the following:

> (a) concerns or complaints raised before the closure of a submission of a tender by candidates or persons having an interest in obtaining a particular public contract;
>
> (b) complaints raised by tenderers or candidates relating to exclusions, non-compliant offers, contract award decisions or cancellations of a procurement procedure after the closing date and time set for the submission of the said call;
>
> (c) requests for the ineffectiveness of a public contract as established in these regulations;
>
> (d) to hear and determine any cases assigned to it under these regulations or any other law; and
>
> (e) to hear and determine any cases assigned to it in a public call for tenders or quotations, even if such call does not involve procurement.[87]

The decisions of the PCRB are preferably taken by unanimity, however, majority decisions shall be deemed final. The PCRB in its decision has to state the reasons upon which the decision has been taken. In lieu of an appeal before the Court of Appeal (Superior Jurisdiction), the PCRB's decision becomes final, thus being an executive title.

The PCRB hearings are public, while the law also explicitly makes provisions so that the principles of publicity, *audi alteram partem* and *nemo iudex in causa propria* are strictly followed.

[86] ibid. Regulation 82.
[87] ibid. Regulation 87.

2.3. The four types of appeals which may be heard by the PCRB

2.3.1. Remedies before the closing date of a call for competition

Any prospective candidate or tenderer, may file a reasoned application before the PCRB, prior to the closing date of a call for competition on any of the following grounds and requesting the said PCRB:

> (a) to set aside or ensure the setting aside of decisions including clauses contained in the procurement document and clarification notes taken unlawfully at this stage or which are proven to be impossible to perform; or
>
> (b) to determine issues relating to the submission of an offer through the government's e-procurement platform; or
>
> (c) to remove discriminatory technical, economic or financial specifications which are present in the call for competition, in the contract documents, in clarifications notes or in any other document relating to the contract award procedure; or
>
> (d) to correct errors or to remove ambiguities of a particular term or clause included in a call for competition, in the contract documents, in clarifications notes or in any other document relating to the contract award procedure; or
>
> (e) to cancel the call for competition on the basis that the call for competition is in violation of any law or is likely to violate a particular law if it is continued.[88]

It is notable that damages are not mentioned in this pre-contractual stage. The final decision of the PCRB may be appealed by the aggrieved party before the Court of Appeal (Superior Jurisdiction). In line with the Remedies Directive, the tendering process shall be suspended, pending the decision of the PCRB.

2.3.2. Appeals from decisions taken after the closing date for the submissions of an offer

The PCRB has also jurisdiction to hear appeals from decisions taken after the closing date for the submissions of an offer, where the estimated value of the public contract meets or exceeds

[88] ibid. Regulation 262.

five thousand Euro (€5,000). An appeal by means of an objection may be filed not only by any tenderer/candidate but also by:

> any person, having or having had an interest or who has been harmed or risks being harmed by an alleged infringement or by any decision taken including a proposed award in obtaining a contract, a rejection of a tender or a cancellation of a call for tender after the lapse of the publication period (…)[89]

The objection shall contain in a very clear manner the reasons for the complaints.

The grounds of appeal with respect to decisions taken after the closing date for the submissions of an offer are the following:

i) harm or risk of harm by an alleged infringement or by any decision taken including a proposed award in obtaining a contract;
ii) a rejection of a tender; or
iii) a cancellation of a call for tender after the lapse of the publication period.[90]

The objection shall be filed within ten (10) calendar days following the date on which the contracting authority or the authority responsible for the tendering process has by electronic means sent its proposed award decision or the rejection of a tender or the cancellation of the call for tenders after the lapse of the publication period. The objection shall only be valid if accompanied by a deposit equivalent to 0.50 per cent of the estimated value set by the contracting authority of the whole tender or if the tender is divided into lots according to the estimated value of the tender set by the contracting authority for each lot submitted by the tenderer, provided that in no case shall the deposit be less than four hundred Euro (€400) or more than fifty thousand Euro (€50,000) which may be refunded as the PCRB may decide in its decision.[91] As soon as the Secretary of the PCRB is notified with the objection, the award procedure is immediately suspended.[92]

Furthermore, the Department of Contracts, the Ministerial Procurement Unit or the contracting authority involved, as the case may be, shall be precluded from concluding the contract during

[89] ibid. Regulation 270.
[90] ibid. Regulation 271.
[91] ibid. Regulation 273.
[92] ibid. Regulation 275.

the period of ten (10) calendar days allowed for the submission of appeals. This effectively means that the award process is completely suspended if an appeal is eventually submitted.

The PCRB may accede, reject or cancel the call for offers. Yet again the Public Procurement Regulations do not stipulate what type of damages, if any, are to be provided in the cases of infringements after the closing date for the submissions of an offer.

2.3.3. Ineffectiveness of a public contract

Any interested party or a tenderer may file an application before the PCRB to declare that a contract with an estimated value that meets or exceeds the threshold of Schedule 5 of the Public Procurement Regulations is ineffective.[93] The grounds of ineffectiveness of a public contract are the same grounds envisaged in the Public Procurement Remedies Directives namely:

i) in the case of an interested party, if the contracting authority responsible for the tendering process has awarded a contract without prior publication of a contract notice in the Official Journal of the European Union without this being permissible in accordance with Directive 2014/23/EC, Directive 2014/24/EC and Directive 2014/25/EC.

ii) In the case of a tenderer:

(a) when, notwithstanding an appeal is lodged before the PCRB, the contracting authority or entity responsible for the tendering process concludes the contract before a final decision is given by the PCRB; or

(b) when the contract is concluded by a contracting authority or the authority responsible for the tendering process before the expiry of the period for the filing of an appeal as provided for in regulation 271 of the Public Procurement Regulations.[94]

Interestingly, the Public Procurement Regulations 2016 provide that:

> An interested party or a bidder cannot proceed before a court or tribunal to challenge an award or a lack of award of a call for tender processed according to these regulations and they cannot ask for damages unless they have first resorted to all the remedies afforded under these regulations.[95]

[93] ibid. Regulation 277(1).
[94] ibid. Regulation 277(3).
[95] ibid. Regulation 277(5).

This effectively means that the first instance process of remedies in front of the PCRB is mandatory. Furthermore, an interested party or bidder cannot demand damages, unless he has first exhausted all the remedies under the Public Procurement Regulations 2016. Is this a correct transposition of the Remedies Directives which afford the aggrieved bidder to make a claim for damages? Why is the law restricting/limiting claims for damages unless the aggrieved bidder has exhausted all the remedies under the Regulations? This is one of the only instances in the Public Procurement Regulations 2016 where damages are mentioned, despite the fact that under Regulation 278, one can request damages.

Furthermore, an interested party or bidder, besides his application for a declaration for the ineffectiveness of a contract, may request the PCRB to liquidate and order the contracting authority responsible for the tendering process to compensate him for actual damages suffered.[96] Yet again, this request for compensation is restricting the claim for damages to actual damages, namely *damnum emergens* and not *lucrum cessans*. Again, "actual" damages are not defined and are left to the interpretation of the courts. Does this mean that forgone profits are not included in any liquidation of damages?

Yet, if the PCRB declares that a public contract is ineffective, the PCRB shall impose penalties on the contracting authority responsible for the tendering process after assessing in its decision all relevant factors, including the seriousness of the infringement and the behaviour of those authorities.[97] The Public Procurement Regulations 2016 provide for an exhaustive list of the penalties that shall be imposed:

> (a) the imposition of fines on the contracting authority responsible for the tendering process and the contracting authority or the central government authority, as the case may be, in the amount of fifteen per cent (15%) of the tender value but not exceeding fifty thousand euro (€50,000); or
>
> (b) the shortening of the duration of the contract: Provided that the award of damages prescribed in regulation 278 shall not be considered as an appropriate alternative penalty for the purposes of this regulation.[98]

[96] ibid. Regulation 278.
[97] ibid. Regulation 280.
[98] ibid. Regulation 281.

Interestingly, these penalties are imposed on the contracting authority, rather than the contracting authority being obliged to pay these penalties to the aggrieved bidder.

The PCRB may not consider a contract ineffective, even though it has been awarded illegally, on the abovementioned grounds, if the PCRB finds, after having examined all relevant aspects that 'the overriding reasons relating to a general interest require that the effects of the contract shall be maintained.'[99] Neither 'overriding reasons' nor 'general interest' are defined in the Public Procurement Regulations 2016, thus the PCRB garners a lot of discretion in this respect, on whether or what is an overriding reason and what is in the general interest. Therefore, this lack of clear definitions may lead to legal uncertainty and incoherency.[100]

2.3.4. Appeal from a decision cancelling a contract

The Director of Contracts is vested with the power to issue a decision to cancel a contract or an agreement according to Regulation 261(7).[101] The decision has to be delivered to the economic operator affected by the cancellation, with the latter being afforded ten (10) days from the notification of this decision to file a motivated objection before the PCRB, which objection is only valid if accompanied by a deposit of four hundred Euros (€400). The deposit can be forfeited or may be refunded in whole or in part according to the decision of the PCRB. As soon as the motivated objection is filed with the PCRB's secretary, the public contract is immediately suspended.

After evaluating all the evidence and after considering all submissions put forward by the parties, the PCRB shall decide whether to accede and reject the appeal on the cancellation of the contract.[102] Yet again no reference is made to any claim for damages.

2.4. The Court of Appeal (Superior Jurisdiction) – an instance of carving out of damages

All the above-mentioned decisions of the PCRB may be appealed before the Court of Appeal (Superior Jurisdiction) by any party who feels aggrieved by a decision taken by the PCRB. Appeals are filed by means of an application filed in the Registry of the Court within twenty

[99] ibid. Regulation 280(2).
[100] ibid.
[101] ibid. Regulation 283(1).
[102] ibid. Regulation 283(9).

(20) calendar days from the date on which that decision has been made public, which appeal shall be addressed against the:

> authority responsible for the tendering process, the contracting authority, the recommended tenderer, if any, and any other party involved in the proceedings before the Public Contracts Review Board, who may file a written reply within twenty days from the date of service: Provided that if the appellant fails to try to serve the appeal application on all the parties above-mentioned within two weeks of the filing of the appeal, the Court, after hearing during the first sitting of the appeal the reasons why service was not effected, may declare by means of a decree delivered in open court that the appeal is deserted with expenses to be borne by the appellant.[103]

Pending the decision of the Court of Appeal, the process of the call for tenders shall be suspended.

The Court of Appeal, in its decision, may also cancel the tendering process if it appears to it that this is the best solution in the circumstances of the case; in this case no party will have the right to request damages because of the decision cancelling the call.[104] So in the case where the Court of Appeal cancels the tender, no party can claim any damages and the claim for damages is specifically carved out. Is this in line with the Remedies Directives? One can say that through this carving out of damages, the legislator is protecting and safeguarding the contracting authority's interests to the detriment of the private economic operator whose interests have been infringed, which surely goes against the remedies provided in the Remedies Directives.

2.5. Limited Appeal granted to the Department of Contracts and the contracting authority - an instance where the award of damages may be appealed

The Public Procurement Regulations 2016 permit only a limited appeal for the Director of Contracts and the contracting authority when it comes to an appeal in front of the Court of Appeal (Superior Jurisdiction), namely that 'The Department of Contracts and a contracting

[103] ibid. Regulation 285.
[104] ibid. Regulation 286(3).

authority may only refer a matter to the Court of Appeal in relation to a decision taken by the Review Board relating to the ineffectiveness of a contract or the award of damages.'[105]

Maltese Civil Law provides also specific grounds for re-trial in specific circumstances outlined by the Code of Organisation and Civil Procedure.[106] Yet the Public Procurement Regulations 2016 stipulate that no application for a re-trial from a decision of the Court of Appeal may be made if 'after the final decision has been given, the public contract has been signed between the contracting authority and the recommended tenderer and no request for the suspension of the execution of the decision has been made'.[107]

2.6. Summary of damages under the Public Procurement Regulations 2016

One can state that damages under the Public Procurement Regulations 2016 are only explicitly mentioned in three instances, namely:

i) The Public Procurement Regulations 2016 establish that an interested party or a bidder cannot proceed before a court or tribunal to challenge an award or a lack of award of a call for tender processed according to the Public Procurement Regulations 2016 and they cannot ask for damages unless they have first resorted to all the remedies afforded under the Regulations. Yet the Regulations fail to give the damages outlined in the Remedies Directives;

ii) In the case of an ineffectiveness of the public contract, an aggrieved bidder may request the PCRB to liquidate and order the authority responsible for the tendering process and the contracting authority to compensate him for actual damages only;

iii) In the case where the Court of Appeal (Superior Jurisdiction) cancels the tendering process when it appears to it that this is the best solution in the circumstances of the case, no party will have the right to request damages because of the decision cancelling the call;

iv) In the case where the Court of Appeal (Superior Jurisdiction) awards damages, the Director of Contracts and the contracting authority have a right to appeal the award of damages.

[105] ibid. Regulation 287.
[106] Code of Organisation and Civil Procedure.
[107] Public Procurement Regulations 2016, Regulation 290.

2.7. Commercial Sanctions Tribunal

The Maltese legislator, besides establishing the PCRB, has also established the Commercial Sanctions Tribunal with the specific function to hear and determine issues relating to the blacklisting of persons. The economic operator who may have been informed by the Director of Contracts that he will be blacklisted can file an appeal before the Commercial Sanctions Tribunal. Blacklisting of an economic operator may also be done by the Director of Employment and Industrial Relations.

The Commercial Sanctions Tribunal is composed of a chairman and two permanent members, one of whom shall act as a deputy-chairman, who are all appointed by the Prime Minister on the advice of the Minister of Finance for a period of three (3) years with the possibility of re-appointment. So, the method of appointment of the members of the Commercial Sanctions Tribunal is the same as for the appointment of the PCRB members.

Furthermore, and unlike the procedure in front of the PCRB, Regulation 97(1) provides that the judicial acts, written pleadings and other documents which are to be filed with the Secretary of the Commercial Sanctions Tribunal, may be filed in the Registry of the Civil Courts and Tribunals, Malta. The aggrieved bidder thus has an option when it comes to the filing of the acts.

2.8. Damages arising out of Pre-Contractual Liability

Pre-contractual liability is the liability that one incurs prior to entering into a contract. In the past, the Maltese courts were reluctant to accept pre-contractual liability on the grounds that the contract is still in a stage of negotiation, and therefore there is no contract nor final consent. However, pre-contractual liability entails that one is also responsible in the negotiations, that one must act in good faith with the other negotiating party. Therefore, if one does not act in good faith, he may be held liable in damages. For instance, one of the rules of good faith is that one does not terminate negotiations capriciously, there must be a good reason for termination.

The Maltese courts for the first time accepted pre-contractual liability in *Grixti v Grech* (1998).[108] Grech had a client who wanted to purchase a property and he contacted Grixti to

[108] Elia Grixti vs. Mark Grech, Civil Court First Hall [3/04/1998] Case no. 222/98.

find one. Grixti did, but Grech had already found another property; however, Grixti still wanted to be paid for his services. The Court held that two elements have to verify themselves, namely:

i) The incurring of expenses during negotiations, whereby one party has incurred expenses in good faith; and
ii) The other party would have capriciously terminated the negotiations.

The court stated that to impose liability, the negotiations must have reached the stage where the parties must have almost concluded negotiations. The court did not award damages since negotiations had not reached the final stage since there were no further discussions. However, the court did accept the concept of pre-contractual liability in principle.

Busuttil v Muscat (1998) concerned similar circumstances; however, the court did not enter into the question of pre-contractual liability.[109] In this case one party stopped the negotiations and the other party sued for damages. However, the court dismissed the case since there was no contract signed and therefore no liability. In *Caruana v Vella* (1983), a shop owner asked an agent to find him an employment and closed down his shop with the expectation that he was going to start a new employment, however his friend did not manage to get him said employment.[110] The shop owner sued for damages, with the court stating that negotiations had not reached an advanced stage. Therefore, there could not be any responsibility even if there was pre-contractual liability.

Article 993 of the Maltese Civil Code[111] refers to the principle of *bona fide*, namely that a party, in the execution of a contract, must act in good faith. Pre-contractual liability is based on good faith in the negotiations. The court held that given that one must act in good faith in the performance of a contract, then he must also act in good faith in the negotiating stage. In *Baldacchino v Chairman tal-Korporazzjoni Enemalta* (2006) the Court accepted the principle of pre-contractual liability on the basis of article 993

> Contracts must be carried out in good faith, and shall be binding not only in regard to the matter therein expressed, but also in regard to any consequence

[109] Carmelina Busuttil vs. Salvatore Muscat noe, Civil Court First Hall [28/10/1998].
[110] Francis Caruana vs. Joseph Vella, Civil Court First Hall [18 January 1983].
[111] Civil Code, Chapter 16, Laws of Malta (Maltese Civil Code).

which, by equity, custom, or law, is incidental to the obligation, according to its nature.[112]

If there is an expectation of a conclusion of a contract and one party terminated the negotiations, then he would be liable for damages.

In *Fenech v Dipartiment tal-Kuntratti* (2012), the Court still had doubts since the Maltese Civil Code is silent on the issue of pre-contractual liability.[113] Where pre-contractual liability was accepted, this was scrutinised under tort law and therefore subject to the two (2) year prescriptive period. The court of appeal confirmed pre-contractual liability however the court observed that the prescriptive period was that of five (5) years under contract. In pre-contractual liability, there is mainly the duty to act fairly and this falls under contract not tort. Once that the parties negotiated, they have entered into a tacit contract to continue negotiations. Nowadays the prescriptive period is that of five (5) years for pre-contractual liability, however there is still a question on the amount of damages, damages arising from pre-contractual liability should not be as much as when there is a breach of contract.

One must act in good faith in all negotiations. In *Debattista v JK Properties Ltd* (2005), one party did not give information to the other party.[114] Pre-contractual liability exists not only when negotiations terminate at an advanced stage, but also when during discussions the parties do not act in good faith. In *De Tigne Ltd v Micallef* (2007), the court held that good faith applies in the negotiating stage.[115] This is the established rule even if the Maltese Civil Code is silent on pre-contractual liability.

2.9. Two case studies on precontractual damages

2.9.1. Case 1: *L-Avukat Peter Fenech, ghan-nom u in rapprezentanza tal-Consortium Norcontrol It Limited Ericsson Microwave Systems AB vs Department of Contracts*

In *L-Avukat Peter Fenech, ghan-nom u in rapprezentanza tal-Consortium Norcontrol It Limited Ericsson Microwave Systems AB vs Department of Contracts,* the plaintiff consortium

[112] Anthony Baldacchino vs. Chairman Tal-Korporazzjoni Enemalta et, Civil Court First Hall [11/10/2006] Case no. 1721/1996/1.
[113] L-Avukat Peter Fenech, ghan-nom u in rapprezentanza tal-Consortium Norcontrol It Limited Ericsson Microwave Systems AB vs. Department of Contracts Civil Court First Hall, [14/02/2012], Case no. 977/2009.
[114] Daniela Debattista vs. JK Properties Ltd, Court of Appeal (Civil, Superior) [07/12/2005] Case no. 840/2004/1.
[115] De Tigne Ltd vs. Lorna Micallef, Court of Appeal (Civil, Inferior) [10/01/2007] Ref no. 353/2002/1.

requested the liquidation of damages, both direct and indirect, following the consortium's disqualification and subsequent exclusion from a tender for the supply and instalment of Malta Traffic Management Information System.[116] The defendant Department of Contracts replied that the plaintiff consortium suffered no damage and that the claim for damages was hypothetical and speculative, adding that the plaintiff consortium had to specify what type of damages it was pretending to have suffered together with the proof.

The First Hall of the Civil Court noted that there are three types of damages under Maltese law, namely (i) damages deriving from a delict, (ii) damages arising from *culpa aquiliana* and (iii) damages *ex contractu,* apart from pre-contractual damages pertaining to the invitation for offers phase.

The First Hall of the Civil Court established that the lawsuit had not been filed on the grounds of contractual damages because the parties had not arrived to an *ex contractu* relationship. The Court stated that neither has the lawsuit been based on *culpa aquiliana* as per article 1031 and 1032(1) of Chapter 16 of the Laws of Malta. The Civil Court observed that, at most, this case pertains to pre-contractual liability, which institute is still dubious and undefined under Maltese law:

> Dan l-istitut ma giex introdott fil-Kodici Civili taghna bhal ma sar f'pajjizi ohra bhall-Italja u l-Germanja. Kien hemm kawzi fejn il-Qrati taghna dahlu f'din il-materja izda ma jistax jinghad li l-Qrati taghna hadu posizzjoni cara, netta, definita u inekwivoka ghaliex tidher b'mod generali r-riluttanza tal-Qrati taghna li jaccettaw b'mod inkondizzjonat materja li mhix kodifikata.[117]

The Court, after having gone through a number of principles which were established by Maltese case law on pre-contractual liability, found no precontractual responsibility on the part of the defendant Department of Contracts. The Court added that there is *no culpa ex contractu* or *extra contractu*, nor *culpa aquiliana*, nor *culpa ex delicto* or *dolo* nor abuse of administrative discretion on the part of the Department of Contracts. Nor has it resulted any responsibility of the Department of Contracts that could lead in terms of the law for the award of damages in

[116] *Fenech vs. Dipartiment tal-Kuntratti* (n 113).
[117] ibid. 18. **Translation**: "This institute was not introduced in our Civil Code as has been done in other countries such as Italy or Germany. There were cases where our Courts have looked into this matter but one cannot say that our courts have taken a clear, all-encompassing, definitive and unequivocal position, since this appears from the reluctance of our Courts to accept unconditionally a matter which is uncodified."

favour of the plaintiff on the ground that the consortium was excluded from the competition for the tender *de quo*.[118]

The plaintiff consortium filed an appeal from the decision of the court of first instance. The Court of Appeal overruled the decision of the court of first instance and held that the Department of Contracts was responsible and that therefore the Department had to answer for the damages incurred by the plaintiff consortium.[119] Interestingly the Maltese Court of Appeal stated that in the case of *culpa in contrahendo*, the liquidation of damages is based on the "negative interest", i.e. not that which would have been acquired by the plaintiff if the plaintiff had been awarded the contract, but which he would not have lost had the plaintiff not submitted its offer.[120] The Court of Appeal also added that the classic damages that are awarded in cases of *culpa in contrahendo* are the expenses relating to the preparation of the tender.

The PCRB and the First Hall of the Civil Court seem to equate the damages resulting from a tendering process with the deposit paid by the aggrieved tenderer when he files an appeal. In fact, in many decisions, the Public Contracts Review Board and the First Hall of the Civil Court limit themselves to order the refund of the deposit.[121]

---

[118] ibid. p. 22-23.

[119] L-Avukat Peter Fenech, ghan-nom u in rapprezentanza tal-Consortium Norcontrol It Limited Ericsson Microwave Systems AB vs. Department of Contracts, Court of Appeal [29 April 2016] Case no. 977/2009. "Madankollu, id-Dipartiment ghandu jwiegeb ghad-danni li garrab il-Konsorzju, mhux ghax naqas mill-obbligi tieghu taht l-art. 1031 tal-Kodici Civili, izda ghax naqas mill-obbligazzjoni kuntrattwali tieghu – imnissla, kif rajna, mill-patt tacitu *de inuendo contractu* li jirregola l-process pre-kuntrattwali - illi ma jwarrabx l-offerta tal-Konsorzju jekk mhux ghal raguni tajba li tiswa fil-ligi. Fil-kaz specifiku ta' sejha ghal offerti ghal kuntratt pubbliku, raguni tajba biex titwarrab offerta tista' tkun nuqqas ta' tharis tal-kondizzjonijiet tas-sejha, kondizzjonjijiet sfavorevoli fl-offerta jew offerta aktar vantaggjuza ta' terzi. Ga' nghatat dikjarazzjoni gudizzjarja, fis-sentenza li temmet il-kawza numru 972/2005, illi ma kienx hemm raguni tajba u illi d-Dipartiment mexa hazin meta warrab l-offerta tal-konsorzju, ghax warrabha ghal raguni li ma tiswiex fil-ligi. Dan in-nuqqas, wahdu, ghax huwa ksur ta' patt kuntrawattwali, inissel responsabbilta' minghajr il-htiega ta' dolus jew culpa proprji ghal responsabbilta' ex delicto vel quasi li fittxet u ma sabitx l-ewwel qorti".
Translation: "L-Avukat Peter Fenech, in the name and in representation of Consortium Norcontrol It Limited Ericsson Microwave Systems AB vs Department of Contracts, Court of Appeal, Sworn Application 977/2009, 29 April 2016 "Despite this, the Department has to answer for the damages incurred by the Consortium, not because it has not adhered to its obligations under art.1031 of the Civil Code, but because it has not adhered to its contractual obligations – emanating, as we have seen, from the tacit pact *de inuendo contractu* which regulates the pre-contractual process - which does not exclude the Consortium's offer unless there is good reason at law. In the specific case of a call for offers for a public contract, a good reason for the exclusion of an offer may be the lack of observance of the conditions of the call, unfavourable conditions in the offer or a third party offer which is more advantageous. A judicial declaration has already been given in the decision which concluded the lawsuit number 972/2005, namely that there was no good reason and that the Department was wrong when it excluded the Consortium's offer, because it was excluded for a reason which was grounded in law. This failure, alone, because it is an infringement of contractual pact, creates responsibility without the need for *dolus* or *culpa* proper for responsibility *ex delicto vel quasi* which the first court tried to explore unsuccessfully."

[120] ibid. 23.

[121] United Equipment Company (UNEC) Ltd. vs. Id-Direttur tal-Kuntratti, u Il-Korporazzjoni Enemalta ghal kull interess li jista' jkollha, Court of Appeal (Inferior Jurisdiction) [10 July 2012] Case no. 5/2012/RCP, p. 41.

2.9.2. Case 2: *Design Solutions Limited (C 16245) vs Direttur tal-Kuntratti u Kunsill Malti ghax-Xjenza u t-Teknologija*

This is a case concerning a claim where the plaintiff company claimed contractual damages, with the court finding that this was a case of precontractual damages. *Design Solutions Limited (C 16245) vs Direttur tal-Kuntratti u Kunsill Malti ghax-Xjenza u t-Teknologija* concerned a call for offers with respect to a 'Services Tender for Architectural Works, including Design and Supervision for the National Interactive Science Centre, Malta'.[122] The plaintiff company, which participated in the call for offers, claimed that it suffered damages given that it was disqualified from a call for offers without a good reason. Furthermore, despite that a decision of the Court of Appeal annulled the call for offers and ordered that the said call for offers had to be re-issued, the defendants still proceeded with the signing of the public contract with third parties, which public contract was fully implemented. Therefore, the plaintiff company requested compensation for the value of the public contract which it lost.

The court noted that this is a similar case to *Avukat Peter Fenech noe vs Dipartiment tal-Kuntratti*, decided by the Court of Appeal on 29 April 2016. The court held that the defendants can be found responsible for damages of a precontractual nature arising from the disqualification of the plaintiff company without a good reason. Furthermore, the defendants had proceeded with the signing of the final agreement with the preferred bidder despite the decision of the Court of Appeal not to do so.

The defendant Director of Contracts argued that in the field of damages, the plaintiff company had to prove the causal link between the act of the defendants and the damages suffered. The Director of Contracts stated that there was no contractual relationship between the parties:

> Issa kif inhu maghruf fil-gurisprudenza taghna sabiex wiehed jista' jitlob danni mnissla minn responsabbilita prekuntrattwali, dak li jkun irid jipprova li l-agir ta' min waqqaf it-trattativi kien immexxi minn *dolo*. F'dan il-kaz hadd mill-intimati ma kellu dan il-hsieb doluz meta skwalifikaw lill-kumpannija rikorrenti

In this case the Court of Appeal decided that the deposit paid by the appellant company for the filing of the appeal in front on the Public Contracts Review Board is to be refunded to the appellant company. See also: Court Design Solutions Limited vs. Direttur tal-Kuntratti, Kunsill Malti ghax-Xjenza u t-Teknologija, Court of Appeal (inferior Jurisdiction, [29 November 2021] Case no. 32/2011, p. 21.

[122] Design Solutions Limited (C 16245) vs. Direttur tal-Kuntratti u Kunsill Malti ghax-Xjenza u t-Teknologija, Civil Court First Hall, [23 October 2018] Case no. 692/2015AF.

> mill-kompetizzjoni pubblika. Ghalhekk fl-assenza tad-*dolo* ebda danni ma huma dovuti.
>
> F'kull kaz fl-istadju prekuntrattwali skont il-gurisprudenza Maltija, il-kumpannija rikorrenti tista' titlob biss li tithallas ghat-telf attwali u mhux ukoll kumpens minhabba telf ta' qliegh.[123]

The Director of Contracts noted that even if he had to issue a new call for offers, the plaintiff company had no guarantee that it would have been awarded the contract. The Court agreed with this reasoning stating that a declaration of responsibility and consequently the liquidation and payment of damages cannot be based on the loss of a contract which the plaintiff company had no guarantee that it would have been awarded to her. The plaintiff company did not provide conclusive proof that it was going to be awarded the contract:

> Huwa ghalhekk ukoll li l-intimati sewwa jeccepixxu li l-attrici ma tistax tipprova li garrbet danni materjali u konkreti, lil hinn minn dawk ta' natura pre-kuntrattwali, ghaliex hija ma tistax turi li kieku harget sejha gdida hija kienet ser tirbah il-kuntratt u allura talba ghad-danni akwiljani jew kuntrattwali abbazi ta' kuntratt li qatt ma gie ffirmat, zgur li ma tregix.[124]

The Court also referred to the definition of pre-contractual liability, as defined by the case *Philip Seguna et vs Kunsill Lokali Zebbug,*[125] where the court stated that precontractual liability arises when two persons enter into direct contact and negotiations with a view to sign a contract, and when one of them stalls from these contacts without justification.

After having established the pre-contractual liability, the Court considered the claim for damages. The defendant Director of Contracts argued that according to Maltese case law, the plaintiff company could only claim actual damages and not compensation for loss of profit.

---

[123] **Translation**: "Now it transpires from our jurisprudence that for one to claim damages arising from precontractual liability, the complainant has to prove that the behaviour of the person who has stopped the negotiations has been driven by *dolo*. In this case, no defendant had *dolus* when they disqualified the applicant company from the public competition. Therefore, in the absence of *dolo*, no damages are due. In any case, in the precontractual stage, according to Maltese jurisprudence, the plaintiff company can only claim the actual loss but not also compensation for loss of profits."

[124] *Design Solutions Limited (C 16245)* (n 122) p. 16.
Translation: "It is for this reason that the defendants are correctly pleading that the applicant cannot prove that it had incurred material and concrete damages, besides those of a precontractual nature, because it cannot prove that if a new call had to be issued, it would have been awarded the contract and therefore a claim for *danni akwiljani* or contractual on the basis of a contract that was never signed, does not hold water."

[125] Philip Seguna vs. Kunsill Lokali Zebbug, Court of Appeal Civil (Superior Court) [03/10/2008] Case no. 934/1998/1.

The Court cited the Court of Appeal in the case *Avukat Peter Fenech noe vs Dipartiment tal-Kuntratti*:

> Il-kejl ta' dawn id-danni ma huwiex il-valur tal-kuntratt li ma sehhx, appuntu ghax dak il-kuntratt ma sehhx u ma holoq ebda rabta, izda dak li jissejjah l-"interess negattiv" i.e. id-danni li l-parti l-ohra ma kinitx iggarrab li kieku ma dahlitx fin-negozjati: l-ispejjez li tkun dahlet fihom biex taghmel jew tqis l-offerta u, possibilment, l-opportunitajiet mitlufa. Dan l-interess negattiv gie mfisser tajjeb hafna fis-sentenza fuq imsemmija ta' Pullen v Matysik:
>
> "the damages to which plaintiffs are entitled are, however to be restricted to the actual losses they incurred up to the time that the negotiations broke down whether they consist in actual expenses incurred or depreciation of material or otherwise but are not to include any profits which they would have derived from the concession of the boutique as in that way he would be benefitting from an obligation which never came into existence."
>
> (…)
>
> Nghaddu issa ghall-likwidazzjoni tad-danni li ghandu jaghmel tajjeb ghalihom id-Dipartiment. Il-kejl tad-danni fil-kaz ta' culpa in contrahendo huwa dak maghruf bhala "l-interess negattiv", i.e., mhux dak li kien jikseb l-attur li kieku nghata l-kuntratt, izda dak li ma kienx jitlef li kieku ma ressaqx l-offerta.[126]

The Court rejected the plaintiff company's request for the value of the contract by way of damages. The Court said that the plaintiff company did not make a claim for the damages which it suffered for its participation in the call for offers nor for moral damages. Therefore, given that under precontractual damages, the plaintiff company could not claim the value of the

[126] ibid. p.19.
Translation: "The quantification of these damages is not the value of the contract which was never concluded, because the contract was not concluded and therefore there is no obligation, but that which is referred to as 'negative interest' i.e. damages due arising out of the fact that the other party would not have suffered if it had not entered in the negotiations: the cost that it had incurred to submit or study the offer, and possibly, the loss of opportunities. This negative interest was explained well enough in the abovementioned decision Pullen v Matysik:
(…)
Now let's look into the liquidation of damages which is the responsibility of the Department. The quantification of the damages in the case of culpa in contrahendo is referred to as "negative interest", i.e., not that which would have been realised by the applicant should he had been awarded the contract, but the costs he wouldn't have made had he not submitted the offer."

contract, and the plaintiff company did not claim compensation for that which it would have lost had it not submitted its offer, therefore there were no damages to be liquidated in this case.

The Court added that this did not prejudice the plaintiff company's rights to file a lawsuit for the liquidation and payment of damages. Therefore, while the Court found in favour of the plaintiff company's request and that the defendant was responsible for precontractual damages consequential to the fault of the defendant to proceed with the call for offers in terms of the law, and for not executing the decision of the Court of Appeal, yet no liquidation of damages was awarded, without prejudice to the plaintiff company's right to file new proceedings for damages and their liquidation.

2.10. Contractual obligations and tortious obligations

In contract law, the general principle is that it is the debtor of the contractual obligation who has to prove that he is not responsible for the non-performance of a contractual obligation. In tort law, one becomes liable because he has inflicted harm on someone else, through a wrongful act which violates social standards and the burden of proof lies with the victim.

In contract law, there is always a pre-existing obligation. In tort, there is the principle that one must not harm others unjustly, expressed through the *naeminem laedere* principle. The aim of tort law is to remedy a wrong which has been committed, while the aim of contract law is to give effect to agreements which normally have a purpose to bring about an economic transaction. In tort, the victim must prove both the harm caused and that said harm was wrongful/unlawful, or else the defendant would not be found liable.

By contrast, in contract law, the plaintiff need not prove the other party was at fault or that it failed to perform its duties intentionally or negligently. All he needs to prove is breach of contract. The *onus* of proof is therefore greater when one deals with tort.

In tort, damages reflect one's negative interest, the idea is that of *restitutio in integrum*. Whilst in contract, the concept of damage will be based on putting the aggrieved party in the position in which he would be had the contract been fulfilled, that is, the aggrieved party may seek to compel the other party to honour his contractual obligations. In order to calculate contractual damages, the injured party needs to be placed in the position at the time the damage was caused to calculate the *quantum* of damages that is owed. There are cases where breach of contract is intentionally caused, that is fraudulent breach of contract. The law does not set a limit to the

damages to be compensated, but they include any damages linked directly to the conduct of the fraudulent party who has breached the contract.

There are also certain situations where parties in a contract have a possibility of also suing each other in tort, namely concurrent liability. This creates an overlap between contract and tort law.

Article 1125 of the Maltese Civil Code on the effects of obligations stipulates that 'Where any person fails to discharge an obligation which he has contracted, he shall be liable in damages.'[127] This article establishes a general principle which is applicable for all sorts of obligations and provides an action for damages for non-performance of obligations arising out of a contractual relationship, including the loss which a creditor may have sustained and the *lucrum cessans* referred to in article 1136.[128] The non-performance of a contractual obligation renders a person liable for damages:

> Huwa proprju in virtu ta' tali kuntratt illi tigi krejata, regolata jew mahlula l-obbligazzjoni (art 960 tal-Kodici Civili). Il-konsegwenza tan-nuqqas ta' ezekuzzjoni ta' l-obbligazzjoni jirrendi lil dak li jkun hekk intrabat passibbli ghad-danni (art 1125 tal-Kodici Civili) … Mill-konsegwenza diretta ta' l-inadempjenza ta' l-obbligu kontrattwali assunt jiskaturixxu d-danni, kif josserva l-Giorgi ("Obbligazioni, Vol IV p.151), "quando si parla di colpa per ommissione si deve intendere la trasgressione di un dovere, per il quale taluno era in obbligo di fare che non fece, giusta l'aforsima "qui non facit quod facere debet videtur facere adversus ea quae non fecit.[129]

---

[127] Maltese Civil Code, Article 1125.

[128] Dr Jose Herrera noe vs. Gaetano Debattista et noe, Civil Court First Hall [21 April 2004] Case no. 1699/1995/1. "L-Artiklu 831 ta' l-Ordinanza VII tal-1868 (illum l-Artikolu 1125 tal-Kapitolu 16) jistabilixxi principju generali applikabbli ghal kull xorta ta' obbligazzjonijiet u jaghti azzjoni ta' danni kontra min jonqos u jikser l-obbligazzjonijiet li jkun refa' fuq spallejh. B'mod generali wkoll id-danni jikkonfiguraw ruhhom fit-telf li l-kreditur ikun bata' u l-qliegh li jkun gie mtellef (artikolu 1135)."
Translate: Article 831 of Ordinance VII of 1868 (today Article 1125 of Chapter 16) establishes a general principle applicable to all kinds of obligations and gives an action for damages against those who fail and violate the obligations that he contracted. In general also the damages configure themselves in the loss that the creditor has suffered and the profit that has been lost (article 1135).

[129] Zammit & Cachia Limited vs. Hix Limited, Court of Appeal (Inferior Court) [17 February 2003] Case no. 750/2000 /1.
Translation: "It is by virtue of the contract that an obligation is created, regulated or terminated, (art. 960 of the Civil Code). The consequence of the lack of execution of the obligation will render the person who is bound by the obligation, responsible for damages, (art 1125 of the Civil Code) … from the direct consequence of not adhereing to the contractual obligation, from which damages ensue, as observed by Giorgi ("Obbligazioni, Vol IV p.151), "when one speaks of culpa arising from omission, there will be the transgression of a duty, for which one is under the obligation to do something, in this case, the aphorism "qui non facit quod facere debet videtur facere adversus ea quae non fecit" applies".

Article 1136 of the Maltese Civil Code provides for the damages payable with respect to breach of contract.[130] It states that when there is a breach of contract as a result of negligence, then the person responsible for the breach must pay compensation which is limited to that which could have been foreseen at the time when the contract had been entered into. When the breach of contract is intentional (fraudulent), then the damages are unlimited. The Court of Appeal interpreted article 1136 as follows, noting that article 1136 refers to contractual damages arising *ex culpa*, while article 1137 of the Civil Code refers to contractual damages arising out of *dolo* (namely the loss sustained and the loss in profit):

> Dina d-dispozizzjoni - art.842 Ord. VII tal-1868 (art.1136 Kod. Civ.) – li qieghda fit-Trattat ta' l-Effetti ta' l-Obligazzjonijiet, u ghalhekk tikkunsidra d-danni kontrattwali, tghid illi "the debtor is liable only to such damages as were, or might have been, foreseen at the time of the obligation, unless the non-performance of the obligation proceeds from fraud on his part". Huwa maghruf illi dina d-disposizzjoni tirriferixxi ghad-danni kontrattwali "ex culpa", u mhux "ex dolo", u ghalhekk tillimita r-responsabbilta' ghad-danni li kienu jew setghu jkunu prevedibbli mid-debitur, mentri l-artikolu ta' wara (843 Ord. (art 1137 Kod. Civ.), li jipprevedi l-kaz ta' dolo, jghid illi d-danni jestendu ghall-hsara – "loss sustained" – u ghall-qliegh li l-kreditur tilef, purke' jkun konsegwenza immedjata u diretta tan-nuqqas ta' l-obbligazzjoni.[131]

The First Hall of the Civil Court pronounced that the ultimate aim of a claim for damages arising from contract is to redress the loss which has been sustained:

> [O]ne would be well advised to keep in mind that once the damages claimed in this action emanate from a contractual context, their sole purpose should be that of redressing the loss which the injured party shows to have suffered, and should not be an occasion of punishing or penalising the non-performing party nor of

[130] Maltese Civil Code, Article 1136 – "The debtor shall only be liable for such damages as were or could have been foreseen at the time of the agreement, unless the non-performance of the obligation was due to fraud on his part."

[131] Gio Maria Grima vs. Gregorio Zammit, Court of Appeal, [5 March 1937].
Translation: "This provision of the law - art.842 Ord. VII tal-1868 (art.1136 Civil Code) – which is under the Treaty on the Effects of Obligations, and therefore it considers contractual damages, states that "the debtor is liable only to such damages as were, or might have been, foreseen at the time of the obligation, unless the non-performance of the obligation proceeds from fraud on his part". It is known that this provision refers to contractual damages "ex culpa", and not "ex dolo", and therefore it limits the responsibility of damages that were or could have been foreseen by the debtor, while the subsequent article (843 Ord. (art 1137 Civil Code), which foresees dolo, states that the damages extend to the loss, – "loss sustained" – and the loss of profit of the creditor, as long as this is an immediate and direct consequence of the non-observance of the obligation."

> providing the said injured party with an opportunity of unduly enriching itself at the other party's expense (App. Comm. 15.12.1952 in Calleja noe vs Mamo pro et noe (Kollez. Vol. XXXIV.i.367). Particularly, a party to a contract which fails to perform what it had undertaken to do, becomes liable to the other party for damages by making good for any damage which is reasonably deemed to be a direct consequence of the failure to properly perform one's undertakings (P.A. PS 23.4.2010 in Joseph Dalli et vs Mediterranean Film Studios Ltd. (not appealed), while at the same time, the injured party has to adopt all reasonable means of mitigating such losses (Inf Civ App 3.11.1956 in Xuereb vs Livick (Kollez.Vol. XL.i.63).[132]

In tort, the concept of foreseeability does not arise because tort is that harm which arises in the absence of contract. This raises the question when one has liability in tort and contract arising from the same situation. The basic rule which the Maltese legal system adopts is to not allow double recovery, that is, one may not recover damage twice (namely once under tort and once under contract). Most European legal systems allow a choice to the plaintiff to sue either in contract or in tort depending on what is more advantageous to the aggrieved party.[133]

In the French legal system, one may only sue on the basis of breach of contract. It is possible for the parties to insert a clause in the contract to allow tort actions, however if the contract is silent, jurists believe that the contract should determine the matter, since the parties had chosen to regulate their relationship through a contract, which in its nature supersedes the generic protection of tort law. In the United Kingdom, where the defendant's conduct gives rise to both a contractual breach and tort, the plaintiff is free to choose whether to sue under tort or contract, or both. This approach to damages may be more flexible and reasonable than the French approach.

Italy follows a similar position to that of the United Kingdom, namely, that there is no objective incompatibility between the specific protection of the parties' interest under contract law and the generic protection afforded by tort law. Thus, by entering into a contract, the parties do not have the intention to renounce to the general protection of their rights under the law of tort. Therefore, concurrent responsibility is allowed whereby the injured party has the right of

[132] Maureen Anne Fabri et vs. Global Capital Financial Management Limited, Civil Court First Hall [8 May 2014] Case no. 694/2013.
[133] This choice is available in Italy, Germany, and England, but not France.

choice which the judge must respect. There are circumstances where an applicant may bring an action without specifying if it is an action based on tort or contract, in which case the court would have discretion to determine what type of action is being exercised.

Maltese law is silent on the issue of concurrence of actions, the courts rarely entered directly into the issue of whether concurrence of actions is possible or whether *non cumul* applies under Maltese law. Generally, the plaintiff will make an action for damages without specifying whether such action is based on contract or tort. It is the court which generally classifies the action as whether it is on contract or tort. The court has indirectly referred to this issue, yet judgments have not been consistent in their approach, some have apparently decided in favour of the *non cumul,* however it is not yet clear.

In issues pertaining to damages, the court takes a two-stage approach in order to award damages. First it decides whether there has been a breach, and whether it is a breach of contract or tort law. The court therefore looks at whether there is liability and under which category it falls. Then, the court must quantify the damages as per following principles:

- If it is under contract, then if there is a negligent breach, only damage foreseeable at the time of entering into a contract can be compensated.
- If the damage was unforeseeable at the time of entering into the contract, then there can be no compensation.
- If there is a fraudulent breach, then both unforeseeable and foreseeable damage can be compensated.

The relevant articles on the Maltese Civil Code with respect to the quantification of damages under contract, are article 1337[134] and article 1338[135].

If on the other hand, the liability falls under tort, one has to verify whether there was imputability and causal links. Then, with respect to the compensation of damages, the Court looks at article 1045 regarding the quantification of damages:

[134] Maltese Civil Code, Article 1137 - "Even where the non-performance of the obligation is due to fraud on the part of the debtor, the compensation in respect of the loss sustained by the creditor, and of the profit of which he was deprived, shall only include such damages as are the immediate and direct consequence of the non-performance."
[135]ibid. Article 1138 - "Where the agreement provides that the party who fails to carry it out shall pay a certain sum by way of damages, it shall not be lawful to award to the other party a greater or lesser sum."

(1) The damage which is to be made good by the person responsible in accordance with the foregoing provisions shall consist in the actual loss which the act shall have directly caused to the injured party, in the expenses which the latter may have been compelled to incur in consequence of the damage, in the loss of actual wages or other earnings, and in the loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused:

Provided that in the case of damages arising from a criminal offence, other than an involuntary offence, and only in the case of crimes affecting the dignity of persons under Title VII of Part II of Book First of the Criminal Code and of wilful crimes against the person subject to a punishment of imprisonment of at least three years under Title VIII of Part II of Book First of the said Code, up to a maximum limit of ten thousand euro (€10,000) or up to such maximum limit as the Minister responsible for justice may by regulations establish both with regard to the maximum amount and about the method of computation depending on the case, the damage to be made good shall also include any moral harm and, or psychological harm caused to the claimant.

(2) The sum to be awarded in respect of such incapacity shall be assessed by the court, having regard to the circumstances of the case, and, particularly, to the nature and degree of incapacity caused, and to the condition of the injured party.[136]

2.11. Maltese law on damages arising out of tortuous liability

Maltese Civil law on damages arising out of tortuous liability provides for the following damages:

1032. Every person, however, shall be liable for the damage which occurs through his fault.[137]

(1) A person shall be deemed to be in fault if, in his own acts, he does not use the prudence, diligence, and attention of a *bonus paterfamilias*.

[136] ibid. Article 1045.
[137] ibid. Article 1031. Under Maltese law, the test of liability is the *culpa levis in abstracto.*

(2) No person shall, in the absence of an express provision of the law, be liable for any damage caused by want of prudence, diligence, or attention in a higher degree.[138]

1033. Any person who, with or without intent to injure, voluntarily or through negligence, imprudence, or want of attention, is guilty of any act or omission constituting a breach of the duty imposed by law, shall be liable for any damage resulting therefrom.[139]

Article 1033 of the Maltese Civil Code is rather enlightening since what matters is that there is a breach of duty imposed by law, no matter if the act was done voluntarily or not. This is the distinguishing factor from the abovementioned articles 1031 and 1032. Articles 1031 and 1032 only refer to acts, not omissions. Articles 1031 and 1032 provide for *quasi* delictual acts to a person who acted but was not in breach of law, whilst article 1033 provides for an act which is a breach of the law.

A distinction in tort is when a person can be held directly responsible or indirectly responsible. In this sense, the basic elements of direct responsibility are:

i) An act which is imputable to a person who materially causes it;
ii) An act which is unjust;
iii) An act which causes damage, with the damage caused being certain, proved and of a patrimonial or moral nature; and
iv) An act which is committed through *dolus* or *culpa*.

The damage caused has to be the consequence of an unjust act, namely for responsibility to arise, the *nexus* between the cause and effect has to be established, with the *onus probandi* being on the injured party.

Therefore, as outlined in article 1033 of the Civil Code, the damage must be caused 'voluntarily or through negligence, imprudence or want of attention'.[140] Consequently, if no *dolus* (intention) or *culpa* (negligence) is proved, tort cannot be proved. Furthermore, since for a person to be held liable for damages he must be in fault, damages which occur due to a fortuitous event, act of God, *force majeure* or accident are considered as defences.

[138] ibid. Article 1032.
[139] ibid. Article 1033.
[140] ibid.

On the other hand, indirect responsibility under tort, which involves cases where a person is held indirectly responsible for the acts of those for whom he is responsible, are beyond the scope of this thesis.

Article 1030 states that 'Any person who makes use, within the proper limits, of a right competent to him, shall not be liable for any damage which may result therefrom.'[141] This article expanded its scope from simple cases of good neighbourliness, to procedural rights and other areas in the field of contract law. Maltese law creates a general duty to perform contractual obligations in good faith. The Court referred to the concept of negotiating in good faith, with regards to pre-contractual liability based upon abuse of right in the Bezzina Case. Article 1030 was linked by the Courts to article 993 (good faith). In *Bezzina nom. vs. Direttur tal-Kuntratti,*[142] the Court stated that the right to negotiate a contract is a right given by the legal system, and since it is a right, it can be abused. When one fails to negotiate in good faith, one is abusing the right to negotiate in a contract. Principles from contract law and tort law can therefore be blended together. The Court held that lack of good faith in contractual negotiations is tantamount to an abuse of the right to negotiate, and this in turn may give rise to a right to compensate on the part of the victim in tort. Good faith is considered to be a fundamental principle of the law of contracts, however, the abuse of a right has to do with tort law.

Damages arising out of breach of contract specifically arising out of public contracts are sparse in Maltese jurisprudence. In *Portelli noe vs. Falzon* (2001)[143], the contracting authority had issued a call for tenders. The plaintiff had made an offer which was excessive and was asked to submit a revised tender. The plaintiff thought it meant that his offer had been accepted, however the contracting authority asked for a new quote which had to be studied and decided upon at a later stage. The aggrieved bidder sued for the recovery of expenses incurred for the revised version, however the court stated that there was no discussion taking place and therefore no contractual liability arose. Furthermore, it was held that the offer had no legal effect and therefore no expenses were awarded neither.

[141] ibid. Article 1030.
[142] Anthony Bezzina noe vs. Direttur Tal-Kuntratti et. Court of Appeal (Civil, Superior) [26 June 2009] Case no. 170/2002/1.
[143] Frank Portelli noe vs. Onor. Michael Falzon et, Civil Court First Hall [18 May 2001] Case no. 78/1991/1.

2.12. Actual damages arising from the ineffectiveness of a public contract

Virtu Holdings Limited (C30642) vs. Gozo Channel (Operations) Limited (C76704) u Islands Ferry Network Limited (C85742) et appears to be one of the only Maltese cases where the court referred to actual damages arising from the ineffectiveness of a public contract.[144] The facts are the following: On 26 January 2018, the Ministry for Transport and Infrastructure issued the 'Request for proposals for a Public Service Concession Contract for the provision of passenger and vehicle ferry services between Malta and Gozo'.[145] The request for proposals comprised transport services for passengers and vehicles between Cirkewwa and Imgarr, Gozo, by means of a conventional ferry and for the service of passenger transport between Valletta and Imgarr and other localities in Malta by means of a fast ferry.

On 9 February 2018, Gozo Channel (Operations) Limited issued the "Preliminary Market Consultation" with an invitation to economic operators to make their offers. Virtu Holdings Limited and Islands Ferry Network Limited participated in this offer.

By letter dated 13 April 2018, Gozo Channel (Operations) Limited informed Virtu' Holdings Limited that its offer had not been accepted while Islands Ferry Network Limited's offer had been accepted.

On 20 April 2018, Virtu' Holdings Limited submitted an Objection to the decision of Gozo Channel (Operations) Limited in front of the PCRB. The decision of the PCRB was appealed. It also transpired that Gozo Channel (Operations) Limited signed an agreement with Islands Ferry Network Limited whereby the latter agreed to lease a fast ferry to Gozo Channel (Operations) Limited should Islands Ferry Network Limited be awarded the agreement.[146]

In view of the above, on 22 June 2018, Virtu' Holdings Limited filed another application before the PCRB, under regulation 277 of subsidiary legislation 601.03 stating that the agreement between Gozo Channel (Operations) Limited and Islands Ferry Network Limited should be declared ineffective. On 11 September 2018, the PCRB decided that it was not necessary to

[144] Virtu Holdings Limited (C30642) vs. Gozo Channel (Operations) Limited (C76704) u Islands Ferry Network Limited (C85742) ghal kull interess li jista' jkollha, Court of Appeal (Civil, Superior) [11 March 2019] Case no. 290/2018.
[145] ibid.
[146] ibid.

declare the agreement ineffective arguing that the suspensive condition of the agreement did not occur yet and that therefore the agreement was:

> in actual fact not effective at present, as it will only come into force subject to Gozo Channel winning the award of the PSO Tender.
>
> At the same instance, the Board notes that the Gozo Channel has in fact concluded a contract before a final decision has been given by the Public Contracts Review Board, however, due to this fact this board deems that the Agreement is not effective at present and is operative only on condition that Gozo Channel wins the PSO Tender, this Board does not deem it necessary to declare it ineffective in terms of Regulation 277 of the Public Procurement Regulations.[147]

The decision was appealed. The Court of Appeal rejected all the preliminary pleas of the defendant company for the same reasons and motivations in *Virtu Holdings Limited (C30642) vs. Gozo Channel (Operations) Limited (C76704) u Islands Ferry Network Limited (C85742) ghal kull interess li jista' jkollha Appell Numru 290/2018*. With respect to the merits, the Court of Appeal held that it is not correct to state that an agreement with a suspensive condition is not conclusive yet and that it is inexistent. It is the obligation which is non-existent before the condition occurs, but when it occurs the effect will be *ex tunc* in terms of article 1061(1) of the Civil Code; the agreement will be existent and deemed conclusive as soon as there is the *in idem placitum consensus*. The Court added that the offer was accepted, the choice of who will render the service for a monetary value had been made and that the agreement was signed.

Therefore, the Court of Appeal concluded that once that the public contract by the contracting authority has been concluded, the appellant company Virtu' Holdings Limited could avail itself of the remedy under Regulation 277 of Subsidiary legislation 601.03.

Interestingly, the Court of Appeal noted that the PCRB, by its own admittance had agreed that 'Gozo Channel has in fact concluded a contract before a final decision has been given by the Public Contracts Review Board.'[148] Therefore, through its own admittance, the PCRB was recognising the ineffectiveness of the agreement under the provisions of Regulation 277. To this effect, the Court of Appeal upheld the appeal:

[147] ibid.
[148] ibid.

- Rejecting all the preliminary pleas;
- Revoking the decision of the PCRB; and
- Referred the acts back to the PCRB for its decision.

Following the referral by the Court of Appeal (292/2018) as per decision dated 11 March 2019, the PCRB delivered its decision on 30 August 2019. The PCRB referred to regulation 277(3)(a)(b) wherein it is stipulated that:

> a) When, notwithstanding an appeal is lodged before the Public Contracts Review Board, the Authority responsible for the tendering process concludes the contract before a final decision is given by the Public Contracts Review Board, or
>
> b) when the contract is concluded by a Contracting Authority or the Authority responsible for the tendering process before the expiry of the period for the filing of an appeal as provided for in Regulation 271.

The PCRB confirmed that Gozo Channel (Operations) Limited is to be considered as a contracting authority and that Gozo Channel (Operations) Limited entered into contractual obligations with Island Ferries prior to a final decision by the PCRB.

Regarding the "ineffectiveness" of the contract signed between Gozo Channel (Operations) Limited and Island Ferries Limited, the PCRB referred to Regulation 277(3)(a) whereby any tenderer may also request the PCRB to declare a contract ineffective when notwithstanding an appeal is lodged before the PCRB, the contracting authority responsible for the tendering process concludes the contract before a final decision is given by the PCRB. Therefore, the PCRB confirmed that Gozo Channel (Operations) Limited did enter into a contractual obligation on the 13 April 2018, well before any decision was taken by the PCRB. The PCRB referred also to Regulation 282(b) whereby applications for the ineffectiveness of a contract shall be deemed admissible if they are made in any other case before the expiry date of a period of at least six (6) months with effect from the day following the date of the signing of the contract.

The PCRB decided that the application for the ineffectiveness of the contract signed between Gozo Channel (Operations) Limited and Island Ferries Limited is within the stipulated time frame of the Public Procurement Regulations 2016 and that therefore the agreement entered between Gozo Channel (Operations) Limited and Island Ferries Limited was concluded prior

to the final decision of the PCRB and to this effect, the PCRB declared that the agreement is ineffective.

The Court of Appeal re-affirmed the principle that if the agreement is still concluded despite pending proceedings before the PCRB, then the agreement is tantamount to an "ineffective" agreement in terms of the Public Procurement Regulations 2016, which reflect the EU's Remedies Directives. To this effect, the aggrieved bidder, Virtu' Holdings Limited, could avail itself of the remedy under regulation 277 of subsidiary legislation 601.03, whereby an interested party or a tenderer may file an application before the PCRB to declare that a contract with an estimated value which meets or exceeds the threshold established under Schedule 5 of the Public Procurement Regulations 2016 is "ineffective".

Furthermore, in terms of the said regulation 278, apart from the declaration for the ineffectiveness of a contract, the applicant may request the PCRB to liquidate and order the authority responsible for the tendering process and the contracting authority to compensate him for actual damages suffered.

If the PCRB declares a contract to be ineffective, it should impose penalties on the authority responsible for the tendering process and on the contracting authority after assessing in its decision all relevant factors, including the seriousness of the infringement and the behaviour of those authorities. In this case, no penalties were imposed by the PCRB.

2.13. Quantification of Damages

In a tort action, the Court has to first decide on the issue of responsibility and then look at the quantification of damages. Quantification of damages relates to taking the decision about the amount of compensation to be granted. As previously seen, under the Maltese legal system, liability in tort is based on article 1030 to article 1033, which articles are the foundations of Maltese law relating to responsibility. Then, articles 1045 and 1046 form the foundations of Maltese law on damages.

Article 1045 of the Maltese Civil Code refers to *damnum emergens* or (the actual loss incurred) and the *lucrum cessans* (the loss of future earnings).

Damnum emergens outlines three types of damages which are to be made good by the person responsible:

i) The actual loss which the act shall have directly caused to the injured party;
ii) The expenses which the latter may have been compelled to incur in consequence of the damage;
iii) The loss of actual wages or other earnings.

Article 1046 of the Maltese Civil Code goes on to define what happens in the case of natural persons, namely when the victim of the tort dies. Where in consequence of the act giving rise to damages death ensues, the court may, in addition to any actual loss and expenses incurred, award to the heirs of the deceased person damages, as in the case of permanent total/partial disability.

These provisions have been very categorical, if one requests compensation for a kind of damage which does not fall under article 1045 of the Maltese Civil Code, then it cannot be compensated. However, in *Boffa v Mizzi* (2005), the court held that the provisions are merely indicative and should not be exhaustive, stating that one cannot have a person who is responsible for tort but who cannot be obliged to compensate the victim.[149] The approach seems to be that if the requirements of the general provisions in tort are satisfied, then one must necessarily also compensate for damages, even if the damages do not fit within one of the categories of damages. In this case, the court granted moral damages which type of damages did not fall under articles 1045 and 1046 of the Maltese Civil Code. This case is an exception to the general trend adopted by the Maltese courts. Recently, there has been an amendment to article 1045 of the Maltese Civil Code in order to include the possibility of moral damages, however this amendment is quite restrictive.

(1) The damage which is to be made good by the person responsible in accordance with the foregoing provisions shall consist in the actual loss which the act shall have directly caused to the injured party, in the expenses which the latter may have been compelled to incur in consequence of the damage, in the loss of actual wages or other earnings, and in the loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused:

Provided that in the case of damages arising from a criminal offence, other than an involuntary offence, and only in the case of crimes affecting the dignity of

[149] Perit Joseph Boffa vs. John A. Mizzi, Court of Appeal (Civil, Superior) [21 June 2005] Case no. 285/1994/2.

> persons under Title VII of Part II of Book First of the Criminal Code and of wilful crimes against the person subject to a punishment of imprisonment of at least three years under Title VIII of Part II of Book First of the said Code, up to a maximum limit of ten thousand euro (€10,000) or up to such maximum limit as the Minister may by regulations establish both with regard to the maximum amount and about the method of computation depending on the case, the damage to be made good shall also include any moral harm and, or psychological harm caused to the claimant.

With respect to the constitutive elements of *lucrum cessans*, in *Butler vs. Heard (1967),*[150] the Court developed a test to calculate future loss of earnings, which test is still used to this day. Although the law does not oblige the courts to follow this test, it has been the general trend which has been adopted by the courts. The formula is based on the average adjusted weekly income of the victim. The court takes a long time period into consideration, whether there may be increases in the weekly salary as expected in one's employment. This is then multiplied by fifty-two (52) weeks and then the numbers of years the victim would have been expected to work in the normal course of events, namely the retirement age and the percentage of disability suffered.

Christopher Bovis observes that the Remedies Directives do not contain provisions on the method of calculation of damages leaving the 'national legislator free to decide', as long as the domestic courts comply with the principles of equivalence and effectiveness.[151] Bovis notes also that the degree of effective award of damages 'varies enormously' in the EU Member States in view of the general principle of judicial autonomy.[152]

[150] Michael Butler vs Peter Christopher Heard, Court of Appeal (Civil, Superior) [22 December 1967].
[151] Bovis (n 19) 573
[152] ibid.

CHAPTER 3: ELEMENTS OF DAMAGES IN PUBLIC PROCUREMENT - CJEU CASE LAW

Despite the principle of judicial procedural autonomy of the Member States, there is scope for more and deeper harmonisation of damages in EU public procurement law. In this sense, one should distinguish between the harmonisation of damages from a substantive law point of view, from the harmonisation of the enforcement of those damages in the national jurisdictions. Urgency appears to be more on the harmonisation of damages rather than the enforcement of damages decisions in the field of public procurement.[153] Therefore, this Chapter will look into the types of damages available, being one of the remedies available, and not to the enforcement of those remedies by a court.

3.1. The types of damages that may be the subject of a claim

Hanna Schebesta notes that the CJEU judgments in *Courage*[154]and *Manfredi*[155] seem:

> in simple terms, to require that violations of EU law, *damnum emergens, lucrum cessans,* and interest must all be claimable. The CJEU uses the terminology of actual loss in an identical sense to *damnum emergens*, and loss of profit in an identical sense to *lucrum cessans*.[156]

She categorises damages under three headings:

i) the preparation of bid costs;[157]
ii) lost profit; and
iii) interest rates.

Schebesta describes the bid costs as being:

[153]Hanna Schebesta, *Damages and EU Public Procurement Law* Vol.6 (Springer International Publishing, Switzerland, 2016) 1. She notes that: "the literature on remedies overlaps significantly with enforcement literature, even though the former tends to be doctrinal in character, emphasising the national/European competence dichotomy, whereas the latter perspective focuses on the processes of enforcing EU law in terms of efficiency."
[154] Case C-543/99 *Courage v Crehan* [2001] ECR I-6297.
[155] Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v Fondiaria Sai SpA (C-296/04) and Nicolò Tricarico (C-297/04) and Pasqualina Murgolo (C-298/04) v Assitalia SpA.* [2006] ECR I-06619, para 94.
[156] Schebesta, (n 153) 186.
[157] ibid.

> the costs relating to the preparation of a tender. Examples of preparation of bid cost items are costs relating to: the obtaining of tender documents; obtaining the required certificates and documentation; analysis of the tender; the development of bid solution and possibly models; price calculations and possibly variants; negotiations, both pre- and post-tender.[158]

Therefore, the tender costs are all the costs involved in the preparation and participation/execution of the tender.

On the other hand, the area of damages referred to as lost profits in public procurement is characterised by a high burden of proof and demonstration that the tender has a serious chance. It appears that it is only in France that courts regularly award lost profits.[159] The same seems to apply in the Netherlands.

Regarding the award of interest and at what rate, this is mostly characterised by the judicial autonomy of the Member States. In fact, Schebesta observes that:

> Although interest is often treated as a head of damage, it is factually subsumed under the procedural autonomy considerations by the CJEU. For example in Metallgesellschaft[160] the Court held "While, in the absence of Community rules, it is for the domestic legal system of the Member State concerned to lay down the detailed procedural rules governing such actions, including ancillary questions such as the payment of interest, those rules must not render practically impossible or excessively difficult the exercise of rights conferred by Community law.[161]
>
> (…)
>
> Under EU law more generally, interest tends to be mentioned in the same breath as actual damage and loss of profit. The availability of interest is a requirement of EU law, and the context indicates that the CJEU regards interest as a head of damage.[162]

[158] ibid. 186.
[159] ibid. 192.
[160] Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and others* [2001] ECR I-1727, para 94.
[161] ibid. para 95.
[162] Schebesta, (n 153) 196.

Christopher Bovis refers to the pattern which has emerged in the Remedies Directives, whereby an aggrieved bidder who has filed for damages:

> must prove that the contracting authority has committed an infringement of the procurement rules and as a direct result and consequence of that infringement, he or she has suffered harm or loss. In some legal orders, the complainant does not have to prove a breach of procurement rules on the part of the contracting authority, if a previous set aside or annulment judgment of an administrative court or tribunal had declared the award decision unlawful. In most Member States, the burden of proof concerning damages is set at a relatively high level. The mere presence of a breach of procurement procedures, which could be proved by the applicant or through a previous set aside or annulment order of the award decision of a contracting authority, would be a sufficient ground to trigger the award of damages relating to bid costs and costs necessary for the preparation and submission of the tender. However, the recovery of the damages relating to losses of profit is subject to the complainant proving that, in the absence of the alleged breach, he would have been awarded the contract.[163]

Therefore, the *lucrum cessans* aspect of damages appears to be tied to proof of a breach, but for which the aggrieved bidder would have been awarded the public contract. Yet, Bovis does not seem to uphold this restrictive interpretation of damages and comments that:

> Anyone who has suffered harm caused by an infringement of Union procurement law shall be able to claim full compensation for that harm. Full compensation shall place anyone who has suffered harm in the position in which that person would have been, had the infringement not been committed.[164]

This entails compensation for *damnum emergens* and *lucrum cessans*, together with 'payment of interest from the time the harm occurred until the compensation in respect of that harm has in fact been paid. The Member States shall ensure that an injured tenderer can in effect exercise the right to be awarded damages.'[165]

---

[163] Bovis, (n 19) 571.
[164] ibid. 571. He also adds on page 573 that "After the conclusion of the contract, damages represent the only remedy available."
[165] ibid. In this instance, Bovis refers to Case C-271/91, *Marshall* [1993] I-4367, paras 24 to 32 and Case C-568/08, *Combinatie Spijker*, Opinion of A-G Villalon, [2010] I-12655, points 109 to 111.

Another issue that arises in the field of damages is whether there should be separate proceedings with respect to the constitution of damages and for the quantification of damages. This issue is elaborated in Chapter 4 which analyses whether the actions for the constitution and quantification of damages should proceed together or separately and whether this should remain within the competence of the EU Member States' courts, all the more so because the issue of quantification has to be looked into on a case-by-case basis. In fact, in the quantification of damages, judges decide the case *ex aequo et bono*.

Those who advocate adopting separate proceedings with respect to the constitution of damages and their quantification argue that once the constitution of damages is established, the parties tend be more inclined to reach an out of court settlement with respect to the quantification of the said damages. There are Member States which have a two-tiered system which keeps distinct proceedings for constitution and quantification, while there are other Member States where the quantification of damages is included in the claim for damages, yet again this issue is explored in Chapter 4. For instance, cases of damages in front of the Maltese Courts include both the claim for damages, together with the quantification and the liquidation of the damages.

The CJEU refers to *damnum emergens* and *lucrum cessans*, yet these types of damages are too generalised, and one needs to define their constitutive elements, while keeping issues of quantification and liquidation within the remit of the Member States. In this respect, the following leading cases of the CJEU will be analysed and discussed.

3.2. Is there harmonisation of damages in EU public procurement law?

3.2.1. Attribution of liability, determination of damages (existence of suffered harm), and estimation of damages (quantification)

Case C-275/03, Commission v Portugal

The first paragraph of article 2 of the Remedies Directive (89/665) stipulates that:

> Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to: (…)
>
> (c) award damages to persons harmed by an infringement.[166]

[166] Directive 89/665/EEC, Article 2.

In *Case C-275/03, Commission v Portugal,* the Portuguese legislation conditioned the award of damages on the production of proof by the injured party that the illegal acts of the State or of public entities have been committed culpably or fraudulently.[167] But if the legislation restricts damages to *culpa* and fraud, does this conform to the spirit of damages envisaged in the Remedies Directive (89/665)? Such preconditions to the award of damages, namely that the aggrieved bidder has to prove the fault of the contracting authority, and whether damages are fault-based, will be discussed at a later stage.

The Commission advanced two arguments attacking the legislation in question: (1) the burden of proof imposed was extremely onerous if not impossible to fulfil since fault in most public procurement cases cannot be individualised and the injured party's action is inadvertently unsuccessful; (2) the burden of proof renders the proceedings very slow and ineffective, contrary to the first paragraph of article 1 of the Directive which obliges the Member States to take measures for tendering decisions which are 'reviewed effectively and, in particular, as rapidly as possible.'[168]

The ECJ held that this is not an adequate system of judicial protection since it deprives the aggrieved bidder of the right to demand damages or, at least, deprives him of a timely remedy.[169] Portugal was deemed to have infringed EU law by not having repealed the relevant provision of law requiring such a high burden of proof (fault or fraud). Another argument which arose was whether the right to damages under the Remedies Directive (89/665) is satisfied by the national law on state liability in general. This appears not to have been the case. Portugal argued that damages may still be obtained through other provisions providing for State liability: (1) in terms of the Constitution the State, *in solidum* with its officials and agents, may still incur civil liability, including in tendering decisions; (2) a draft law concerning the extracontractual civil liability of the State which introduces a presumption of fault which the State must rebut.[170] The ECJ dismissed the argument on the ground of legal certainty.[171]

Case C-70/06, Commission v Portugal

In *Case C-70/06, Commission v Portugal*, the Commission brought infringement proceedings for failure to comply with the judgment in Case C-275/03 *Commission v Portugal*. The court

[167] Case C-275/03, *Commission v Portugal,* EU:C:2004:632, [2004] para 27.
[168] ibid. paras 21-22.
[169] ibid. para 31.
[170] ibid. paras 25-26.
[171] ibid. para 33.

had to decide whether it is compatible with the Remedies Directive (89/665) to require, as a precondition to the award of damages, the aggrieved bidder to prove the fault of the contracting authority. It was held that there is no need to prove the fault. The ECJ confirmed that the burden of proving fault or fraud of the State or public body in a tendering process rendered actions for damages by an aggrieved bidder more difficult and costly.[172] The ECJ held that the right to damages under the Remedies Directive (89/665) was not satisfied by the Portuguese national law on state liability in general. The ECJ simply stated that an EU Member State cannot rely on existing provisions of law to justify the non or incorrect transposition of the Remedies Directive.[173]

Stadt Graz v Strabag AG and Others

Article 2, paragragh 7 of Directive 89/665 stipulates that:

> Except where provided for in Articles 2d to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law.
>
> Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(5), paragraph 3 of this Article or Articles 2a to 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.[174]

Case *C-314/09, Stadt Graz v Strabag AG and Others* concerned a tender for the manufacture of asphalt starting March 1999. The successful bidder had enclosed with its tender a letter stating that he would only possess an asphalt mixing plant in May 1999. Had the successful bidder been excluded, the aggrieved tenderers would have been successful instead. The contract was nonetheless awarded when the procurement review body dismissed the action of the aggrieved bidders. That decision was overturned on appeal and the award of the contract was deemed to be unlawful. The aggrieved bidders subsequently sued the public entity for damages before the ordinary courts wherein the issue of establishing the fault of the public entity was raised. Under Austrian law the contracting authority is presumed to be at fault and therefore it has to rebut this presumption. A preliminary question was referred to the ECJ as to

[172] Case C-70/06, *Commission v Portugal* EU:C:2008:3, [2008], ECR I-1, para. 42.
[173] ibid. para 23.
[174] Directive 89/665, Article 2 para 7.

whether all national legislation which, in any way, makes the bidder's right to damages conditional on a finding that the contracting authority is at fault must be held to be incompatible with that directive, or only national legislation which imposes on the bidder the burden of proving that fault.

The question asked was whether it is compatible with Directive 89/665 to require, as a precondition to the award of damages, the fault – proved or presumed – of the contracting authority. It was held that fault is not a precondition. The ECJ cited the same arguments which it used in the Portugal case, that is, even if there is a presumption of fault this may still lead to the aggrieved bidder being deprived of an effective and rapid remedy.[175]

The European Court of Justice ("ECJ") made another, perhaps more interesting, argument. It stated that the procedural autonomy of the EU Member States is not only limited by the principles of equivalence and effectiveness, but the remedy of damages must also be interpreted in the light of its general context and aim within the Remedies Directive.[176] In this respect the ECJ pointed out that, Article 2 paragraph 7 of the Directive (at time of judgment article 2 paragraph 6), permitted the EU Member States to limit post-contractual remedies to damages.[177] Consequently, the Court reasoned, if damages constitute the only remedy available to an aggrieved bidder and are a procedural alternative to the other remedies of article 2, then damages cannot be conditional on a finding of fault and be considered an effective remedy where the other remedies would not have been.[178] The implication is that since none of the other remedies under the Directive requires fault, then, damages should not either.

Roberto Caranta in analysing *Strabag* states that the CJEU:

> strongly reasoned along both the lines of *effet utile* and of effective judicial protection of tenderers' rights. What is surprising, and even more so since the reasoning here is more developed than in the infringement case against Portugal, is that once again the Brasserie du Pêcheur line of cases is totally ignored. As recalled, the indication that fault by itself was going beyond MSB [Manifest and Serious Breach] and as such could not be required in assessing the consequences of breaches of EU law was clearly spelt out in Brasserie du Pêcheur and could

[175] *Stadt Graz* (n 12) paras 40-42.
[176] ibid. para 34.
[177] ibid. para 38.
[178] ibid. para 39.

have been enough to dispose of the cases examined so far. Instead, only a few procurement specific cases were referred to in Strabag.[179]

Case C-568/08, Combinatie Spijker

In *Case C-568/08, Combinatie Spijker*, the contracting authority in question awarded a contract for the construction of bridges to the lowest tenderer, without giving further explanations, namely whether the successful tender satisfied all the award criteria.[180] The aggrieved bidder sought interim measures but just a few days later the contracting authority withdrew its call for tenders on the ground that the procedure had been flawed. The district court hearing the action for interim measures decided that in a fresh call for tenders the contracting authority had to award the contract to the same successful bidder having regard to the principles of equality and legitimate expectations, and by reason of pre-contractual good faith. The contract was thus concluded with the successful bidder.

The aggrieved tenderer brought a new action for damages. The local court considered that the contracting authority did not seem to be liable since it had recalled the tender when the procedure had been vitiated and then re-issued it and awarded it the contract according to a court judgment. The local court referred the following questions, among others to the ECJ:

i) Whether the court hearing interim measures could have ordered the award of the contract;
ii) Whether the authority could be deemed to be liable if the award of the contract had been ordered by a court judgment;
iii) If liable, what are the criteria set by EU law, if any, for determining and estimating those damages?;
iv) Whether some person other than the contracting authority can be deemed liable under EU law;
v) What a national court must do if it appears to be impossible, or extremely difficult, under national law and/or EU law to attribute liability?

[179] Roberto Caranta, *Damages in EU public procurement law:* Fosen-Linjen *can hardly be the last chapter*, in *European Procurement & Public Private Partnership Law Review,* Vol. 14 (European Procurement & Public Private Partnership Law Review 2019) 5.
[180] Case C-568/08, *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others v Provincie Drenthe* EU:C:2010:751, [2010], ECR I-12655.

The ECJ held that a contracting authority can still be deemed liable for damages when it awards a contract pursuant to a court order/judgment.

Regarding the first question the ECJ considered that the court hearing the interim measures had not ordered the contracting authority to award the contract to the bidder that had been successful before the withdrawal of the tender, it had only ordered the contracting authority not to award the contract to anybody else but that bidder.[181] Under Dutch law this is the only possibility. Therefore, the contracting authority could have refrained from awarding the contract, or brought court action on the substance, or appealed against the judgment or, have waited, before awarding the contract, for a possible appeal to be made by any aggrieved bidder as indeed had happened.[182] The ECJ thus reformulated the question so as to ask whether the Remedies Directive (89/665) precludes a national court hearing an application for interim measures from making an interpretation of EU law regarding a particular tendering procedure which is then classified as erroneous by the court dealing with the merits of the case.[183] The ECJ proceeded to answer this in the negative.[184] Regarding the second question, the ECJ declined to answer since that question was premised on the national court having ordered the contract to be awarded to a particular bidder which had been found not to be the case.[185]

Nonetheless, if, as the ECJ stated, the contracting authority could have refrained from awarding the contract, or brought court action on the substance, or appealed against the judgment or have waited, before awarding the contract, for a possible appeal to be made by any aggrieved bidder, then the implication is that any liability should be attributed to the contracting authority.

The fourth and fifth questions were also left unanswered for the same reason.[186]

Regarding the third question, the ECJ held, preliminarily, that article 2(1)(c) of the Remedies Directive (89/665) 'gives concrete expression to the principle of State liability for loss and damage caused to individuals as a result of breaches of EU law for which the State can be held responsible.'[187] In this sense the ECJ referred to its previous case law wherein it was held that:

> individuals harmed have a right to reparation where three conditions are met: the rule of EU law infringed must be intended to confer rights on them; the breach

[181] ibid. para 69.
[182] ibid. para 71.
[183] ibid. para 74.
[184] ibid. paras 77-80.
[185] Ibid. paras 82-84.
[186] ibid. paras 93-96.
[187] ibid. para 87.

> of that rule must be sufficiently serious; and there must be a direct causal link between the breach and the loss or damage sustained by the individuals.[188]

Therefore, the ECJ has clearly placed the liability that arises from the Remedies Directives with the *Francovich* principle of State liability.[189] This same thinking on the three conditions to be met has also been expressed in *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission*.[190]

Prima facie, the *Combinatie Spijker* case then seems to resolve the question of how the Remedies Directive relates to the *Francovich* principle of state liability. Despite the judgment, academic scholarship remains divided on the issue.[191] A 'unifying thesis' holds that the liability to pay damages under the Remedies Directive is merely an application of EU Member State liability for breach of EU law under the *Francovich* case law. A "separation thesis" which holds distinct the liability under the Remedies Directive and the public law tort of Member State liability. A proponent of the separation thesis, Schebesta, points out that while the *Combinatie Spijker* judgment definitely imports EU Member State liability into the Remedies Directive, it holds back in so much as it rejects that there exist more detailed criteria for damages that were valid for the specific area of law, that is, the review of the award of public contracts specifically and that it 'leaves that possibility open for the future by stressing the fact that this is "for the moment", and "not yet" the case' in paragraphs 88, 89 and 90 of the judgment.[192]

This however seems to confuse the question on the attribution of liability on the part of the contracting authority with the question on the determination of ensuing damage. That is, whereas the latter question asks whether an aggrieved bidder has suffered damages, the former

---

[188] ibid. para 87.
[189] Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v Italy* EU:C:1991:428, [1991], ECR I-05357, paras 37 and 40.
[190] Case C-352/98 P., *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission*, EU:C:2000:361 [2000] ECR I-5291.
"The conditions under which the Community may incur non-contractual liability for damage caused by its institutions or by its servants in the performance of their duties cannot, in the absence of particular justification, differ from those governing the liability of the State for damage caused to individual by a breach of Community law. The protection of the rights which individuals derive Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage. Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be direct causal link between the breach and the damage sustained by the injured parties".
[191] Albert Sanchez-Graells, 'You Can't Be Serious: Critical Reflections on the Liability Threshold for Damages Claims for Breach of EU Public Procurement Law After the EFTA Court's Fosen-Linjen Opinion' (2018) Nordic Journal of European Law 1, 3.
[192] Schebesta (n 153) 60.

question asks whether any such damages are attributable to the contracting authority. Thus, the *Combinatie Spijker* judgment should be read as asserting the harmonisation of EU law in so far as the question of attributing liability to contracting authorities is concerned and asserting the non-harmonisation of EU law with regards to how any ensuing damage is determined (or established) and how it is to be quantified.

Yet EU law does not harmonise the determination or the estimation of damages. In fact, as regards the third question *per se*, the ECJ considered that neither its case law nor the Remedies Directive (89/665) had set out more detailed criteria on the basis of which damage must be determined and estimated.[193] In the absence of harmonisation, the ECJ held that it is for domestic law to regulate the determination and estimation of damages provided that the principles of equivalence and effectiveness are complied with.[194]

Roberto Caranta observes that in the *Spijker* case, the CJEU followed a separate path from *Strabag*, basing its line of thinking on *Francovich - Brasserie du Pêcheur* line of jurisprudence, namely that there has to be an infringement of a rule of EU law which intends to confer rights, the breach has to be sufficiently serious and there must be the nexus between the breach and the loss/damage suffered:

> Not unlike in Strabag, in Spijker the Court of Justice started from the recognition that Article 2(1)(c) of Directive 89/665/ECC 'contains no detailed statement either as to the conditions under which an awarding authority may be held liable or as to the determination of the amount of the damages which it may be ordered to pay'. Unlike in Strabag, however, in Spijker the Court of Justice rather built on the Francovich - Brasserie du Pêcheur line of cases. According to the Court, Article 2(1)(c) gives 'concrete expression to the principle of State liability for loss and damage caused to individuals as a result of breaches of EU law for which the State can be held responsible. According to case-law developed since the adoption of Directive 89/665, but which is now consistent, that principle is inherent in the legal order of the Union. The Court has held that individuals harmed have a right to reparation where three conditions are met: the rule of EU law infringed must be intended to confer rights on them; the breach of that rule

[193] ibid. paras 88-89.
[194] ibid. paras 90-91.

must be sufficiently serious; and there must be a direct causal link between the breach and the loss or damage sustained by the individuals'.[195]

Case E-16/16, Fosen-Linjen I

Case E-16/16, Fosen-Linjen I concerned the tendering procedure for the procurement of ferry services. Following an action by Fosen-Linjen, the aggrieved bidder (who had ranked second), the signing of the contract was suspended and the ordinary courts found that the contracting authority had erroneously applied one of the tendering criteria.[196] The tender procedure was thus cancelled and the contracting authority entered into a contract with the bidder who had previously ranked first in the interim until it re-tendered the contract.[197] Rather than resubmitting a tender, Fosen-Linjen sued the contracting authority for damages for positive contract interest (loss of profit – *lucrum cessans*; the judgment does not seem to give any consideration to loss of opportunity even though this is usually categorised also as positive contract interest) or, in the alternative, for negative contract interest (costs of bidding – *damnum emergens*).[198] At first instance, the Court rejected both claims for damages, despite the error of the contracting authority in the tendering procedure having been established, and on appeal several questions were referred. Amongst other whether Directive 89/665 precludes the award of damages being conditional on certain criteria imposed by national law, and on the applicability in relation to that directive of the second condition of the Francovich principle – whether there is a sufficiently serious breach of EU law (in this case EEA law).

The EFTA Court found that it is incompatible with Directive 89/665 to make the award of damages conditional on certain criteria. The referring court had cited three criteria:

i) culpability and a requirement that the contracting authority's conduct 'must deviate markedly from a justifiable course of action';
ii) the existence of a 'material error' where culpability is part of a more comprehensive overall assessment; and
iii) the existence of a 'material, gross and obvious error'.[199]

Not surprisingly after the Portugal cases, the EFTA Court rejected all three criteria. However, it does not follow, as the EFTA Court seems to imply in this case, that a sufficient breach of

[195] Caranta (n 179) 6.
[196] Case E-16/16, *Fosen-Linjen v AtB*, [2017], OJ 2018/C 186/06, para 31.
[197] ibid.
[198] ibid. para 32.
[199] ibid. para 46.

public procurement law requires some 'culpability', 'unjustifiable course of action', 'material error', or 'material, gross and obvious error' on the part of the contracting authority.[200]

On the contrary, the ECJ has expressly negated the possibility of conditioning the general principle of liability for breach of EU law upon any condition of fault (intent or negligence) even though a 'sufficiently serious breach' may involve connotations thereof.[201] In *Brasserie du Pêcheur,* in which this question was specifically raised, the ECJ held that:

> The obligation to make reparation for loss or damage caused to individuals cannot, however, depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of Community law. Imposition of such a supplementary condition would be tantamount to calling in question the right to reparation founded on the Community legal order.[202]

The notion of fault may vary in the different national legal systems.[203] Surely, these considerations also apply to the liability of national contracting authorities for breach of EU public procurement law. With respect to *Brasserie du Pêcheur*, Roberto Caranta notes that:

> The Court of Justice rephrased the conditions for liability holding that damages are due when: (1) a right granted under EU law has been breached, (2) the breach is manifest and serious (the so called MSB condition), and (3) there is a causal link between the breach and the harm. According to the same judgment, the procedural rules for bringing damages claims fall under the procedural autonomy of the Member States on condition that these rules comply with the equivalence and effectiveness principles.[204]

Taking into consideration the *Combinatie Spijker* Case, the threshold for awarding damages need not be a 'sufficiently serious breach of EU law', but the threshold of 'simple breach' is applied.

Nonetheless, the question as to whether national law may impose preconditions of fault or error and the question as to whether a 'sufficiently serious' breach is required were assimilated and

[200] Sanchez-Graells (n 191) 6.
[201] Paul Craig & Gráinne de Búrca, *EU Law: Text, Cases and Materials*, (7th edn, Oxford University Press, 2020) 249.
[202] Joined cases C-46/93 and 48/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others.* EU: C:1996:79, [1996], ECR I-01029, para 79.
[203] ibid. para 76.
[204] Caranta (n 179) 3.

treated as being one and the same question. In consequence, the answer of the EFTA Court seems to have been that the liability to pay damages cannot be conditioned on criteria such as fault or error (resting on the *Commission v Portugal* and *Strabag* Cases), and that for this reason 'A simple breach of public procurement law is in itself sufficient to trigger the liability of the contracting authority to compensate the person harmed for the damage incurred.'[205] The EFTA Court advances principally two arguments to support its stance that liability for breach of EU public procurement law is different than the general principle of liability for breach of EU law.

The first is the argument that when awarding a tender and signing a contract the contracting authority is not acting *jure imperii*.[206] The 'tender procedure aims at the conclusion of a contract *inter partes*, which encompasses a commercial act' and in this sense the contracting authority is acting *jure gestionis*.[207] The point the EFTA Court attempted to make is that contracting authorities in tendering procedures are governed by private law rather than public law. In this manner the EFTA Court framed the legal issue before it within the wider academic debate on how the Remedies Directive relates to the *Francovich* principle of EU Member State liability. Even without challenging the premise that a contracting authority should not be treated as a Member State authority, discarding *Francovich,* the principle seems to be incorrect in view of the ECJ case law.

Specifically, in *Courage/Cerhan*, the ECJ extended the liability to pay damages to cases where private parties had breached EU competition law.[208] Admittedly, in that case the ECJ only cited the *Francovich* case law to assert that EU law confers rights on individuals both expressly but also by virtue of the obligations that EU law imposes on the EU Member States and on other individuals.[209] From this the ECJ pursued its reasoning by confirming the invocability of article 101 TFEU (then article 85 EC Treaty), on the prohibition of anti-competitive agreements, by individuals and against individuals and proceeded to declare that the principle of effectiveness requires that there exist private liability for ensuing damages.[210] Nowhere does the *Courage/Cerhan* judgment state that this private liability is triggered by the *Francovich* conditions. Legal scholarship nonetheless seems to concur that the conditions for private

[205] *Fosen-Linjen*, (n 196) para 82.
[206] ibid. paras 61-66.
[207] ibid. para 64.
[208] *Courage* (n 154).
[209] ibid. para 19.
[210] ibid. paras 24-26.

liability are analogous to the *Francovich* conditions; they are merely adapted to suit the specific claim arising from a breach of competition rules:

a. breach of EU competition law (instead of "a sufficiently serious breach"),
b. damage suffered (instead of "the rule infringed was intended to confer rights on individuals"), and
c. causation.[211]

The reformulation of the conditions derives from the ECJ's own assertion in later case law that pursuant to the *Courage/Cerhan* case 'any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition'.[212] Thus, the *Francovich* conditions are clearly adaptable and applicable to situations other than state liability. The real issue is rather that the first condition of a *mere* breach of EU (competition) law seems to be identical to the EFTA Court's standard of a *simple* breach of EU (public procurement) law. Certainly, that condition is closer to a 'simple breach' than to a 'sufficiently serious breach' of EU law. In this light, the EFTA Court's reasoning seems to be founded on the distinction between these two conditions for liability to be incurred, one lower and one higher.

The purely public law remedy of damages on condition of a 'sufficiently serious breach' is generally considered to be 'specifically designed to limit the potential for Member State liability to arise in respect of the performance of public functions in the general interest.'[213] If, as the EFTA Court has stated itself,[214] damages under the Remedies Directives are intended to protect the interests of traders to a greater extent than the public interest, then, it is only reasonable that 'When the Member State is acting in a purely private law capacity, the standard of judicial protection for individuals required under EU law should be governed by exactly the same framework as that applicable to any other private law actor' – a mere breach of EU law.[215]

[211] Walter Van Gerven, 'Bringing (Private) Laws Closer to Each Other at the European Level' (2005) <http://www.casebooks.eu/documents/2005-01-18_WvG_Impact_courts_on_private_law.pdf> accessed 2 April 2020, 22; Christopher Bovis & Charles Clarke, Private Enforcement of EU Competition Law' (2015) Liverpool Law Review 49, 55; and Dunne Niamh, ''Antitrust and the Making of European Tort Law' (2016) Oxford Journal of Legal Studies 366, 378.
[212] Case C-360/09, *Pfleiderer v Bundeskartellamt* EU:C:2011:389, [2011], ECR I-05161, para 28.
[213] Michael Dougan, 'Addressing Issues of Protective Scope within the Francovich Right to Reparation', (2017) Vol 13 Issue 1, European Constitutional Law Review 2017, 124, 156.
[214] *Fosen-Linjen*, (n 196) para 65.
[215] Dougan (n 213) 157.

Did the EFTA Court purposefully classify tendering as a commercial activity to align the Remedies Directive with the *Courage/Cerhan* case and thus lowering the threshold of liability?

Irrespective of the Court's intentions it seems that it has misconstrued the threshold of a 'sufficiently serious breach', in the public law remedy for damages, as being a particularly high threshold. This brings us to the second argument advanced by the EFTA Court. Having confused a 'sufficiently serious breach' of EU law for a fault-based criterion, it relied on the *Commission v Portugal* and *Strabag* cases to decide that a *sufficiently serious* breach of public procurement law is not required since this would undermine the fundamental right to an effective judicial remedy and the principle of effectiveness.[216] Clearly the EFTA Court was preoccupied with considerations as to the success rate of actions for damages in public procurement if too high a threshold for liability is imposed.

Contrary to first appearances, the 'sufficiently serious breach' condition is not that high threshold. Firstly, as has been aforementioned, in *Brasserie du Pêcheur* the ECJ clearly decided that a sufficiently serious breach does not require fault or negligence.[217] Secondly, the conventional test for a sufficiently serious breach – whether the EU Member State has manifestly and gravely disregarded the limits of its discretion – does not always apply. The ECJ has stated, when asked regarding the liability of a national court, that:

> although it remains possible for national law to define the criteria relating to the nature or degree of the infringement which must be met before State liability can be incurred (…) under no circumstances may such criteria impose requirements stricter than that of a manifest infringement of the applicable law.[218]

In *Hedley Lomas* it was held that where:

> The Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion [that case concerned a purely administrative action], the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.[219]

[216] *Fosen-Linjen*, (n 196) paras 72-76, and 77 et seq.
[217] *Brasserie du Pêcheur* (n 202), para 79.
[218] Case C-173/03, *Traghetti del Mediterraneo v Italy* EU:C:2006:391 [2006] ECR I-05177, para 44.
[219] Case C-5/94, *R. v Ministry of Agriculture, Fisheries, and Food (MAFF), ex parte Hedley Lomas Ltd* EU:C:1996:205 [1996] ECR I-02553, para 28.

Therefore, even in purely public law circumstances liability of the EU Member States, or indeed the EU institutions, may be incurred by the *mere* infringement of EU law under the second *Francovich* condition where the act at issue is an administrative act in regard of which the authority had 'only considerably reduced, or even no, discretion.'[220] This test – "mere infringement" – would have certainly applied in the *Fosen-Linjen* case, where the contracting authority had misapplied one of its tendering criteria, had the EFTA Court been faithful to the *Hedley Lomas* case law. Moreover, that test would have been satisfied and liability incurred by the contracting authority nonetheless.[221]

Therefore, the EFTA Court may have been correct in stating that any simple breach of public procurement law would give rise to liability for compensation in damages. Its legal reasoning, specifically in the manner with which it drew a clear-cut distinction between private and public liability, was nevertheless incorrect and its concerns with the threshold of liability under the *Francovich* regime misplaced. That regime in itself already provides sufficient flexibility in lowering the threshold for liability both when an EU Member State authority acts in a private or commercial function (*Courage/Cerhan*) as well as when an EU Member State authority acts administratively and has no discretion (*Hedley Lomas*).

Case UKSC-34, Nuclear Decommissioning Authority

In *Nuclear Decommissioning Authority*, the High Court found that the Nuclear Decommissioning Authority ("NDA") had failed to award the contract to the tenderer which submitted the most economically advantageous offer according to the evaluation criteria it had established.[222] The aggrieved bidder had asked for a prolongation of the standstill period before challenging the tendering procedure, but to no avail: the NDA pressed ahead and concluded the contract.[223] For this reason, the aggrieved bidder demanded damages, the only remedy that was left to it.

Therefore, the issue arose as to whether a sufficient breach of EU public procurement law on the part of the NDA was required for it to incur liability for damages, and whether this issue

[220] Case C-352/98 P, *Bergaderm and Others v Commission* EU:C:2000:361 [2000] ECR I-05291, para 44; Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, *Dillenkofer and Others v Germany* EU:C:1996:375 [1996] ECR I-04845, para 25; and Case C-424/97, *Haim v Kassenzahnärztliche Vereinigung Nordrhein* EU:C:2000:357 [2000] ECR I-05123, para 38. See also: Dougan, (n 213) 124, 155.
[221] Sanchez-Graells, (n. 242) 6.
[222] *Nuclear Decommissioning Authority v EnergySolutions EU Ltd (now called ATK Energy EU Ltd)* [2017] UKSC 34, [2017] All ER (D) 53 (Apr), para 3.
[223] ibid. para 6.

was an *acte clair*. These questions were referred to the UK Supreme Court. The aggrieved bidder argued in particular that to require a sufficiently serious breach would mean to condition the award of damages on a 'special feature', this being a sufficient breach, contrary to the ECJ's judgment in *Strabag*.[224] It further argued that the ECJ's ruling on the applicability of the *Francovich* conditions in *Combinatie Spijker* is confined to Member State liability in those cases where the contracting authority cannot be held to be liable, whereas the exercise of determining whether the contracting authority itself is liable is subject to no conditions at all under EU law (by implication, this being left to national law).[225]

Therefore, one would question: since the attribution of liability has been harmonised (*Combinatie Spijker*), does it mean that the threshold for awarding damages ought to be a 'sufficiently serious breach of EU law'? The answer seems to be in the affirmative, but an EU Member State is free to adopt conditions for liability which are more favourable to the injured party, such as a "mere breach of EU law" threshold.

Lord Mance quickly dismissed the arguments of the aggrieved bidder. He considered that the position of the ECJ in *Combinatie Spijker* was clear and had to be taken at face value – the award of damages within the Remedies Directive falls within the general regime of the *Francovich* case law and therefore the condition of a sufficiently serious breach of EU law applies. He further explained that there was no inconsistency between the *Combinatie Spijker* and *Strabag* judgments inasmuch as the latter judgment holds that no condition of fault may be applied to the liability for damages to be incurred.[226] Whether an error is excusable or not is a matter that national courts may take into account when determining whether there is a sufficiently serious breach. Lord Mance correctly stated that the determination of liability, irrespective of the author of the alleged harm, has been harmonised with the *Francovich* conditions.[227] However, he endorsed the view that the condition that a breach of law be 'sufficiently serious' means that not every legal error in a tendering procedure gives ground for the liability of the contracting authority to pay damages.[228] This last point completely ignores the ECJ's *Courage/Cerhan* and *Hedley Lomas* case law, in light of which the truth may lie somewhere between the EFTA Court's judgment in *Fosen-Linjen I* and the UK Supreme Court's judgment in *NDA*, i.e. a mere infringement of law may ground the liability of a

[224] ibid. para 18.
[225] ibid. para 22.
[226] ibid. para 24.
[227] ibid. para 25.
[228] ibid.

contracting authority, and this would be within the confines of the *Francovich* regime for liability.

This judgmental error, it is submitted, led Lord Mance to treat the *Francovich* conditions as minimum conditions because the Remedies Directive is an act of minimum harmonisation. Thus, he formulated a regime where a EU Member State may choose to implement the stricter liability threshold (*sufficiently serious* infringement) which EU law imposes upon the Member States to adopt as a minimum, or a lower liability threshold (*mere* infringement), since the EU Member States are left the discretion to make their liability more easily triggered.[229] Since the UK transposing legislation was not clear on which threshold had been chosen, Lord Mance assumed that the UK had not parted from the minimum mandated by EU law, reasoning that no EU Member State would want to make its liability to pay damages more easily invoked.[230] This view has also been endorsed in academic circles.[231]

Indeed, the ECJ has confirmed that the Remedies Directives is an instrument of minimum harmonisation, this is unquestionable.[232] Notwithstanding, this does not mean that the *Francovich* conditions are also minimum conditions, as the Supreme Court seems to assume. Rather, those conditions do not arise from the Directives but from the general principle of the autonomy of the EU legal order and the *effet utile* of EU law and are, therefore, harmonised conditions which cannot be parted from.[233] However, the Opinion of Advocate General Léger in *Köbler* lends some support to the Supreme Court's thesis when it explains that the foundation for *Francovich* and *Brasserie du Pêcheur* is that the remedy of damages is at least homogeneous if not uniform.[234] Thus Advocate General Léger indeed treats those conditions as minimum conditions laid down by EU law. Therefore, the reasoning of Lord Mance may be correct in this respect. The problem is that the two-tiered regime of liability established in the *NDA* ruling is irreconcilable with the *Courage/Cerhan* and *Hedley Lomas* case law. That case law established two tests for liability to be incurred under the second *Francovich* condition, one being a lower threshold – *mere* infringement of EU law, and the other being a stricter threshold to meet – whether the Member State concerned manifestly and gravely disregarded

[229] ibid. para 39.
[230] ibid.
[231] Sanchez-Graells (n. 191) 8.
[232] *Strabag* (n 12) para 33. See also: Case C-327/00, *Santex v Unità Socio Sanitaria Locale and Others* EU:C:2003:109, [2003], ECR I-01877, para 47.
[233] *Francovich* (n 189) para 31-35.
[234] Case C-224/01, *Köbler v Austria* EU:C:2003:513, [2003], ECR I-10239, Opinion of AG Léger EU:C:2003:207, para 121.

the limits on its discretion. Furthermore, it is not even at the option of the Member States to apply one test or the other. The test of 'mere infringement' must apply where the contracting authority 'has only considerably reduced, or even no, discretion', whereas as the other conventional test is to be applied in all other cases.[235]

Fosen-Linjen II

The same facts of *Fosen-Linjen I* gave rise to Case E-7/18*, Fosen-Linjen II*. After the first judgment of the EFTA court the Norwegian appellate court that had referred to it the question nevertheless decided that the award of *lucrum cessans* damages is contingent on there being a sufficiently serious breach.[236] Both the aggrieved bidder and the contracting authority appealed this judgment before the Norwegian Supreme Court, which submitted the question to the EFTA Court as to whether any breach of public procurement rules is sufficient for a contracting authority to incur *lucrum cessans* damages.[237] By implication the Norwegian Supreme Court seems to have accepted that the condition for *damnum emergens* damages is to be any breach.

Therefore, the question arises, since the attribution of state liability has been harmonised (*Combinatie Spijker*), whether the threshold for awarding damages ought to be a 'sufficiently serious breach of EU law'? The answer appears to be in the affirmative, but only for *lucrum cessans*, for *damnum emergens* the threshold is that of 'any simple breach of EU law'.

In response to the Norwegian Supreme Court's question the EFTA Court gave a very clear answer. 'Article 2(1)(c) of the Remedies Directive does not require that any breach of the rules governing public procurement in itself is sufficient to award damages for the loss of profit to persons harmed by an infringement of EEA public procurement rules.'[238]

Fosen-Linjen II raises the question whether the EFTA Court meant for the threshold of a "sufficiently serious" to apply to *lucrum cessans* damages while leaving the threshold of 'any simple breach' it had established in *Fosen-Linjen I* applicable to *damnum emergens* damages. In fairness the EFTA Court was not required to consider actual loss since the question from the Supreme Court confined itself to loss of profits.[239]

[235] *Hedley Lomas* (n 219) para 28.
[236] Case E-7/18, *Fosen-Linjen v AtB*, [2019], OJ 2019/C 378/07, para 32.
[237] ibid. para 36.
[238] ibid. para 121.
[239] ibid.

Still, the judgment is unsatisfactory in so far is it does not explain its reasoning for negating *Fosen-Linjen I*, at least with respect to loss of profits. The EFTA Court seems to rely merely on citing the ECJ's case law, as presented herein, and holding it to be unquestionable, even if it had previously questioned it in *Fosen-Linjen I*.[240] The *Fosen-Linjen II* judgment also rests on the assumption that if the condition of a sufficiently serious breach is applied for the liability of the EEA States, then it must be sufficient to safeguard the rights of individuals in all cases.[241] In this respect, like the UK Supreme Court in *NDA*, the EFTA Court seems to ignore the ECJ's *Courage/Cerhan* and *Hedley Lomas* case law which supports the assumption but with the caveat that in certain cases even a mere breach may be a sufficiently serious breach. Another problem with the assumption of the EFTA Court is that it cannot be, nor is it in its judgment, confined to *lucrum cessans* damages. That is, if the condition of a sufficiently serious breach is applied for the *damnum emergens* liability of the EEA States, then it must also be sufficient to safeguard the rights of individuals suffering *damnum emergens* in all cases. This further puts into question whether the EFTA Court makes a distinction in *Fosen-Linjen II* between loss of profits and actual loss.

Nevertheless, the *Fosen-Linjen II* judgment is seen to be a welcome "U-turn" from the EFTA Court's previous judgment since it confirms (to a certain extent) the unifying thesis.[242]

3.2.2. Heads of Damages

For clarity and consistency reasons, the reference to "damages" is being categorised as follows:

i) Positive interest damages"[243] (generally speaking referred to also as expectation damages or *lucrum cessans*) including:
   a. "loss of profits" meaning the profits that would have been realised by the aggrieved bidder had the tender been awarded to it and the contract concluded with it, therefore, adding all sums due to the bidder by the contracting authority or by third parties (especially where a service is being offered to the public by the bidder under the tendered contract against a price) and subtracting therefrom

[240] ibid. paras 117-119.
[241] ibid. para 120.
[242] Albert Sanchez-Graells, 'The EFTA Court's Fosen-Linjen saga on the liability threshold for damages claims for breach of EU public procurement law: a there and back again walk' (2019) European Procurement & Public Private Partnership Law Review.
[243] "Positive interest damages" and "negative interest damages" are used by the EFTA Court in the *Fosen Linjen* Cases. The ECJ is not so consistent but usually (and especially in its later case law like *Vakakis*) it refers to "loss of profit", "loss of an opportunity" and "costs of participation".

the expenditure of the bidder in order to be able to complete its obligations under the tendered contract; *and*

b. "loss of opportunity" meaning the value of the tendered contract at the time of its conclusion.

ii) "Negative interest damages" (generally speaking referred to as reliance damages or *damnum emergens*) meaning the bidding costs incurred by the aggrieved bidder.

There is only a positive interest damage if it is sure that the aggrieved bidder would have been awarded the public contract. In that case there is no space for a negative interest damage. It is only when there is no aggrieved bidder with a positive interest damage that a negative interest damage for all bidders is possible.

Case C-81/98, Alcatel

In Case C-81/98, *Alcatel,* a tender was awarded, with the contract being signed on the same day. Therefore, the bidders were also notified of the award decision on the same day that the contract was signed restricting their ability to challenge the award decision. In fact, an aggrieved bidder's application for interim measures was denied since the contract had already been concluded. In later proceedings before the ordinary courts, it was found that the tender procedure had been indeed conducted with a number of flaws and the award of the tender incorrect. The only remedy available under Austrian law in those circumstances was the award of damages. The issue referred to the ECJ was whether the Member States are obliged under the Remedies Directives to provide for a review procedure whereby the decision to award the tender (prior to conclusion of the contract) may be set aside, even if the aggrieved tenderer always has recourse to damages post-contract.

The question was whether it is compatible with the Remedies Directive (89/665) to provide only for post-contractual review. This is not so. The question raised dealt specifically with the second paragraph of article 2(6) of the Directive, which provides the Member States with the possibility of limiting post-contractual remedies to damages only. In his Opinion, Advocate General Mischo interpreted that provision as establishing a chronological sequence so that, under the Remedies Directive, the decision awarding the contract and the conclusion of the contract cannot coincide in time.[244] Mischo further reasoned that if these two events are made

[244] *Alcatel Austria*, paras 35-36.

to coincide, this would have the effect of widening the limitation allowed by article 2(6) to 'the most important decision of the contracting authority, namely the award of the contract', thus impeding the principle of effective and rapid review of decisions of contracting authorities, set out in article 1(1) of the Remedies Directive.[245]

Adopting this reasoning, the ECJ ruled that the Member States are required to ensure that the contracting authority's decision to award the tender (pre-contractual phase) is in all cases open to review in a procedure whereby the aggrieved bidder may have that decision set aside if the relevant conditions are met.[246] This judgment makes it clear that there are two types of review available to an aggrieved bidder – pre-contractual and post-contractual. In a pre-contractual review, the decision to award the contract to the successful bidder is challenged and sought to be set aside, whereas in a post-contractual review the aggrieved bidder primarily seeks to show that the unlawful conclusion of the contract has caused him damages.

In pre-contractual review, therefore, only negative interest damages (bidding costs) seem to be recoverable since there can be said to be no loss of opportunity or loss of profits if the error is rectified, the tender re-opened or if tender is abandoned altogether. On the other hand, in post-contractual review, it would seem that both negative interest damages and positive interest damages may be recoverable since the aggrieved bidder would not only have suffered damage in the form of lost bidding costs but would also have suffered lost profits and loss of opportunity as a result of the contract being concluded (unlawfully) with another bidder and where such contract cannot now be rescinded.

This interpretation is based on the following:

i) The fact that the ECJ makes a clear distinction between pre-contractual and post-contractual review (thus implying that their judicial effects are also different);

ii) The Opinion of AG Mischo that, in a pre-contractual review, bidders will 'retain their chances of winning the contract'; therefore, by definition they cannot claim loss of profits or loss of opportunity.[247] The Opinion further elaborated that a post-contractual review is less beneficial to the bidder since it is difficult to quantify and prove the resultant loss when the contract has already been concluded – this "loss" appears to

[245] ibid. paras 38-39.
[246] ibid. paras 37 and 41.
[247] *Alcatel Austria* (n 244).

> refer to loss of profits and loss of opportunity since bidding costs are easily quantifiable.

According to article 2(7) of Directive 89/665, Member States may provide that the remedies in a post-contractual phase shall be limited to awarding damages to any person harmed by an infringement'.[248] This continues to confirm the Opinion of AG Mischo. Whereas in a post-contractual phase damages may be the only effective remedy, in a pre-contractual phase there are interim measures which may be taken, and which are more effective such as the amendment of the technical specifications, setting aside the award decision and beginning the process again. But then the remedy of the aggrieved bidder is the rectification of the error or unlawful act and not damages for lost profit and lost opportunity. Bidding costs and legal costs have nonetheless been suffered and should, in principle, be recoverable. In fact, in a pre-contractual phase the Member States do not have any margin of appreciation to determine the remedies available; therefore, damages are also available together with interim measures.

Advocate General Mischo drew a distinction between pre-contractual and post-contractual review by arguing that the former is much more beneficial in terms of remedies:

> The setting aside of a decision means that tenderers seeking review retain their chances of winning the contract [pre-contractual phase]. Conversely, damages alone are often unsatisfactory compensation for a company passed over [post-contractual phase], having regard to the difficulties it might face, in particular, in quantifying its loss and proving a causal link with the infringement of Community law.[249]

It is quite clear that the Advocate General was referring in the post-contractual phase to positive interest damages (although it is not clear whether he was referring to loss of profits or loss of opportunity), since negative interest damages are easily quantifiable even at a pre-contractual stage given that the aggrieved bidder would have already incurred the bidding costs.

Even if this is merely an *obiter dictum* in an Advocate General's Opinion, it implies two things. Firstly, that post-contractually there must necessarily be positive interest damages available. Secondly, that pre-contractually only negative interest damages (bidding costs) are recoverable since the aggrieved bidder is offered remedies of correcting an infringement or setting aside an unlawful award decision meaning that the aggrieved bidder will not incur any loss of profits or

[248] Directive 89/665/EEC, Article 2(7).
[249] *Alcatel Austria* (n 244) para 38.

loss of opportunity since, as the case may be, the tendering procedure will continue with any infringement corrected or the tendering procedure will be reopened and any bidder may participate again.

Joined cases C-295/04 to C-298/04, Manfredi

Joined cases C-295/04–C-298/04, Manfredi concerned an action for damages brought by an individual before the ordinary Italian courts against insurance companies which had been found to have breached article 101 TFEU by the Italian competition authority. The complainant claimed that he had suffered harm as a result of an increase in the cost of premiums brought about by the anti-competitive behaviour of the insurance companies. The referring court asked whether EU Member State law must allow third parties to bring a claim for damages pursuant to a decision of infringement of EU competition law and if so under what heads of damages, in particular, punitive damages.

The question asked was whether the principles of equivalence and effectiveness require that damages awarded pursuant to the infringement of EU law should cover loss of profits as well as actual loss, which in effect it does.

The ECJ commenced its reasoning by stating that article 101 produces direct effects and also creates rights for individuals and therefore an individual may rely on a breach of that article.[250] The ECJ thus argued that the full effect of the right derived from a breach of article 101 must mean that an individual harmed may claim damages.[251] Regarding the particular question whether the individual harmed should also be entitled to punitive damages, the ECJ reiterated that for EU law to be given full effect damages must be made available as a remedy; however, 'it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages, provided that the principles of equivalence and effectiveness are observed.'[252] Basing itself on this legal grounding the ECJ went on to say that the principle of equivalence means that punitive damages are only required to be awarded for breach of EU competition law where they would be awarded pursuant to similar actions founded on domestic law.[253] This is not true for loss of profit as a head of damage.

[250] *Manfredi and Others* (n 155) paras 58-59.
[251] ibid. para 60 et seq.
[252] ibid. para 90-92.
[253] ibid. para 93.

The ECJ asserted clearly that the principle of effectiveness necessarily means that an individual harmed by a breach of EU competition law 'must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest.'[254] This is so since according to the ECJ, in the context of 'economic or commercial litigation', reparation of the damage would be impossible if damages for loss of profit were to be totally excluded.[255] That argument is taken word for word from *Brasserie du Pêcheur*, in which Germany had infringed the free movement of goods provisions.[256] This continues to strengthen the unifying thesis since it shows a clear spill-over of the principles that apply to EU Member State liability for breach of EU law (under the *Francovich* case law) into private party liability for breach of EU law. In *Manfredi*, the private party had infringed EU competition law but there is nothing to indicate that the same principles should not also be applied to the infringement of EU public procurement law by a national contracting authority.

Indeed, even in procurement by EU institutions, the ECJ confirmed in some detail in *Vakakis*[257] that damages for loss of profit, but also for loss of opportunity and bidding costs, are recoverable by an aggrieved bidder, subject to the *Francovich* principles of non-contractual liability of the EU and its institutions.

Case T-292/15 Vakakis

The *Vakakis kai Synergates* case is a landmark case in the field of damages arising from public procurement, given that the General Court of the European Union ventured to award damages for loss of opportunities. This was a highly unusual development both at EU level and at the level of the national judiciaries.[258]

Case T-292/15 Vakakis concerned the tendering procedure for a public contract to be entered into by the EU Delegation in Albania for which the Terms of Reference had been drafted by an expert of a company which made part of a consortium which was a bidder.[259] Despite various complaints by other bidders about this fact, and the doubt on the absence of a level playing

[254] ibid. para 95.
[255] ibid. para 96.
[256] *Brasserie du Pêcheur* (n 202) para 87.
[257] Case T-292/15, *Symvouloi gia Agrotiki Anaptixi AE Meleton, formerly Vakakis International - Symvouloi gia Agrotiki Anaptixi AE*, ECLI:EU:T:2018:103 [2018].
[258] ibid.
[259] ibid. paras 1-6.

field, the consortium consisting of the company whose representative/expert had drafted the Terms of Reference was awarded the contract.[260]

The award decision also contained reasons for finding that there was no conflict of interest; however, the European Ombudsman found differently following a complaint of an aggrieved bidder.[261] For these reasons, the aggrieved tenderer brought an action before the General Court. It claimed that it had suffered five different heads of damages:

i) loss of profit,
ii) cost incurred in contesting the lawfulness of the tendering procedure,
iii) loss of an opportunity to participate and win other tenders,
iv) loss of an opportunity to be awarded the contract, and
v) costs relating to the participation in the tendering procedure.

Having concluded that the tendering procedure had indeed been flawed and unlawful, the General Court proceeded to review the applicant's entitlement to each head of damage.[262]

For an aggrieved bidder to be entitled to lost profits, the aggrieved bidder must prove that he would have been awarded the contract.

Regarding the loss of opportunity, the Commission argued that the case-law invoked by the applicant in Case T-292/15 was not relevant to disputes relating to public contracts and stated that, in that context, the Court has dismissed actions for damages deriving from loss of profit or loss of opportunity.[263] The Commission pointed out that the costs of participation in a tendering procedure are not considered to be damage that is capable of being remedied by an action for damages.[264]

The General Court did not agree with the Commission and reasoned as follows:

> 186 First, as regards the damage based on the loss of an opportunity, it is necessary first of all to reject the Commission's argument that the damage invoked by the applicant in respect of the loss of an opportunity is uncertain.
>
> 187 By maintaining that the Court, on numerous occasions, rejected claims for damages alleging loss of profit or the loss of an opportunity due to the broad

[260] ibid. paras 7-13.
[261] ibid. paras 13-14.
[262] ibid. paras 162-163.
[263] ibid. para 182.
[264] ibid. para 184.

discretion enjoyed by the contracting authority in deciding to award a contract, the Commission wrongly equates damages resulting from a loss of profit and those resulting from the loss of an opportunity.

188 First, those two types of damage are different. The loss of profit concerns compensation for the loss of the contract itself, whereas the loss of opportunity concerns compensation for the loss of the opportunity to conclude that contract (see, to that effect, judgments of 21 May 2008, Belfass v Council, T-495/04, EU:T:2008:160, paragraph 124, and of 20 September 2011, Evropaïki Dynamiki v EIB, T-461/08, EU:T:2011:494, paragraph 210).

189 Secondly, the fact that the contracting authority enjoys a broad discretion in the context of the award of the contract at issue does not prevent the damage caused by the loss of opportunity from being actual and certain for the purposes of the case-law (see, to that effect and by analogy, judgment of 9 November 2006, Agraz and Others v Commission, C-243/05 P, EU:C:2006:708, paragraphs 26 to 42, and Opinion of Advocate General Cruz Villalón in Giordano v Commission, C-611/12 P, EU:C:2014:195, points 60 and 61). Moreover, the fact that the contracting authority is never obliged to award a public contract does not preclude the finding of a loss of opportunity in the present case. Although that fact affects the tenderer's certainty of winning the contract, and, therefore, the corresponding loss, it cannot preclude all likelihood of winning that contract and therefore the loss of opportunity. In any event, although it is true that the contracting authority may always, until the signature of the contract, either abandon the procurement, or cancel the procedure for the award of a public contract, without the candidates or tenderers being entitled to claim compensation, the fact remains that those situations of abandonment of the procurement or cancellation of the procedure did not actually materialise and that, as a result of the unlawful acts committed during the procedure for the award of the contract, the applicant lost an opportunity of winning that contract (see, to that effect, judgment of 29 October 2015, Vanbreda Risk & Benefits v Commission, T-199/14, EU:T:2015:820, paragraph 199).

190 Next, as is apparent from paragraph 156 above, the Court considered that, during the tendering procedure, the Commission committed several unlawful

> acts in the context of the investigation relating to the existence of the conflict of interests. Such unlawful acts in the conduct of the tendering procedure fundamentally vitiated that procedure and affected the chances of the applicant, whose tender was ranked in second position, being awarded the contract. If the EU Delegation had fulfilled its obligation of due diligence and adequately investigated the extent of Mr P.'s involvement in the drafting of the ToR, it is not excluded that it might have established the existence of a conflict of interests in favour of company A. justifying its exclusion from the procedure. Therefore, by deciding to award the contract to the consortium of which company A. was a member without having conclusively established that the latter was not in a situation of a conflict of interests even though significant evidence suggested the existence of an apparent conflict of interests, the EU Delegation affected the chances of the applicant being awarded the contract.
>
> 191 In those circumstances, the damage invoked with respect to the loss of an opportunity must, in the present case, be considered to be actual and certain, because there is evidence that, as an unsuccessful tenderer, the applicant definitively lost an opportunity to be awarded the contract and that that opportunity was real and not hypothetical.[265]

The General Court held that the damage directly and immediately resulted from the unlawful acts committed in the present case by the Commission, that the 'loss is actual and certain and results directly from those unlawful acts, it must be concluded that the conditions for compensating the applicant in respect of the loss of an opportunity are satisfied':[266]

> 194 Secondly, as regards the costs and expenses relating to the participation in the tendering procedure, it should be noted that economic operators are to bear the risks forming an integral part of their activities. In the context of a tendering procedure, those economic risks include, *inter alia*, the costs associated with the preparation of the tender. The costs incurred for that purpose therefore remain chargeable to the undertaking which chose to participate in the procedure, since the right to bid for the award of a contract does not signify that the contract will definitely be awarded to that undertaking (see, by analogy, judgment of 30 April

[265] ibid. paras 186-191.
[266] ibid. para 193.

2009, CAS Succhi di Frutta v Commission, C-497/06 P, not published, EU:C:2009:273, paragraph 79). In that regard, Article 101 of the Financial Regulation provides that the Commission is free to decide not to make any award at all. Therefore, there was no guarantee that even the tenderer offering the most advantageous bid would win the contract.

195 Consequently, the costs and expenses incurred by a tenderer in connection with its participation in a tendering procedure cannot, in principle, constitute harm which is capable of being remedied by an award of damages (judgments of 30 April 2009, CAS Succhi di Frutta v Commission, C-497/06 P, not published, EU:C:2009:273, paragraph 81; of 17 December 1998, Embassy Limousines & Services v Parliament, T-203/96, EU:T:1998:302, paragraph 97; and of 8 May 2007, Citymo v Commission, T-271/04, EU:T:2007:128, paragraph 165).

196 However, that principle cannot, without potentially undermining the principles of legal certainty and of protection of legitimate expectations, apply in cases where an infringement of EU law in the conduct of the tendering procedure has affected a tenderer's chances of being awarded the contract (judgments of 30 April 2009, CAS Succhi di Frutta v Commission, C-497/06 P, not published, EU:C:2009:273, paragraph 82; of 17 March 2005, AFCon Management Consultants and Others v Commission, T-160/03, EU:T:2005:107, paragraph 98; and of 8 May 2007, Citymo v Commission, T-271/04, EU:T:2007:128, paragraph 165).

197 In the present case, since the Court considered that the unlawful acts invoked by the applicant in the conduct of the tendering procedure had affected its chances of being awarded the contract and that, therefore, it was necessary to compensate it for the loss of an opportunity, the costs and expenses relating to the participation in the tendering procedure are damage capable of being remedied by the grant of damages.[267]

The General Court also dealt with the issue of compensatory interest, stating that:

[267] ibid. paras 194-197.

> the conditions for non-contractual liability must be satisfied for an applicant to be eligible to receive compensatory interest (judgments of 2 June 1976, Kampffmeyer and Others v EEC, 56/74 to 60/74, EU:C:1976:78, and of 26 February 1992, Brazzelli and Others v Commission, T-17/89, T-21/89 and T-25/89, EU:T:1992:25, paragraph 35, upheld on appeal by judgment of 1 June 1994, Commission v Brazzelli Lualdi and Others, C-136/92 P, EU:C:1994:211, paragraph 42).[268]

The General Court contended that given that the applicant must be compensated for the loss consisting in the costs and expenses relating to the participation in the tendering procedure and that the compensation is intended so far as possible to provide restitution for the party applying for compensation, the applicant's claim that the amount of the loss consisting in the costs and expenses relating to the participation in the tendering procedure be increased by compensatory interest must be upheld.[269]

Therefore, the General Court upheld the applicant's claim for damages:

> in so far as it seeks compensation for the loss of an opportunity to be awarded the contract at issue and compensation for the costs and expenses relating to the participation in the tendering procedure, plus compensatory interest, and to reject it as to the remainder.[270]

Commenting on this case, Zbigniew Raczkiewicz observed that this case is rather special given that the General Court has awarded damages for loss of opportunities, which is not common, and that furthermore, the General Court:

> gave clear guidelines how the amount of damages shall be calculated, what shall be taken into consideration when their amount is fixed.
>
> (…)
>
> Actually those guidelines shall be welcome by all the parties – applicants (tenderers), defendants, contracting authorities and the courts/other bodies responsible for the judicial review of the procurement procedures. There are still very few cases when the damages for the loss of an opportunity to be awarded

[268] ibid. para 199.
[269] ibid. para 201.
[270] ibid. para 202.

> the contract were granted, so there is no commonly accepted model how to quantify/calculate/establish amount of damages. As a result, it is an underdeveloped domain, with lots of uncertainties for all the parties involved in the process of the judicial review […].[271]

Regarding the compensation, the General Court said that in order to determine the total amount capable of being compensated in relation to the loss of an opportunity, one has to take into consideration the net profit and the probability of winning the tender. The Court also ruled on the applicant's claim that the amount of compensation be increased by default interest of 8% on the sum awarded from the date of the judgment until the date of the actual payment. The General Court noted that it follows:

> from the case-law that the obligation to pay default interest arises on the date of the judgment establishing the obligation to make good the damage, and that is the case even where the Court establishes, by an initial interlocutory ruling, the obligation to make good the damage and reserves the determination of the amounts of the compensation for the damage to a later stage (judgments of 4 October 1979, Dumortier and Others v Council, 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79, EU:C:1979:223, paragraph 25; of 13 November 1984, Birra Wührer and Others v Council and Commission, 256/80, 257/80, 265/80, 267/80, 5/81, 51/81 and 282/82, EU:C:1984:341, paragraph 37; and of 26 June 1990, Sofrimport v Commission, C-152/88, EU:C:1990:259, paragraph 32).[272]

It was noted that the interest rate is to be calculated on the basis of the rate set by the European Central Bank for main refinancing operations, as applicable during the period in question, increased by two percentage points.[273]

In this case, the General Court ruled that the aggrieved bidder's claim to lost profits was not real and certain. In order for damages under this head to be real and certain the aggrieved bidder must prove that, in the absence of the unlawful conduct alleged against the contracting

---

[271] Zbigniew Raczkiewicz, 'Compensation for damages incurred in irregular public procurement procedure: Annotation on the Judgment of the General Court (Third Chamber, Extended Composition) of 28 February 2018 in Case T-292/15, Vakakis Kai Synergates v European Commission.' (2018) European Procurement & Public Private Partnership Law Review, vol. 13, no. 4 (Lexxion Verlagsgesellschaft mbH) <https://www.jstor.org/stable/26695301> accessed 20 November 2020 349.

[272] *Symvouloi gia Agrotiki Anaptixi AE Meleton* (n 257) para. 222.

[273] ibid. para.223; Case T-160/03, *AFCon Management Consultants and Others v Commission* EU:T:2005:107 [2005], para 133; Case T-285/03 *Agraz and Others v Commission* not published, EU:T:2008:526 [2008] para 55; and Case T-384/11, *Safa Nicu Sepahan v Council*, EU:T:2014:986 [2014] para 151.

authority, the aggrieved bidder would have been entitled to be awarded the contract.[274] In the present case, the contracting authority in any case had the discretion to abandon the contract or cancel the award.[275] Therefore, no bidder would be entitled to compensation for lost profits. The addition of this secondary argument seems to indicate that it is not enough for the aggrieved bidder to merely prove that it would have been entitled to the award of the contract but it has also to prove the unlawful procedure. The aggrieved bidder must also prove that the contracting authority would have actually awarded it the contract, that is, that it would not have abandoned the tender.

For an aggrieved bidder to be entitled to a reimbursement of the costs for challenging the award, these costs must have been strictly necessary to challenge the decision meaning that the amount must also have been justified.

While the General Court accepted that the aggrieved bidder is entitled to recover costs of contesting an unlawful award decision, it asserted that this head of damage must still satisfy the requirement of 'real and certain' loss. In the present case the aggrieved bidder failed to prove said real and certain loss since it only presented a bill of legal costs without any evidence explaining exactly what those costs covered and without any evidence justifying those amounts.[276] Furthermore, the aggrieved bidder had chosen to engage a lawyer for the purposes of raising the complaint with the European Ombudsman where that procedure is designed so that legal assistance is not necessary; the General Court concluded in this regard that such cost should be borne by the aggrieved bidder.[277]

The Court also looked into whether an aggrieved bidder is entitled to damages for loss of an opportunity to participate in and win other tenders. It was held that such damages cannot be awarded unless the subsequent tender specifically requires the successful bidder to have been successful in the tender at issue (thus, this is in practice inconceivable).

The aggrieved bidder made this claim on the basis that had it been successful in the tender and, if awarded the contract at issue, it would have been able to invoke the contract to demonstrate that it fulfilled the selection criteria, namely sufficient experience, for another two subsequent tenders.[278] The General Court dismissed this argument stating that the aggrieved bidder had

[274] ibid. para 166.
[275] ibid.
[276] ibid. para 172.
[277] ibid. para 173.
[278] ibid. para 178.

not proven that the award of the contract at issue constituted the only possibility of obtaining sufficient experience so as to fulfil the selection criteria for those subsequent tenders and was necessary for that purpose.[279] In any case, the General Court reasoned that it cannot be assumed the aggrieved bidder would have satisfied the selection criteria of other tenders merely because it had been successful in another tender.[280]

It is generally agreed that for an aggrieved bidder to be entitled to damages for lost opportunity, the aggrieved bidder must have been successful had it not been for the vitiated tendering procedure. On this point, the Commission argued that the aggrieved bidder was not entitled to damages under this head just as it was not entitled to damages for lost profits – since the contracting authority in any case had the discretion to abandon the contract or cancel the award.[281] The General Court dismissed the argument by maintaining that the two heads of damages are different – 'The loss of profit concerns compensation for the loss of the contract itself, whereas the loss of opportunity concerns compensation for the loss of the opportunity to conclude that contract.'[282]

Contrary to the head for lost profits, the General Court stated that the discretion of the contracting authority to abandon or cancel the tender affects the bidder's certainty of winning the contract, and, therefore, the corresponding loss, but it does not mean that there is no loss of opportunity at all.[283] Therefore, even where such discretion is exercised there will still be some loss of opportunity. The General Court thus granted these damages considering that there was a sufficient causal link between vitiated procedure and the alleged loss of opportunity since the aggrieved bidder had placed second and would have won the contract had it not been for the vitiated procedure.[284]

While it is not necessary to show that the contract would not have been dropped due to vitiated procedure it is necessary to show that the aggrieved bidder would have placed differently in the ranking and won the contract. For example, the ruling of the General Court in the *European Dynamics* case to award damages under this head was overturned by the ECJ for this reason. In that case the aggrieved bidder had been placed fourth in a cascade procedure; the first three ranked bidders would conclude contracts with the contracting authority but it had not been

[279] ibid.
[280] ibid. para 79.
[281] ibid. para 187.
[282] ibid. para 188.
[283] ibid. para 189.
[284] ibid. para 190.

sufficiently proven that the aggrieved bidder would have placed third had it not been for the errors which were found in the procedure.[285] In another case, *Agriconsulting Europe*, the ECJ upheld the decision of the General Court to award damages for loss of opportunity precisely because the aggrieved bidder had been unlawfully deprived of the award of the contract even though it had placed first.[286]

An aggrieved bidder is entitled to recover bidding costs when the infringement of the contracting authority affects the bidder's chances of being awarded the contract.

The General Court first set out the general principle that a bidder is liable to incur its own costs for participating in a tender.[287] The reasoning is that the right to bid in a tender carries no guarantee as to winning the tender.[288] In this case, the tender did not even guarantee that the bidder offering the most advantageous bid would win the contract since the EU Delegation had the discretion to abandon the contract or cancel the award. This general principle however does not apply when an infringement in the conduct of the tendering procedure has affected a bidder's chances of being awarded the contract.[289] As regards causality of the damages and the infringement, in the present case the tendering procedure had been vitiated, and this sufficed for the General Court to find that the unlawful acts in the procedure caused the aggrieved bidder to incur costs needlessly.[290] The General Court also increased the damages for bidding costs by compensatory interest for the lapse of time between the occurrence of the event causing the damage and the date of payment of the compensation.[291]

Case E-7/18, Fosen-Linjen II

In *Fosen-Linjen II*, the principal issue raised was how to establish liability of the contracting authority for positive interest damages. The EFTA Court deemed it fit to assert preliminarily that in principle, loss of profit as a possibly applicable head of damages cannot be excluded by national law. As with the rest of the reasoning in this ruling, this assertion is founded on the unifying thesis, this time referring to the unity of the heads of damages that are available for

[285] Case C-376/16 P, *European Union Intellectual Property Office v European Dynamics Luxembourg* EU:C:2018:299 [2018] paras 80-81.
[286] Case C-198/16 P, *Agriconsulting Europe v European Commission* EU:C:2017:784 [2017] para 15.
[287] *Symvouloi gia Agrotiki Anaptixi AE Meleton* (n 257) para. 194.
[288] ibid.
[289] ibid. para. 196.
[290] ibid. paras. 197-198.
[291] ibid. paras 199-201.

infringements by EU institutions on the one hand, and those available for infringement by national contracting authorities on the other.

The heads of damages for EU institutions' liability (as defined in *Vakakis*) are the same in the case of infringements by national contracting authorities.

The EFTA Court in this case expressly endorsed the view that the *Manfredi* principle of effectiveness read in conjunction with the *Francovich* conditions for liability applies with respect to all infringement of EU law whether it is an infringement of competition law, or an infringement of public procurement law by an EU institution, or an infringement of public procurement law by a national contracting authority.[292] While the EFTA Court did not go as far as to state so, the implication of its judgment is clearly that the heads of damages that are available in case of infringements by EU institutions (on the basis of the judgment in *Vakakis*) should also be available in the case of infringements by national contracting authorities.

The problem with this interpretation is that it is incompatible with the finding of the ECJ in *Combinatie Spijker* that the determination of damages remains the remit of national procedural law. Therefore, while it may be argued that the same heads of damages as established in *Vakakis* should be available in case of infringements by national contracting authorities, it is unclear whether it may successfully be argued that the determination of each head should also be in the manner prescribed in *Vakakis*.

3.2.3. *Locus standi* and proper defendant

Joined cases C-145/08 and C-149/08, Club Hotel Loutraki

Greek law had established a system of restrictions applicable to the conclusion of public contracts with persons who are active or who have holdings in the media sector. Under that law a contracting authority had to apply to the Ethniko Simvoulio Radiotileorasis (National Radio and Television Council) ("ESR") for the issue of a certificate confirming that a bidder is not restricted from participating or entering into the contract under that law.[293] The decision of the ESR is binding on the contracting authority. In Case C-145/08 the ESR had issued the certificate and this decision was challenged by an aggrieved bidder.[294] In case C-149/08 the ESR refused to issue the certificate; that decision was challenged by the bidder that was

[292] *Fosen-Linjen II* (n 236) paras 115-116.
[293] Joined cases C-145/08 and C-149/08, *Club Hotel Loutraki and Others v Ethnico Symvoulio Radiotileorasis and Others* EU:C:2010:247, [2010] ECR I-04165, paras 21-22.
[294] ibid. paras 26-27.

effectively blocked from further participation in the tender procedure.[295] In both cases, the bidders challenging the ESR decision were consortia comprising several members. In both cases the ESR decision was only addressed to some members of the respective consortium and it was these members who brought the challenge.

In Case C-145/08, the tender was for a mixed contract and object of the preliminary reference was to clarify whether such mixed contract falls under the Remedies Directive despite its nature. The ECJ held that in principle mixed contracts may be held to fall under the public procurement directives, but it was not the case here, since the contract was an indivisible whole and the supply of services and performance of works (the public procurement aspects of the contract) were only the ancillary objects of the contract.[296] The preliminary reference in case C-149/08 concerned principally a national procedural rule which required all members of a consortium to bring an action to annul or invalidate a decision of the contracting authority. An action to seek compensation in damages had to be necessarily preceded by a successful action for annulment or invalidation of the contracting authority's decision and could be brought by any individual member of the consortium. The two actions were heard by two different courts.

It was held that an entity other than the contracting authority cannot be sued under the Remedies Directive (89/665), but general principles of EU law nonetheless apply to those other entities.

While this question was not raised by the referring court, the ECJ noted that the decision being attacked in that case was that of the ESR for refusing to issue the certificate required for the successful bidder to be awarded the contract.[297] Therefore, it took this issue as the starting point for its reasoning. The ECJ ruled without any hesitation that only the contracting authority may be sued for the remedies provided under the Remedies Directive. Its reasoning is based on the fact that under article 1(4) (then article 1(3)) of the Remedies Directive the Member States may require that the person wishing to use a review procedure has notified the contracting authority of the alleged infringement and of his intention to seek review.[298]

However, the ECJ went on to state that the decisions of the ESR have an effect on the conduct or outcome of the tendering procedure and in this sense those decisions concern the proper

[295] ibid. para 42.
[296] ibid. paras 57-63.
[297] ibid. para 66.
[298] ibid. para 68.

application of EU law in the public procurement area.[299] Having established this, the ECJ considered that the decisions of the ESR and their review, even though the ESR was not the contracting authority, must comply with the principle of effective judicial protection as a *general principle of EU law*.[300] That principle further encompassed the principles of effectiveness and equivalence which are also principal tenets of the Remedies Directive.[301] This does not mean that the authorities which are not the contracting authorities in a tender fall within the purview of the Remedies Directive; even though some authors have considered that the *Club Hotel Loutraki* ruling extends the scope of the Remedies Directive *de lege feranda*.[302]

What the ECJ actually decided is that those authorities, in so far as their decisions may have an effect on EU law (in this case in the field of public procurement law), fall within the purview of the general principles of EU law, such as judicial effectiveness and equivalence, both of which are incidentally also provided for under the Remedies Directive.[303] So much so, the ECJ cited in support of its arguments on the applicability of the general principles (notwithstanding the status of the ESR) two judgments which had nothing to do with public procurement law and much less so with the Remedies Directive.[304] The first case, *Unibet*, concerned the review of legislation which prohibited the promotion of gaming services.[305]

The second case, *Impact*, concerned the review procedure for decisions relating to fixed-term employment contracts of Irish civil servants, in particular, a challenge to the jurisdiction of the reviewing body.[306] This reading of the *Club Hotel Loutraki* case further supports the unifying thesis.

The ECJ ruled that the national legislation was in breach of the principle of equivalence since procedural rules for the judicial review of public procurement decisions were different than those for the judicial review of administrative decisions in general. In the latter case the court having jurisdiction for the award of damages also reviewed, as an incidental matter, the legality of the administrative act being challenged. In the review of public procurement decisions, one

[299] ibid. para 70.
[300] ibid. para 73.
[301] ibid. para 74.
[302] Christopher H. Bovis, *EU Public Procurement Law* (2nd ed, Edward Elgar, 2012) 249.
[303] Supporting this view see: Folkert Wilman, *Private Enforcement of EU Law Before National Courts: The EU Legislative Framework* (Edward Elgar, 2015), 92.
[304] *Club Hotel Loutraki* (n 293) paras 73-74.
[305] Case C-432/05, *Unibet v Justitiekanslern* EU:C:2007:163, [2007] ECR I-02271.
[306] Case C-268/06, *Impact v Minister for Agriculture and Food and Others* EU:C:2008:223, [2008], ECR I-02483.

court had jurisdiction to annul or invalidate the act being challenged, whereas a different court had jurisdiction to award damages.[307]

As for the *locus standi* of individual members of a consortium, the ECJ held that the national legislation which precluded this was in breach of the principle of effectiveness. Nevertheless, the ECJ distinguished this case from the *Espace Trianon* case.[308] In the latter case the national legislation was deemed to be compatible with the Remedies Directive since it only deprived individual members of *locus standi* when the decision challenged had been addressed to the consortium (the principle of equivalence had been satisfied in this case).[309] In *Club Hotel Loutraki* the ESR's decision was addressed solely to one member of the consortium, and it was that member which had instituted judicial proceedings for the review of the decision.

3.2.4. Conclusions to be drawn from existing case law

Domestic law cannot require the fault of the contracting authority (Case C-314/09, *Strabag*), and much less so, that such fault must be proved by the aggrieved bidder (Case C-275/03, *Commission v Portugal*; Case C-70/06, *EC v Portugal*).

The attribution of liability for infringement of public procurement law by national contracting authorities is determined by applying the *Francovich* conditions, according to the unifying thesis (Case C-568/08, *Combinatie Spijker*; Case E-7/18, *Fosen-Linjen II*).

Once liability has been established, the determination of damages (whether the infringement has resulted in any damage) and the estimation/quantification of those damages are governed by national procedural law but general principles of EU law still apply, namely the principles of effectiveness and equivalence (Case C-568/08, *Combinatie Spijker*).

National law must provide for pre-contractual review and post-contractual review since the award of the tender and the signing of the contract are two distinct events which cannot coincide (Case C-81/98, *Alcatel*).

It appears that in a pre-contractual review, damages may be limited to negative interest damages (bidding costs); whereas in a post-contractual review damages must include positive interest (Opinion of AG Mischo in Case C-81/98, *Alcatel*).

[307] *Club Hotel Loutraki* (n 293) paras 75-76.
[308] ibid. paras 78-79.
[309] Case C-129/04, *Espace Trianon and Sofibail v FOREM* EU:C:2005:521, [2005], ECR I-07805, paras 24-26.

The principle of effectiveness means that an individual harmed by a breach of EU law must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) together with interest (Joined cases C-295/04 to C-298/04, *Manfredi*).

In the case of an infringement by an EU institution, heads of damage include (Case T-292/15, *Vakakis*):

a) Lost profits if the contract would have been awarded to the aggrieved bidder;
b) Costs for challenging the award if those costs are strictly necessary to challenge the decision meaning also that the amount of costs must be justified;
c) Lost opportunity in another tender (not the one being the subject of the proceedings) only if that other tender specifically requires the successful bidder to have been successful in the tender at issue;
d) Lost opportunity if the tender would have been awarded to the aggrieved bidder (but not necessarily that the contract would have been given);
e) Bidding costs if the infringement of the contracting authority has affected the aggrieved bidder's chances of being awarded the contract.

It would seem that the heads of damages for infringement of public procurement law by national contracting authorities are the same as the heads detailed in *Vakakis* for infringement by EU institutions; however, the determination of the existence of those heads may still fall under national law (Case E-7/18, *Fosen-Linjen II*).

Only decisions of national contracting authorities may be challenged in terms of the Remedies Directive; however, decisions of other authorities which affect the tendering procedure may still be challenged under the principle of effective judicial protection as a general principle of EU law, which principle encompasses the principles of effectiveness and equivalence (Joined cases C-145/08 and C-149/08, *Club Hotel Loutraki*).

National review procedures must give *locus standi* to individual members of a bidding consortium where the challenged decision concerns that member individually (Joined cases C-145/08 and C-149/08, *Club Hotel Loutraki*).

Roberto Caranta believes that the CJEU:

> has sent contradictory signals on the wider question of whether (a) the liability for breach of public procurement and concession rules is just one instance of the general doctrine of Member States liability for breach of EU law or, on the

contrary, or rather (b) it is regulated by special rules derived from the interpretation of Directive 89/665/EEC.[310]

It is submitted that the doctrine of state liability is the underlying ultimate safeguard of the individual's rights, and as a result prevails over the specific provisions of the Directives. The limitations of direct effect and indirect effect, especially in relation to directives, can have a significant impact on individuals' ability to benefit from EU law rights. To this effect, the principle of state liability comes into play, whereby the individual, subject that the criteria of state liability are satisfied, has a right to damages against the Member State who has infringed EU law, which infringement has brought a loss to the individual.

3.2.5. The scope for further harmonisation of damages in public procurement

The harmonising effect brought about by the existing case law of the ECJ with regard to some aspects of the remedy in damages under the Remedies Directives presents three major arguments for pursuing further harmonisation.

First, the Remedies Directives still do not meet one major objective – 'opening-up of public procurement to Community competition'.[311] A substantial reason for this is the different approaches adopted by the EU Member States with respect to the right to damages. The European Commission published the conclusions of the report made by a Stakeholder Expert Group on Public Procurement which convened in Brussels on 23 February 2013.[312] This report observed that post-contractual remedies, in particular damages, are not as effective as pre-contractual remedies. It was concluded that pre-contractual remedies (setting aside of decisions) are more effective since 'economic operators are interested in being awarded a contract and not in compensation.'[313] The Group also concluded that it is 'notoriously difficult to seek damages in most Member States' due to the difficulty in proving causation.[314] The Commission report also points to a conference of Supreme Administrative Court Judges convened in Helsinki on 22-23 October 2015, at which the difficulty in bringing actions for damages was again pointed out, and it was noted that that national courts apply different

[310] Caranta (n 179) 7.
[311] Preamble to the Remedies Directive.
[312] European Commission, '*Evaluation of the Modifications Introduced by Directive 2007/66/EC to Directives 89/665/EEC and 92/13/EEC Concerning the European Framework for Remedies in the Area of Public Procurement/ Refit Evaluation*', Brussels 24.1.2017, SWD (2017) 13 final, 65. < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0013&from=EN> accessed 10 January 2021.
[313] ibid.
[314] ibid.

standards of causation and of recoverable losses.[315] The judges 'considered that the right to damages lacked a sufficient level of harmonisation at EU level.'[316]

Some harmonisation of the standard of causation and of the heads of damages available would go a long way in ensuring a single market for public procurement. Even if tenderers generally prefer pre-contractual remedies, like setting aside an award decision, damages may often be the only remedy available post-contract. Therefore, the lack of legal certainty on damages, especially for tenderers not established in the EU Member State of the procedure, might be a significant cause for not participating at all.

Secondly, despite the judicial harmonisation that has taken place there is significant room for divergent interpretation as has been show in this chapter. This lack of clarity affects two aspects in particular. One aspect is the 'unifying/separation thesis' dichotomy, that is, whether the liability of the contracting authorities is subject to the *Francovich* regime which also applies to EU Member State liability for infringements of EU law generally. While it is submitted that this question should be answered affirmatively, and this view is also supported in scholarship,[317] in the discussion relating to the *Combinatie Spijker* and *Fosen-Linjen* cases, a different interpretation arguing for the separation thesis may indeed be made.[318] Therefore, the case law discussed above cannot be taken as being definitive on the matter. The other outstanding aspect is whether the public procurement review of EU institutions spills over or informs the review undertaken at national level. Most importantly it is unclear whether the heads of damages available in review of decisions of EU institutions as laid down in the *Vakakis* case can be said to apply also at national levels of review. For these reasons, adopting a new instrument of EU law, or amending further the current Remedies Directives, would allow for more legal certainty in this important area of damages which is still lacking proper harmonisation.

Thirdly, despite the lack of clarity on the aspects highlighted in the previous paragraph, other aspects of the judicial harmonisation that has taken place may be codified. This would not be the first time. For example, the 'Standstill period' clause, Article 2a, of the Remedies Directive is largely seen as the codification of the *Alcatel* ruling.[319] As a minimum, the much needed

[315] ibid. 67.
[316] ibid. 26.
[317] Sanchez-Graells (n 191).
[318] Schebesta (n 153) 65 et seq.
[319] ibid. 26; and Nikolaos Korogiannakis, 'Recent Case Law of the CJEU on Interim Measures and Award of Damages in EU Public Procurement Law' (2017) ERA Forum 18, 100, fn 20 < https://doi.org/10.1007/s12027-017-0467-2> accessed 20 January 2021.

codification should encompass the principle that the fault of the contracting authority is not required, the interpretation of the principle of effectiveness as warranting compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*), and aspects of the proper defendant and *locus standi* in public procurement review.

CHAPTER 4: DAMAGES AS APPLIED IN MEMBER STATES' JURISDICTIONS

4.1. Introduction

This Chapter attempts to explore the types of damages that are applied in the Italian, Dutch and French jurisdictions. The aim of examining these three jurisdictions is to take a snapshot of the different approaches in the laws of damages and their applications in the Member States under study, particularly the heads of damages. This analysis, together with the previous analysis of CJEU case law, will ultimately serve to propose concrete rules on what type of compensation in damages may be applicable in cases involving public procurement remedies and the liquidation of damages. This with a view to achieve more uniform criteria to the award of compensation in damages.

4.2. Italian Civil Law on damages

Italian law recognises both patrimonial damages and non-patrimonial damages (such as moral damages). For damages to be awarded, there has to be a damage which is a consequence of an immediate and direct illicit act, and in the determination of damages, one has to look at the *damnum emergens*, the *lucrum cessans* and loss of chance, but not limitedly. In this sense, the Italian Civil Code provides that 'Il risarcimento dovuto al danneggiato si deve determinare secondo le disposizioni degli articoli 1223[320], 1226[321] e 1227. Il lucro cessante è valutato dal giudice con equo apprezzamento delle circostanze del caso.'[322]

The Italian Civil Law on patrimonial damages identifies the following heads of damage:

---

[320] Italian Civil Code, Article. 1223 "Il risarcimento del danno per l'inadempimento o per il ritardo deve comprendere così la perdita subita dal creditore come il mancato guadagno, in quanto ne siano conseguenza immediata e diretta."
Translation: "Compensation for damages for non-fulfillment or delay must thus include the loss suffered by the creditor as well as the loss of earnings, insofar as they are an immediate and direct consequence."

[321] ibid. Article. 1226, "Se il danno non può essere provato nel suo preciso ammontare, è liquidato dal giudice con valutazione equitativa."
Translation: "If the damage cannot be proved in its precise amount, it is liquidated by the judge with an equitable assessment."

[322] ibid. Article. 2056 "Il risarcimento dovuto al danneggiato si deve determinare secondo le disposizioni degli articoli 1223, 1226 e 1227. Il lucro cessante è valutato dal giudice con equo apprezzamento delle circostanze del caso"
Translation: "The compensation due to the injured party has to be determined according to the provisions of articles 1223, 1226 and 1227. The loss of profits is arrived at by the judge by taking into consideration fair appreciation of the circumstances of the case."

> a) sia il 'danno emergente', per tale intendendosi la diminuzione del patrimonio del danneggiato (in conseguenza, ad es., della distruzione di una sua cosa, della riduzione del suo valore d'uso e/o di scambio, ecc.) (v. Cass. 10 novembre 2010, n. 22826);
>
> b) sia il 'lucro cessante', per tale intendendosi il guadagno che la vittima dell'illecito avrebbe presumibilmente conseguito – e che invece non ha conseguito – a causa dell'illecito sofferto (si pensi, ad es., alla Perdita di capacita' reddituale che puo' conseguire alla lesione dell'integrita' fisica, ecc.: v. Cass. 24 febbraio 2011, n. 4493).[323]

Although Italian law is silent on loss of chance, yet damages for loss of chance have been developed by the Italian courts' jurisprudence. Recent decisions of the Court of Cassation and scholarly authors have shed more light on the institute of damages, including the *danno emergente*, the *lucrum cessans* and the *loss of chance*.

'Danno emergente'

C. Massimo Bianca and Mirzia Bianca observe that the *danno emergente* comprises, but not limitedly:

> Il valore del bene distrutto, la diminuzione di valore del bene causata dal deterioramento, la diminuzione di valore della prestazione a causa della difettosita' o mancanza di qualita' del bene che ne e' oggetto, l'importo delle spese rese necessarie dall'inadempimento, ecc.[324]

The Court of Cassation, defining *danno emergente* within the context of a case in connection with precontractual damages, has commented as follows:

---

[323] ibid. 894-895.
Translation: "a) both the 'emerging damage', namely the diminution of the patrimony of the injured party (in consequence, for instance, of the destruction of his thing, of the reduction in value of use and/or exchange, ecc.) (v. Cass. 10 November 2010, n. 22826);
b) and also 'the loss of profit', which means the gains that the victim of the illicit act would presumably have achieved – and that instead has not achieved – due to the illegal act suffered (one can think, for instance, of the loss of the capacity to earn which may result from injury to the physical integrity, ecc.: v. Cass. 24 February 2011, n. 4493)."

[324] Cesare Massimo Bianca con la collaborazione di Mirzia Bianca*, Istituzioni di diritto privato*, (2nd edn, Giuffre: Milano, 2018) 628.
Translation: "The value of the destroyed property, the decrease in value of the asset caused by the deterioration, the decrease in value of the service due to the defect or lack of quality of the goods to which it is subject, the amount of the expenses made necessary by the non-performance, etc."

> Il pregiudizio patrimoniale suscettibile di ristoro, in caso di responsabilita' precontrattuale, comprende tanto le spese inutilmente sostenute in relazione alle trattative, quanto la perdita subita dalla parte per non aver usufruito delle occasioni presentatesi nel corso delle trattative, di stipulare un altro contratto. Il primo pregiudizio – che integra un danno emergente – si configura anche nell'ipotesi in cui abbia luogo la semplice contrazione di un impegno di spesa, dal momento che l'assunzione del debito nei confronti del terzo incide negativamente sulla sfera del soggetto che si e' obbligato, riducendo la consistenza del patrimonio di questo per effetto del sovvenire di una nuova passivita'. Infatti, in tema di liquidazione del danno, la locuzione "perdita subita", con la quale l'articolo 1223 codice civile, individua il danno emergente, non puo' essere considerata indicativa dei soli esborsi monetari o di diminuzioni patrimoniali gia' materialmente intervenuti, ma include anche l'obbligazione di effettuare l'esborso, in quanto il vinculum iuris, nel quale l'obbligazione stessa si sostanzia, costituisce gia' una posta passiva del patrimonio del danneggiato, consistente nell'insieme dei rapporti giuridici, con diretta, rilevanza economica, di cui una persona e' titolare (Cass. 10 novembre 2010, n. 22826).[325]

The Court concluded its decision by stating that precontractual responsibility, as evidenced in article 1337 of the Italian Civil Code, covers all the direct and immediate consequences:

> della violazione del dovere di comportarsi secondo buona fede nella fase preparatoria del contratto, secondo i criteri stabiliti dagli articoli 1223 e 2056 codice civile, si estende al danno per il pregiudizio economico derivante dalle rinunce a stipulare un contratto, ancorché' avente contenuto diverso, rispetto a

[325] Cassazione Civile, Sez. II., 11 Marzo 2016, n. 4718 (Pres. Matera, rel. Falabella)
Translation: "The pecuniary prejudice susceptible to be restored, in the event of pre-contractual liability, includes both the expenses unnecessarily incurred in relation to the negotiations, as well as the loss suffered by the party for not having taken advantage of the opportunities presented during the negotiations, to enter into another contract. The first prejudice – which integrates an emerging damage – is also configured in the hypothesis in which the simple contraction of an expenditure commitment takes place, since the assumption of the debt towards the third party negatively affects the sphere of the person who is obliged, reducing the consistency of the assets of this due to the effect of the subsidy of a new liability. In fact, on the subject of liquidation of the damage, the expression "loss suffered", with which Article 1223 of the Civil Code, identifies the emerging damage, cannot be considered indicative only of monetary disbursements or asset reductions already materially occurred, but also includes the obligation to make the disbursement, as the *vinculum iuris*, in which the obligation itself is substantiated, already constitutes a passive item of the injured party's assets, consisting of all the legal relationships, with direct, economic relevance, of which a person is the owner (Cass. 10 November 2010, n. 22826)".

> quello per cui si erano svolte le trattative, se la sua mancata conclusione si manifesti come conseguenza immediata e diretta del comportamento della controparte, che ha lasciato cadere le dette trattative quando queste erano giunte al punto di creare un ragionevole affidamento nella conclusione positiva di esse.[326]

Therefore, precontractual liability in terms of article 1337 of the Italian Civil Code, comprises, within the negative interest, all the immediate and direct violation of the obligation of good faith during the preparatory phase of the contract negotiation, as established in articles 1223 and 2056 of the Italian Civil Code. Thus, if the negotiations fail as a consequence of the direct and immediate absence of good faith of one party, and the negotiations would have reached an advanced stage, then the *danno emergente* may result in favour of the aggrieved party.

Yet, as stipulated in the Italian Civil Code, patrimonial damages do not consist solely of *danno emergente* (material damages), but also of *lucro cessante* (loss of profits). Lucia Izzo describes the difference between *danno emergente* and the *lucro cessante* as follows:

> Il danno emergente consiste nella perdita economica che il patrimonio del creditore ha subito per colpa della mancata, inesatta o ritardata prestazione del debitore.
>
> Il lucro cessante è, invece, il mancato guadagno che si sarebbe prodotto se l'inadempimento non fosse stato posto in essere.
>
> Entrambi i concetti di danno emergente e lucro cessante, rappresentano le due componenti cui si fa comunemente riferimento per fornire la definizione unitaria del danno patrimoniale, ossia la forma di danno ingiusto che colpisce direttamente la sfera economico-patrimoniale del danneggiato.
>
> Il codice civile, tuttavia, non richiama espressamente le due categorie, limitandosi a precisare all'art. 1223 (Risarcimento del danno) che "il risarcimento del danno per l'inadempimento o per il ritardo deve comprendere

[326] ibid.
Translation: "of the breach of duty to act in good faith at the preparatory stage of the contract, according to the criteria established by Articles 1223 and 2056 of the Civil Code, extends to damage for economic damage resulting from the waiver of concluding a contract, even if it has a different content, from that for which the negotiations were conducted, if its non-conclusion manifests itself as an immediate and direct consequence of the conduct of the other party, who has dropped those negotiations when they had reached the point of creating a reasonable expectation in the successful conclusion of those negotiations."

così la perdita subita dal creditore come il mancato guadagno, in quanto ne siano conseguenza immediata".[327]

Lucrum cessans

Therefore, if the concrete existence of damage is proved (*damnum emergens),* then one may also consider whether there are also damages in the form of *lucrum cessans*, as envisaged in article 2056 of the Italian Civil Code, namely that the compensation due to the injured party has to be determined according to the provisions of articles 1223, 1226 and 1227 of the Italian Civil Code:

> La valutazione equitativa del lucro cessante prevista dall'art. 2056 c.c., comma 2, non implica alcuna relevatio dall'onere probatorio quanto alla concreta esistenza del pregiudizio patrimoniale, riguardando il giudizio di equità solo l'entità di quel pregiudizio, in considerazione dell'impossibilità o della grande difficoltà di dimostrarne l'esatta misura; e tanto risulta condiviso dall'orientamento assolutamente prevalente di questa corte, sia nelle linee generali (cfr. Sez. 3^ n. 11969-13, Sez. 2^ n. 12256-97, Sez. 3^ n. 9835-96), sia in materia brevettuale (v. Sez. 1^ n. 12545-04), sia infine nei casi di danno da concorrenza sleale (v. Sez. 1^ n. 24635-08; n. 16447-08 cit.).[328]

C. Massimo Bianca and Mirzia Bianca have described the lucro cessante as:

---

[327] Lucia Izzo, 'Danno emergente e lucro cessante: cosa sono e quali sono le differenze,' (*Studio Cataldi Il Diritto Italiano,* 25 June 2015)
<https://www.studiocataldi.it/articoli/18691-il-danno-emergente-e-il-lucro-cessante-cosa-sono-e-quali-sono-le-differenze.asp#:~:text=Il%20danno%20emergente%20consiste%20nella,fosse%20stato%20posto%20in%20essere.> accessed 11 August 2023.
Translation: "Actual damage consists of the economic loss that the creditor's assets have suffered as a result of the debtor's missed, incorrect or delayed performance.
The loss of profit is, on the other hand, the loss of profit that would have occurred if the non-fulfillment had not been carried out. Both concepts of emerging damage and loss of profit, represent the two components commonly referred to provide the unitary definition of pecuniary damage, i.e., the form of unjust damage that directly affects the economic-patrimonial sphere of the injured party.
The Civil Code, however, does not expressly refer to the two categories, limiting itself to specifying in art. 1223 (Compensation for damages) that "compensation for damage for non-performance or delay must therefore include the loss suffered by the creditor as the loss of profit, as they are an immediate consequence".

[328] Cassazione civile sez. I, 21 giugno 2016, n. 12812 (ud. 12/04/2016, dep. 21/06/2016),
Translation: "The equitable evaluation of the loss of profit provided for by art. 2056 of the Italian Civil Code, paragraph 2, does not imply any relief from the burden of proof as regards the concrete existence of pecuniary damage, concerning the judgment of equity only the extent of that prejudice, in consideration of the impossibility or great difficulty of demonstrating its exact extent; and so much is shared by the absolutely prevailing orientation of this court, both in general lines (see Sec. 3 ^ n. 11969-13, Sec. 2 ^ n. 12256-97, Sec. 3 ^ n. 9835-96), both in patent matters (see Sec. 1 ^ n. 12545-04), and finally in cases of damage resulting from unfair competition (see Sec. 1 ^ n. 24635-08; n. 16447-08 cit.)."

> il guadagno patrimoniale netto che viene meno al creditore a causa dell'illecito o dell'inadepimento. A differenza del danno emergente il lucro cessante e' un danno che concerne una ricchezza non conseguita dal danneggiato. (…) Il lucro cessante e' un danno normalmente futuro che richiede in ogni caso una ragionevole certezza in ordine al suo accadimento, e che deve di regola valutarsi in via equitativa (art. 2056c.c.).[329]

Loss of chance

Italian law on damages presupposes the happening of an illicit act which brings with it a civil responsibility.[330] The notion of damages in Italian law refers to 'conseguenza si intende qualsiasi alterazione negativa della situazione del soggetto rispetto a quella che si sarebbe avuta senza il verificarsi del fatto illecito.'[331] Given that Italian Civil law is silent on the loss of chance, the Italian courts have been recently active on defining, qualifying and determining what are the constitutive elements of compensation for the loss of chance:

> [P]erdita di chance, per tale intendendosi la Perdita di una concreta ed effettiva occasione favorevole di conseguire un determinato bene o risultato utile (si pensi, ad es., al dipendente per l'accesso alla qualifica superior: non e' dato sapere se, in caso di corretto espletamento della procedura, detto dipendente sarebbe risultato incluso nell'elenco dei promossi; e' pero' certo che ha perduto una concreta probabilita' di conseguire il risultato utile).[332]

The Court of Cassation in a recent judgment in the field of employment law, dated 18 February 2020, has ruled that the loss of chance needs to be proven by the employee:

---

[329] Bianca (n. 324) 628.
Translation: "the net asset gain that is lost to the creditor as a result of the tort or failure to act. Unlike the emerging damage, the loss of profit is a damage that concerns a wealth not achieved by the injured party. (...) The loss of profit is normally a future damage that requires in any case a reasonable certainty regarding its occurrence, and which must normally be evaluated equitably (art. 2056c.c.).
[330] Andrea Torrente & Piero Schlesinger, *Manuale di Diritto Privato* (Ventesima Edizione, Giuffre Editore 2011, 891.
[331] ibid.
Translation: "by consequence, one intends any negative change of the situation of the subject with respect to that which should have taken place without the verification of the illicit fact".
[332] ibid.
Translation: "Loss of chance, in effect means the loss of a concrete and effective favourable way of following a determinate good or useful result (one can think, for instance, of an employee who would like to access a superior qualification: it is not known if, in case of correct completion of the procedure, the said employee will be included in the list of promotions; but it is certain that he has lost a concrete probability to follow the desired result."

> La Cassazione – confermando quanto stabilito dalla Corte d'Appello – afferma che il lavoratore che lamenti la violazione, da parte del datore, dell'obbligo di osservare la par condicio fra gli aspiranti alla promozione e chieda il risarcimento dei danni derivanti dalla perdita di chance, deve fornire gli elementi atti a dimostrare la possibilita' che egli avrebbe avuto di conseguire la promozione, sulla base di un calcolo della probabilita'.
>
> (…)
>
> Secondo I Giudici di legittimita', e' dunque, il lavoratore che deduca di essere stato illecitamente estromesso da una graduatoria a dover provare in ogni modo, anche per presunzioni, di aver subito il relativo danno.[333]

Therefore, for loss of chance to subsist, the loss has to be capable of being valued in economic terms.

Furthermore, the Consiglio di Stato, Sezione VI, by decision dated 13 September 2021, n. 6268, outlined the conditions that have to subsist for the claim of loss of chance in administrative law.[334] It affirmed that:

> Poiché l'esigenza giurisdizionale è quella di riconoscere all'interessato il controvalore della mera possibilità – già presente nel suo patrimonio – di vedersi aggiudicato un determinato vantaggio, l'an del giudizio di responsabilità deve coerentemente consistere soltanto nell'accertamento del nesso causale tra la condotta antigiuridica e l'evento lesivo consistente nella perdita della predetta possibilità; la tecnica probabilistica va quindi impiegata, non per accertare l'esistenza della chance come bene a sé stante, bensì per misurare in modo equitativo il 'valore' economico della stessa, in sede di liquidazione del 'quantum'

[333] Fieldfisher (ed), 'Cassazione: criteri di quantificazione ed onere della prova del risarcimento del danno da Perdita di chance', (*Lavorosi Associazione Per Lo Sviluppo Del Lavoro*, 9 March 2020) <http://www.lavorosi.it/rapporti-di-lavoro/inquadramento-mansioni-mobilita-professionale/cassazione-criteri-di-quantificazione-ed-onere-della-prova-del-risarcimento-del-danno-da-perdita-di/> accessed on 26 July 2023
Translation: "The Court of Cassation – confirming what was established by the Court of Appeal – states that the worker who complains about the breach, by the employer, of the obligation to observe the *par condicio* between the aspirants to the promotion and asks for compensation for damages deriving from the loss of opportunity, must provide the elements to demonstrate the possibility that he would have had to achieve the promotion, based on a probability calculation.
(…)
According to the Judges of legitimacy, it is therefore the worker who deduces that he has been illegally excluded from a ranking list who must prove in every way, even by presumptions, that he has suffered the relative damage."
[334] Consigilio Di Stato, Sez. VI, 13 settembre 2021, n. 6298 (Pres. Volpe, Est. Simeoli)

> risarcibile; con l'avvertenza che, anche se commisurato ad una frazione probabilistica del vantaggio finale, il risarcimento è pur sempre compensativo (non del risultato sperato, ma) della privazione della possibilità di conseguirlo.[335]

With respect to this decision, Irene Merlo comments that the claim for loss of chance is dependable on the injured party showing the causal link between the loss of chance and the event which led to the loss of chance:

> La perdita di chance, dunque, è risarcibile a condizione che il danneggiato dimostri la sussistenza d'un valido nesso causale (potendo d'altronde questi prescindere dalla dimostrazione altresì della sussistenza dell'elemento psicologico della colpa, laddove – come nella vicenda esaminata e sulla scorta di pacifico orientamento giurisprudenziale, formatosi sulla scia dei principi eurounitari – si verta in materia di aggiudicazione di appalti pubblici).[336]

The *Consiglio di Stato* held that the loss of chance has to be serious 'per raggiungere la oglia dell'ingiustizia'.[337]

The issue of compensation for damages in the field of employment law has been the subject matter of a decision of the Court of Cassation dated 21 January 2022.[338] The Court of Cassation held that the compensation for loss of chance involved the moral and patrimonial damage suffered by the injured party resulting from lost opportunities. In this case, it entails an economic damage which damage needs to be liquidated together with other heads of damages suffered by the injured party. Yet the injured party has to prove concrete and effective loss of

---

[335] Consiglio Di Stato sez. VI, 13/09/2021, n.6268
Translation: "Since the judicial requirement is to recognize the interested party the countervalue of the mere possibility - already present in his assets - of being awarded a certain advantage, the act of liability must consistently consist only in ascertaining the causal link between the unlawful conduct and the harmful event consisting in the loss of the aforementioned possibility; The probabilistic technique must therefore be used, not to ascertain the existence of the chance as a good in its own right, but to measure equitably the economic 'value' of the same, when liquidating the compensable 'quantum'; with the caveat that, even if commensurate with a probabilistic fraction of the final advantage, the compensation is still compensatory (not of the desired result, but) of the deprivation of the possibility of achieving it."
[336] I Merlo, 'Danno Da Perdita Di Chance e Grado Di Probabilità (Di Aggiudicazione)' (*Scuderi & Motta Avocati*, 20 September 2021)
<https://scuderimottaeavvocati.it/danno-da-perdita-di-chance-e-grado-di-probabilita-di-aggiudicazione/>
accessed 26 July 2023
Translation: "The loss of opportunity, therefore, is compensable provided that the injured party proves the existence of a valid causal link (moreover, these can also disregard the demonstration of the existence of the psychological element of guilt, where – as in the case examined and on the basis of peaceful jurisprudential orientation, formed in the wake of the Euro-unitary principles – it concerns the matter on the award of public contracts)."
[337] Consiglio Di Stato sez. VI (n 335).
[338] Cassazione Civile Sez. Lavoro., 21 gennaio 2022, n.1884/2022 (ud. 21/12/2021, dep. 21/01/2022).

chance in view that damages for loss of chance have to be viewed in connection with the thing or the right that has been breached: 'Tale Perdita costituisce un danno attuale, che e' risarcibile se e in quanto l'occasione favorevole sia funzionalmente connessa alla cosa o al diritto leso.'[339]

Similarly, the Tribunal of Torino held that for damages to be claimed, it is necessary that the damage suffered is certain, which has to be proved by the loss of an actual possibility, based on a specific and concrete circumstance. Therefore, the injured party has to prove with certainty and through a high level of probability, its actual existence. Therefore, loss of chance will only be awarded when there is a high level of certainty, objectivity and probability that the injured party has actually lost the chance.[340]

In another case concerning loss of chance, the plaintiff filed a claim against the Università degli studi Suor Orsola Benincasa di Napoli and Poste Italiane s.p.a., requesting that these two entities are to be condemned to pay compensation in damages arising from the late delivery of a registered letter sent by the University, claiming that the late delivery had impeded the injured party from participating in a public call by the University for obtaining a PhD.

The first instance court held that the plaintiff had not provided any proof on the real possibility of winning the award, failing to indicate nor prove the number of candidates and the final result. Therefore, the plaintiff had not demonstrated a reasonable probability of success should the plaintiff have participated in the examination, in which public call the plaintiff could not participate due to late delivery of the letter. It was held that the late delivery of the letter by itself was not a sufficient justification for compensation in damages.

In this respect, on 17 February 2022, the Court of Cassation pronounced itself on whether the plaintiff is justified or otherwise for claiming compensation in damages with respect to loss of chance:

> La giurisprudenza di questa Corte ha affermato che la perdita di chance costituisce un danno patrimoniale risarcibile, quale danno emergente, qualora sussista un pregiudizio certo (anche se non nel suo ammontare) consistente nella perdita di una possibilità attuale, ed esige la prova, anche presuntiva, purché fondata su circostanze specifiche e concrete, dell'esistenza di elementi oggettivi dai quali

[339] Bianca (n. 324), 635.
Translation: "This Loss constitutes a present damage, which is compensable if and to the extent that the favourable opportunity is functionally connected to the thing or right injured."
[340] Tribunale di Torino, sentenza, 11 ottobre 2021 n. 4523/2021.

> desumere, in termini di certezza o di elevata probabilità, la sua attuale esistenza (sentenza 30 settembre 2016, n. 19604); ed ha anche affermato che tale perdita implica la sussistenza ex ante di concrete e non ipotetiche possibilità di conseguire vantaggi economici apprezzabili, la cui valutazione è rimessa al giudice di merito (sentenza 29 novembre 2016, n. 24295). Nella materia specifica dei concorsi, è stato parimenti affermato che l'espletamento di una procedura concorsuale illegittima non comporta di per sé il diritto al risarcimento del danno da perdita di chance, occorrendo che il dipendente provi il nesso di causalità tra l'inadempimento datoriale ed il suddetto danno in termini prossimi alla certezza, essendo insufficiente il mero criterio di probabilità quantitativa dell'esito favorevole (sentenza 9 maggio 2018, n. 11165; in argomento v. pure l'ordinanza 15 ottobre 2018, n. 25727).[341]

Therefore, a consistent Court of Cassation line of case law affirms that loss of chance is a patrimonial damage that needs to be compensated for, but subject that the damage is proved to be certain:

> [L]'espletamento di una procedura concorsuale illegittima, non comporta di per sé il diritto al risarcimento del danno da perdita di chance, occorrendo che il dipendente provi il nesso di causalità tra l'inadempimento datoriale ed il suddetto danno in termini prossimi alla certezza, essendo insufficiente il mero criterio di probabilità quantitativa dell'esito favorevole.[342]

[341] Cass. Civile., Sez. VI,17 febbraio 2022, n. 5231.
Translation: "The case-law of this Court has held that loss of opportunity constitutes pecuniary damage which can be compensated for, as actual damage, where the damage is certain (even if not in its amount) consisting in the loss of a present possibility, and requires proof, even presumptive, provided that it is based on specific and concrete circumstances, the existence of objective elements from which to deduce, in terms of certainty or high probability, its current existence (judgment no. 19604 of 30 September 2016); and also stated that such a loss implies the existence ex ante of concrete and non-hypothetical possibilities of obtaining appreciable economic advantages, the assessment of which is referred to the court on the merits (judgment no. 24295 of 29 November 2016). No. 24295). With regard to competitions specifically, it has also been held that the completion of an unlawful insolvency procedure does not in itself entail the right to compensation for loss of opportunity, since it is necessary for the employee to prove the causal link between the employer's failure to fulfil obligations and that damage in terms close to certainty, since the mere criterion of quantitative probability of the favourable outcome is insufficient (judgment no. 11165 of 9 May 2018; see also order no. 25727 of 15 October 2018)"
[342] Cassazione Civile, Sez. Lavoro, 9 maggio 2018, n. 11165 and , Cassazione Civile, Sez. Lavoro, 15 ottobre 2018, n. 25727 (ud. 13/06/2018, dep. 15/10/2018).
Translation: "The completion of an unlawful insolvency procedure does not in itself entail the right to compensation for loss of opportunity, since it is necessary for the employee to prove the causal link between the employer's failure to fulfil his obligations and the aforementioned damage in terms close to certainty, the mere criterion of quantitative probability of the favourable outcome being insufficient."

Therefore, for a claim of loss of chance to subsist, the injured party, who bears the burden of proof, has to prove concrete and effective damage, not mere hypothetical damage.[343] Given that the loss of chance from its nature is presumptive, the injured party has to prove, also through circumstantial evidence, the existence of the damage. Furthermore, there are no pre-established criteria for the liquidation of damages arising from loss of chance and the Court has to liquidate the damages on a case by case basis. The Court has to take into consideration the level of probability and the *lucrum cessans*, which consists not just in the loss of an economic advantage, but also the possibility of achieving it.

Another form of compensation for damages is curricular damage, which has been described as that form of damage:

> that prevents the company from enhancing its professional curriculum. In other words, the performance of a public contract (regardless of the income earned with the price paid by the contracting client), is the source of an economically appraisable advantage in that it increases the company's ability to compete in the market and thus its chances to win further and future contracts.[344]

Therefore, curricular damage is the loss of the specific possibility to increase the economic operator's goodwill relating to its professional curriculum.

In this respect, a claim for compensation for curricular damage as a form of loss of chance has been the subject of the decision of the *Consiglio di Stato* of 15 November 2019.[345] Although the Court rejected the claim for damages, the Court looked into a line of previous decisions on loss of chance and made the following observations:

> 5.2.2. E' noto che nei casi di attività della pubblica amministrazione connotata da ampia discrezionalità, l'esito del giudizio prognostico risulta particolarmente incerto e che, per questo motivo, è invalsa nella giurisprudenza amministrativa l'utilizzo della tecnica risarcitoria della c.d. chance. Si è infatti affermato che: "Il risarcimento del danno da perdita di chance esprime uno schema di reintegrazione patrimoniale riguardo un bene della vita connesso ad una situazione soggettiva che, quando è sostitutiva di una reintegrazione in forma specifica come nei

[343] *Onus probandi incumbit actori.*
[344] Silvia Ponzio, *State Liability in Public Procurement – The Case of Italy,* 91, in Duncan Fairgrieve and François Lichère, *Public Procurement Law – Damages as an effective remedy* (Oxford and Portland, Oregon, Hart Publishing 2011) 106-107, 109.
[345] Consiglio di Stato, sez. V, sent. 15 novembre 2019, n. 7845.

contratti pubblici, poggia sul fatto che un operatore economico che partecipa ammissibilmente a una procedura di evidenza pubblica, per ciò solo, è stimabile come portatore di un'astratta e potenziale chance di aggiudicarsi il contratto (così come chiunque, in generale, partecipi ad una procedura comparativa per la possibilità di conseguire il bene o l'utilità messi a concorso)" (Cons. Stato, sez. V, 11 luglio 2018, n. 4225; V, 26 aprile 2018, n. 2527).

Per dette ragioni i confini della tecnica risarcitoria della chance vanno dal caso in cui una procedura competitiva sia completamente mancata (per caso di applicazione della chance a seguito di accertato illegittimo affidamento diretto di un contratto d'appalto, Cons. Stato, sez. V, 11 gennaio 2018, n. 118 cui è seguita, nella stessa vicenda, V, 17 dicembre 2018, n. 7117) a quello in cui l'unico esito possible dell'annullamento degli atti di gara è l'aggiudicazione all'operatore economico vittorioso in giudizio; situazione in cui, ove non sia praticabile il risarcimento in forma specifica, è dovuto il danno c.d. da aggiudicazione illegittima (Cons. Stato, Ad. pl. 12 maggio 2017, n. 2).

(…)

5.2.3. La tecnica risarcitoria della chance, tuttavia, richiede un ulteriore necessario passaggio: è possibile accedere a detto risarcimento per equivalente solo se la chance ha effettivamente raggiunto un'apprezzabile consistenza, di solito indicata dalle formule "probabilità seria e concreta" o anche "elevata probabilità" di conseguire il bene della vita sperato. Al di sotto di tale livello, dove c'è la "mera possibilità", vi è solo un ipotetico danno non meritevole di reintegrazione poiché in pratica nemmeno distinguibile dalla lesione di una mera aspettativa di fatto (oltre alle sentenze in precedenza citate, in tema di pubblici concorsi, Cons. Stato, III, 27 novembre 2017, n. 5559, nonché Cass., lav., 25 agosto 2017, n. 20408; in tema di contratti pubblici, Cons. Stato, V, 7 giugno 2017, n. 2740; VI, 4 settembre 2015, n. 4115; 5 marzo 2015, n. 1099; VI, 20 ottobre 2010, n. 7593).[346]

[346] ibid. **Translation**: "5.2.2. It is well known that in cases of activities of the public administration characterized by wide discretion, the outcome of the prognostic judgment is particularly uncertain and that, for this reason, the use of the compensation technique of the so-called chance has prevailed in administrative jurisprudence. It has in fact been stated that: "The compensation for damage from loss of opportunity expresses a scheme of patrimonial reintegration regarding a good of life connected to a subjective situation that, when it is a substitute for a reintegration in a specific form as in public contracts, is based on the fact that an economic operator who

With respect to who bears the burden of proof, the Court of Cassation held that the plaintiff bears the burden of proof, namely the burden of providing certain and concrete proof of the damage, so as to allow its liquidation, as well as proof of the causal link between the damage and the conduct charged to the other party:

> Indeed, recourse may be had to liquidation in equity, when the conditions referred to in art. 1226 of the Italian Civil Code, only on condition that the existence of the damage is in any case demonstrated, on the basis of elements suitable to provide plausible parameters of quantification.[347]

In this case, the Court held that no proof of the damage had been submitted, and that the alleged damage from loss of opportunity complained of for failure to participate in other tender procedures not linked by a causal link with the conduct of the contracting authority has not been proved and therefore rejected by the Court. The Court made an important pronouncement stating that it is settled case-law on the subject that:

> [T]he possibility of compensation for the "chance" of award is admissible only when the damage is linked to the demonstration of a serious probability of obtaining the desired advantage, having to, conversely, exclude the compensation when the "chance" of obtaining the lost utility remains within the category of the mere possibility (ex multis Cons. State, Sec. IV, 23 June 15 n. 3147); Therefore,

---

admissibly participates in a public tendering procedure, for that reason alone, is estimable as having an abstract and potential chance of winning the contract (as is anyone who, in general, participates in a comparative procedure) for the possibility of obtaining the good or utility put out to tender)" (Cons. Stato, sect. V, 11 July 2018, n. 4225; V, 26 April 2018, n. 2527).

For these reasons, the boundaries of the technique of compensating for the chance go from the case in which a competitive procedure is completely missed (in case of application of the chance following ascertained illegitimate direct assignment of a contract, Cons. Stato, sec. V, 11 January 2018, n. 118 which was followed, in the same case, V, 17 December 2018, No. 7117) where the only possible outcome of the annulment of the tender documents is the award to the unsuccessful economic operator in court; situation in which, where compensation in a specific form is not practicable, the so-called unlawful award damage is due (Cons. Stato, Ad.pl. 12 May 2017, n. 2).

5.2.3. The technique of compensating for chance, however, requires a further necessary step: it is possible to access this compensation for equivalence only if the chance has actually reached an appreciable consistency, usually indicated by the formulas "serious and concrete probability" or even "high probability" of achieving the good of life hoped for. Below that level, where there is "mere possibility", there is only a hypothetical damage not worthy of reinstatement because in practice not even distinguishable from the injury of a mere expectation of fact (in addition to the judgments previously cited, on the subject of public competitions, Cons. Stato, III, 27 November 2017, n. 5559, as well as Cass., lav., 25 August 2017, n. 20408; on the subject of public contracts, Cons. State, V, 7 June 2017, n. 2740; VI, 4 September 2015, n. 4115; 5 March 2015, n. 1099; VI, 20 October 2010, n. 7593)."

[347] N. 02709/2022REG.PROV.COLL. N. 03290/2021 REG.RIC. The Council of State (Section Five), on 11 April 2022, delivered a decision, on the appeal general register number 3290 of 2021 with respect to Call for tenders no. 2/2020 "Open Procedure for the concession for advertising purposes of the interior and exterior spaces of tram cars, in public service on the urban network of Rome".

"in order to obtain compensation for damages, even for loss of a "chance", it is still necessary that the injured party demonstrates, albeit presumptively but still on the basis of certain and punctually attached factual circumstances, the existence of a valid causal link between the harmful conduct and the reasonable probability of obtaining the lost alternative advantage and proves, consequently, the existence, in practice, of the conditions and conditions for achieving the desired result and prevented by the unlawful conduct, of which the compensable damage must be configured as an immediate and direct consequence "(TAR Lazio, Sec. I, 6 November 2019, n.12735 confirmed by Cons. Stato, Sec. V, 26 October 2020, n. 6465; State Cons., Sec. V, 11 July 2018, n.4225; Cons. Stato, Sec. IV, 16 May 2018, n. 2907 and Cons. Stato, Sec. V, 25 February 2016, n. 762 where it is highlighted that, for the purposes of compensability of the lost chance, "the applicant has the burden of proving the elements capable of demonstrating, even if only in a presumptive way and based on the calculation of probabilities, the concrete possibility that he would have had to achieve the desired result, given that the equitable assessment of the damage, within the meaning of Article 1226 of the Civil Code, presupposes that the existence of compensable damage is proved; in particular, the impairment of the concrete possibility of obtaining a favourable result presupposes that there is a probability of success of at least 50%, since, otherwise, even mere chances of success, statistically insignificant, would become compensable"; Cons. State Sec. V Sent., 30/06/2015, n. 3249 according to which "In relation to compensation for damage from loss of opportunity deriving from failure to participate in tender procedures called for the award of public contracts, the applicant (injured) has the burden of proving the elements to demonstrate, even if only in a presumptive way and based on the calculation of probabilities, the concrete possibility that he would have had to achieve the desired result, given that the equitable assessment of the damage, pursuant to art. 1226 of the Civil Code, presupposes that the existence of compensable damage is proven").[348]

[348] ibid.

And indeed, as clarified also recently by Cons. giust. amm. Sicily, 15 October 2020, n. 914:

> [F]or the purposes of compensating for a loss of chance, the jurisprudence teaches, in fact, that the relative compensation technique guarantees access to compensation for equivalent only if the chance has actually reached an appreciable consistency, usually indicated by the formulas "serious and concrete probability" or even "high probability" of achieving the good of life hoped for; and that in the case of mere "possibility" there is only a hypothetical damage, not worthy of reinstatement because in practice it is not even distinguishable from the injury of a mere expectation of fact (C.d.S., sec. V, 15 November 2019, n. 7845; IV, 23 September 2019, n. 6319; III, 27 November 2017, n. 5559); the acceptance of the relative request requires, therefore, that proof has been provided, even presumptive, of the existence of objective elements from which to deduce, in terms of certainty or high probability, but not of mere potential, the existence of an economically assessable prejudice (Cass. civ., Sec. I, 13 April 2017, n. 9571; Labor Section, 11 October 2017, n. 23862). [349]

Lucrum cessans and loss of chance

Whether the *lucro cessante* and *danno di perdita di chance* may or may not subsist concurrently has been the subject of a Court of Cassation case, whereby a fifteen year old football player had succumbed to a ninety per cent disability due to a traffic accident. The aggrieved party lamented that the first instance Tribunal undervalued the compensation in damages for the loss of the capacity to work, and that subsequently the Court of Appeal had not awarded the loss of chance due to professional success. Commenting on this decision, Avvocato Umberto Vianello, stated that:

> Secondo la Cassazione, infatti, sebbene la vittima fosse un promettente calciatore, aveva pur sempre solo quindici anni.
>
> Il Tribunale ha dunque liquidato il danno ponendo a base del calcolo la metà del reddito di un calciatore di “serie A”: ciò sull’evidente presupposto (ancorché non

[349] Consiglo di Gustizia, AMM. Sicilia, 15 ottobre 2020, n. 914.

esplicitato) che se fosse rimasta sana, la vittima avrebbe raggiunto quell livello di reddito non immediatamente, ma solo dopo un certo numero di anni.[350]

With respect to the absence of the award of damages for loss of chance due for professional success, the Court of Cassation deemed this claim to be overly unfounded given that 'un danno da perdita di chance è ovviamente alternativo rispetto al danno da lucro cessante futuro da perdita del reddito. Se c'è l'uno non può esserci l'altro, e viceversa'.[351]

The Court of Cassation confirmed the decision of the Tribunal, namely the liquidation of damages of the injured party's patrimonial rights in the form of *lucrum cessans,* but failed to take into consideration the loss of chance, stating that these two heads of damages cannot subsist concurrently but are alternative:

10.1. Con una quinta censura del secondo motivo di ricorso, il ricorrente S.E. lamenta che la Corte d'appello non avrebbe liquidato il danno da perdita di chance di successo professionale.

10.2. Il motivo è manifestamente infondato.

Un danno da perdita di chance è ovviamente alternativo rispetto al danno da lucro cessante futuro da perdita del reddito. Se c'è l'uno non può esserci l'altro, e viceversa.

Delle due, infatti l'una: o la vittima dimostra di avere perduto un reddito che verosimilmente avrebbe realizzato, ed allora la spetterà il risarcimento del lucro cessante; ovvero la vittima non dà quella prova, ed allora le può spettare il risarcimento del danno da perdita di chance.

Nel nostro caso il Tribunale ha liquidato alla vittima il risarcimento del danno patrimoniale da perdita dei redditi futuri, e dunque correttamente non ha preso in

[350] Studio Legale Vianello, 'Risarcimento Danno Perdita Della Capacità Di Lavoro' (*Avvocato Umberto Vianello*, 17 April 2018) <https://www.studiolexvianello.it/2016/11/28/nella-recente-sentenza-n-20630-del-13-ottobre-2016-la-cassazione-esamina-criteri-calcolare-danno-perdita-della-capacita-lavoro-ed-danno-perdita-chan/> accessed 27 July 2023.
Translation: "According to the Supreme Court, in fact, although the victim was a promising footballer, he was still only fifteen.
The Court therefore liquidated the damage by basing the calculation on half of the income of a "Serie A" player: this on the obvious assumption (although not explicit) that if he had remained healthy, the victim would have reached that level of income not immediately, but only after a certain number of years."
[351] Cassazione civile, sez. III, sentenza 13 ottobre 2016 n. 20630.
Translation: "A loss of opportunity damage is obviously an alternative to the loss of future income. If there is one there cannot be the other, and vice versa".

> esame l'ipotesi della perdita di chance. Se si sommasse questo risarcimento a quello da lucro cessante si realizzerebbe una duplicazione risarcitoria, e la vittima verrebbe addirittura a trovarsi in una situazione patrimonialmente più favorevole di quella in cui si sarebbe trovata se fosse rimasta sana.[352]

Penalty clause

The Italian Civil Code also provides for the imposition of a penalty clause. On its part, the contracting authority, without prejudice to any claim for damages, may impose a penalty clause for the nonfulfillment of a public contract or a delay in the execution of a public contract. The penalty clause and its effects, is regulated by article 1382 of the Italian Civil Code:

> La clausola, con cui si conviene che, in caso d'inadempimento o di ritardo nell'adempimento, uno dei contraenti è tenuto a una determinata prestazione, ha l'effetto di limitare il risarcimento alla prestazione promessa, se non è stata convenuta la risarcibilità del danno ulteriore.
>
> La penale è dovuta indipendentemente dalla prova del danno.[353]

Monteverde comments that article 1382 of the Italian Civil Code provides that the parties to a public contract can 'preliminarily define the extent of the possible damage that could derive from delayed execution and/or default of the contractual obligations.'[354]

---

[352] ibid.
Translation: "10.1. By a fifth complaint of the second plea, the applicant S.E. complains that the Court of Appeal did not liquidate the loss of chances of professional success.
10.2. The plea is manifestly unfounded.
A loss of opportunity damage is obviously an alternative to the loss of profit from the future loss of income. If there is one, there cannot be the other, and vice versa.
Of the two, in fact, the one: either the victim proves to have lost an income that he would probably have made, and then he will be entitled to compensation for the loss of profit; that is, the victim does not give that proof, and then he may be entitled to compensation for damage from loss of chance.
In our case, the Court paid the victim compensation for the pecuniary damage caused by loss of future income, and therefore correctly did not consider the hypothesis of loss of opportunity. If this compensation were added to the loss of profit, there would be a duplication of compensation, and the victim would even find himself in a more favourable financial situation than he would have been if he had remained healthy."
[353] Italian Civil Code, Article 1328.
Translation: "The clause whereby, in case of default or delayed execution, one of the parties is committed to fulfil a certain promise, has the effect of limiting the damages for the contractual breach, unless it is agreed the recoverability of further damages. The penalty is due regardless of evidence of the damage."
[354]Giovanni B. Monteverde, 'Public tenders and public contracts in Italy. The issues that large groups have to face when bidding/contracting with Italian awarding bodies' (Autumn 2008) Vol 2 No.5 International In-house Counsel Journal 740—747, 742. <https://www.iicj.net/subscribersonly/08october/iicjoct5-contracts-giovannimonteverde-alstom-italy.pdf> accessed 16 April 2023.

Therefore, despite that Italian Civil law foresees the inclusion of a penalty clause in full and final settlement, yet the contracting authority can reserve its rights to claim further damages. This means that the penalty clause can lose its efficacy and scope, given that the contractor may be faced with further damages apart from those resulting from the penalty clause.

4.2.1. The Italian Public Contracts Code

Public procurement in Italy is governed by the newly enacted Public Contracts Code of 2023.[355] The new Code is quite comprehensive and enshrines a number of general principles, which include the principle of trust, the principle of market access, the principles of good faith and protection of legitimate expectations and the principle of contractual autonomy. The reference to the principle of market access is quite interesting, in view that the Code is formally recognising public procurement as an important sector of the EU economy, and therefore the importance of having market access to achieve a fully functioning internal market in all the four freedoms.

The Code also contains sections on digitalisation, selection procedures, preparatory acts prior to the issue of a tender, the execution of the public contract and governance. Furthermore, all the areas of procurement have been codified in one Code, namely the areas of utilities, defence, security, secret contracts, concessions and even public-private partnerships. Finally, the Code amends the Code of Administrative Procedure referred to in Annex 1 of Legislative Decree No.104 of 2010 in the area of judicial remedies and provides also a number of procedures for an out of court settlement of disputes.

The Code aims to achieve comprehensiveness with simplicity and legal certainty of the public procurement rules.

Aura Iurascu commenting on the new Italian Public Contracts Code, states that on the strength of article 1 of Law No. 78 of 21 June 2022, the Italian Parliament delegated the Italian government:

> [T]o adopt one or more legislative decrees concerning the regulation of public contracts to adapt it to European law, to the principles expressed by the case law

[355] Decreto legislativo 31 marzo 2023, n. 36 Codice dei contratti pubblici in attuazione dell'articolo 1 della legge 21 giugno 2022, n. 78, recante delega al Governo in materia di contratti pubblici (G.U. n. 77 del 31 marzo 2023 - S.O. n. 12) The new Italian Public Contract Code entered into force on the 1st of April 2023, with applicability from July 1st, 2023.

> of the Constitutional Court and of the higher, domestic and supranational courts, and to rationalize, reorganize and simplify the existing regulations on public contracts relating to works, services, and supplies.
>
> (…)
>
> The four keywords that characterize this reform are i) simplification, achieved by increasing the discretion of administrations and removing gold plating wherever possible; ii) acceleration, understood as maximum speeding up of procedures, and guaranteeing certainty in terms of awarding, execution, and payment times to companies; iii) full digitization of procedures and interoperability of platforms; and iv) protection, by fully implementing the delegation to protect workers and companies (e.g. through division into lots).[356]

Iurascu praises 'the innovative introduction of result, trust, and market access principles' and the introduction of the principle of market access that contracting authorities must guarantee to economic operators. While referring to the Code as 'a piece of art' particularly due to the involvement of the most distinguished experts in the field, yet Iurascu insists that the Code has missed the opportunity of giving particular attention to social and environmental requirements to be included in the public tender. Another legal commentator on the new Code, Beatrice Puliti, observes that the new Code re-quantifies:

> the thresholds in tenders, adapting public administrations to the age of digitalisation (and much more), it has also gradually coordinated the passing of the baton from the old to the new code, so as to allow operators a step-by-step adjustment to the new discipline.[357]

Other aspects of the new Italian Public Contracts Code are simplification and digitisation. According to Allen and Overy, this drive towards more simplification and digitisation is due to the fact that the:

> [R]ules on public awards, partly aimed at preventing corruption, have dictated a rigid and detailed discipline, with little room for manoeuvre for the contracting

[356] Aura Iscaru, 'The New Italian Public Contract Code: Setbacks, Innovation, and New SPP Requirements' (*SAPIENS Network*, 6 April 2023) <https://sapiensnetwork.eu/new-italian-public-contract-code-setbacks-innovation-spp/> accessed 1 August 2023.
[357] Beatrice Puliti, 'The Timeline of the New Italian Public Procurement Code' (*Aiternalex*, 10 May 2023) <https://aiternalex.com/en/public-procurement-en/the-timeline-of-the-new-italian-public-procurement-code/> accessed 10 May 2023.

> entities, who, faced with a stratification of rules and bureaucracy, moreover not always coordinated with each other, have often been blocked by uncertainty. This has resulted in delays and inefficiencies. Therefore, this is a long-awaited reform and an essential tool to implement the objectives of the National Recovery and Resilience Plan (Piano Nazionale di Ripresa e Resilienza – NRRP) and ensure the recovery of the Italian economy after the pandemic.[358]

Furthermore, the new Code has strived to align Italian law with EU law. It is also a self-contained Code, which augurs well for uniformity, equivalence, and legal certainty in the implementation of public procurement rules. Article 209 of the Code extends to disputes concerning public concessions tenders and agreements governed by the Code and actions asking for damages brought by the contracting authority against the economic operator.

The new Code caters for alternative dispute resolution, namely the Collegio Consultivo Tecnico (CCT). For works with a value above the European threshold, the establishment of the CCT is mandatory. The CCT expresses opinions (which are always mandatory in cases of suspension of the execution of public infrastructures) and, if the parties to the contract adhere to them, these opinions may result in decisions having the force of an arbitral award.[359]

The new Public Contracts Code, Book V – Of litigation and the National Anti-Corruption Authority - Title I - Judicial appeals, article 209, has made amendments to the Code of Administrative Procedure referred to in Annex 1 to Legislative Decree No. 104 of 2 July 2010. The following changes were made to the Code of Administrative Procedure, referred to in Annex 1 to Legislative Decree 2 July 2010, n. 104:

> a) Article 120 is replaced by the following: « Article 120 – (Specific provisions for the proceedings referred to in Article 119, paragraph 1, letter a)) – (omissis)»;
>
> b) Article 121 is replaced by the following: « Article 121 – (Ineffectiveness of the contract in cases of serious violations) – (omissis)»;

[358] Allen & Overy, 'The New Italian Public Procurement Code: A (Missed) Revolution?' (*Allen & Overy*, 5 April 2023) <https://www.allenovery.com/en-gb/global/news-and-insights/publications/the-new-italian-public-procurement-code-a-missed-revolution> accessed 1 August 2023.

[359] Chambers and Partners, 'The Reform of the Italian Public Procurement Code: Article: Chambers and Partners' (*Chambers and Partners*, 12 May 2023) <https://chambers.com/articles/the-reform-of-the-italian-public-procurement-code-6> accessed 3 August 2023.

c) in article 123, paragraph 1, subsection, the words: «referred to in article 121, paragraph 4» are replaced by the following: «referred to in article 121, paragraph 5»;

d) Article 124 is replaced by the following: « Article 124 – (Protection in specific form and by equivalent) – (omissis)».[360]

In the case of article 124, the judge can award compensation if the damage is proven.[361]

Title II - Alternative remedies to judicial protection, provides four alternative dispute resolutions, namely, amicable agreement for contracts of works (article 210), amicable agreement for contracts of services and supplies (article 211), transaction (article 212) and arbitration (article 213).

A prerequisite for both the amicable agreement of works and the amicable agreement for services and supplies is that the economic amount of the work has to vary between 5 percent (5%) and 15 percent (15%) of the contractual amount.

With respect to a transaction, disputes relating to individual rights deriving from the execution of public contracts for works, services and supplies can be resolved by settlement in compliance with the civil code only and where it is not possible to carry out other alternative remedies to judicial action.[362]

[360] Italian Code of Administrative Procedure.
[361] Article 124 as amended, Code of Administrative Procedure:
"1. L'accoglimento della domanda di conseguire l'aggiudicazione e di stipulare il contratto è comunque condizionato alla dichiarazione di inefficacia del contratto ai sensi degli articoli 121, comma 1, e 122. Se non dichiara l'inefficacia del contratto, il giudice dispone il risarcimento per equivalente del danno subìto e provato. Il giudice conosce anche delle azioni risarcitorie e di quelle di rivalsa proposte dalla stazione appaltante nei confronti dell'operatore economico che, con un comportamento illecito, ha concorso a determinare un esito della gara illegittimo.
2. La condotta processuale della parte che, senza giustificato motivo, non ha proposto la domanda di cui al comma 1, o non si è resa disponibile a subentrare nel contratto, è valutata dal giudice ai sensi dell'articolo 1227 del codice civile."
Translation: "1. The acceptance of the request to obtain the award and stipulate the contract is in any case conditional on the declaration of ineffectiveness of the contract pursuant to articles 121, paragraph 1, and 122. If he does not declare the ineffectiveness of the contract, the judge orders compensation for the equivalent of the damage suffered and proven. The judge also knows about the compensation and compensation actions proposed by the contracting authority against the economic operator who, with illicit behaviour, contributed to determining an illegitimate outcome of the tender.
2. The procedural conduct of the party who, without justified reason, has not proposed the request referred to in paragraph 1, or has not made himself available to take over the contract, is evaluated by the judge pursuant to article 1227 of the civil code."
[362] New Italian Public Contracts Code, Article 212(1).

Article 213(1) on arbitration provides the following grounds for the convening of arbitration proceedings:

> 1. Disputes on individual rights, deriving from the execution of contracts relating to works, services, supplies, design contests and ideas, including those resulting from the failure to reach the amicable agreement referred to in articles 210 and 211, can be referred to referees. The arbitration also applies to disputes relating to contracts in which a publicly held company or a subsidiary or associated company of a publicly held company is a party, pursuant to article 2359 of the civil code, or which in any case concern works or supplies financed with resources charged to public budgets.[363]

Furthermore, article 213(2) states that the contracting entity can directly indicate in the call for tender/Notice/Invitation, whether or not the contract will contain the arbitration clause:

> In these cases, the successful tenderer may refuse the arbitration clause within 20 twenty days of knowledge of the award. In this case the arbitration clause is not included in the contract. It is within the faculty of the parties to compromise the dispute in arbitration during the execution of the contract.
>
> 3. The arbitration clause inserted without authorization in the announcement or in the notice with which the tender is called or, for procedures without announcement, in the invitation is null and void. The clause is inserted subject to the reasoned authorization of the governing body of the contracting authority.[364]

The arbitration award can be challenged both on grounds of nullity as well as for violation of the rules of law relating to the merits of the dispute. The appeal has to be filed within ninety days of notification of the award and can no longer be proposed after one hundred and eighty days have elapsed from the date of filing of the award with the Chamber of Arbitration.[365] Upon the request by one of the parties, the Court of Appeal can suspend, with an order, the effectiveness of the award, if there are serious and well-founded reasons. In this case, Article 351 of the Code of Civil Procedure applies.[366] The Arbitration Chamber for public contracts

[363] ibid. Article 213(1).
[364] ibid. Article 213(2).
[365] ibid. Article 213(14).
[366] ibid. Article 213(15).

relating to works, services and supplies has been established as the National Anti-Corruption Authority ("ANAC").[367]

The Italian Public Contracts Code provides also for the Technical Advisory Board, whose aim is to prevent disputes or allow the rapid resolution of the same or of technical disputes of any kind that may arise in the execution of the public contracts. Each party may request the establishment of a technical advisory board. For works aimed at the construction of public works for an amount equal to or greater than the thresholds of European significance and supplies and services for an amount equal to or greater than 1 million euro, the constitution of the college is mandatory:[368]

> The technical advisory board expresses opinions or, in the absence of an express contrary will, adopts decisions having the nature of a contractual award pursuant to article 808 of the code of civil procedure. If the ruling assumes the value of a contractual award, the mediation and conciliation activity is in any case aimed at choosing the best solution for the speedy execution of the work in a workmanlike manner.[369]
>
> (…)
>
> The acquisition of the opinion of the technical advisory board is mandatory in cases of suspension, voluntary or coercive, of the execution of works aimed at the construction of public works for an amount equal to or greater than the thresholds of European significance referred to in article 14, as well as in the cases of contracts relating to services and supplies referred to in article 121, paragraph 11, second sentence[370].

4.2.2 Competence and jurisdiction of Italian fora with respect to damages arising out of public procurement

In terms of Legislative Decree number 104/2010 (the Code of the Administrative Procedure), disputes arising from the award of public works, services and supplies, and concessions, including damages claims, fall within the remit of the Administrative Court.[371] The

[367] ibid. Article 214(1).
[368] ibid. Article 215(1).
[369] ibid. Article 215(2).
[370] ibid. Article 216.
[371] Legislative Decree number 104/2010 (the Code of the Administrative Procedure).

Administrative Court hears cases for the annulment of administrative measures, such as a call for tender and exclusions, in order to allow the tenderer to participate in the tender or to be awarded the contract. If the contact has already been performed, the aggrieved bidder will only have the option to make a claim for damages, including for loss of chance.

The Administrative Court decision may be appealed before the Council of State. An appeal on the grounds of jurisdiction may be filed in front of the Supreme Court.

In the case where a contract has been signed, it is the Italian Civil Courts that have jurisdiction over disputes connected to the performance of the contract. This excludes disputes connected to the award procedure. Therefore, issues arising from the performance, infringement of contract and interpretation of a signed public contract fall within the jurisdiction of the Italian Civil Courts.

Alternative out of court redress with respect to the execution phase of the contract consist in settlements, arbitration and pre-litigation advice issued by the ANAC.

Comba, when commenting on the Italian system of remedies, notes that for the enforcement of public procurement provisions prior to the conclusion of the contract, only Administrative Courts (TAR at first instance judge and *Consiglio di Stato* as judge of appeal) are involved. He adds that:

> It is generally understood that all litigation arising after the conclusion of the contract falls into the jurisdiction of the ordinary judge because it is considered as being a litigation between two private parties, as the contracting authority does not exercise a public power in the mere execution of the contract.[372]

4.2.3. Concluding observations

Italian public procurement law is embodied in the newly enacted Italian Code of Public Contracts 2023. While the Code of Public Contracts is a comprehensive Code providing for a comprehensive transposition of the Remedies Directives, yet issues pertaining to damages arising out of public contracts are within the purview of general Italian law on civil damages.

[372] Mario Comba, *Enforcement of EU Procurement Rules. The Italian System* in *Steen* Treumer & François Lichère *Enforcement of the EU Public Procurement Rules*, (1st edn, Djøf Publishing, 2011) 240.

Italian law Civil law recognises both patrimonial and non-patrimonial damages, including precontractual damages. Included under the heads of patrimonial damage, is *damnum emergens* and *lucrum cessans*, the latter being the actual profit that the tenderer/candidate would have earned in case of award, based on the bid submitted for tender. This element of *lucrum cessans* is arrived at by the court on an equitable assessment of each case which is in front of it. In addition, given that Italian Civil law is silent on loss of chance, recent case law of the Court of Cassation has developed further the concept of damages in the form of loss of chance, which also includes curricular damages.

With respect to loss of chance, the plaintiff bears the burden of proof, which proof is to be based on serious and concrete probability, not hypothetical possibility. The plaintiff has to prove the loss of a concrete and effective occasion to follow-up a determinate good or result, which has to be capable of being valued in economic terms. The plaintiff needs to establish with a high level of certainty, objectivity and probability that he has lost a chance. *Lucrum cessans* and loss of chance are not cumulative damages but alternative damages, therefore if *lucrum cessans* is awarded, no loss of chance damages are awarded and vice-versa.

An important criterion for damages to subsist is that the plaintiff establishes the causal link between the loss suffered and the damage sustained.

Finally, in the area of remedies, public procurement disputes are generally heard by administrative tribunals, except for issues arising from the performance, infringement of contract and interpretation of a signed public contract, which dispute areas fall within the jurisdiction of the Italian Civil Courts.

4.3. Damages arising from public procurement law in the Netherlands

In the Netherlands, the rules on public procurement are envisaged in the Public Procurement Act 2012 (Aanbestedingswet 2012), which implements the European public procurement Directives. On 1 July 2016, the amended Dutch Public Procurement Act entered into force. With respect to public procurement disputes, as a general rule, these fall within the remit of Dutch private law, with the Civil Courts only having competence on procurement disputes, including the validity, cancellation and modification of a public contract. The civil courts can also provide interim measures in summary proceedings. There are instances where the tender document itself provides for arbitration proceedings, in which case the civil court is excluded. There are also sector specific Dutch laws, such as the Passenger Transport Act 2000 with respect to concessions in the area of public transport services, which stipulate that the

administrative courts have competence to oversee the dispute after the award of the public contract. There are no specialised courts on public procurement matters. The Civil Courts can award damages for claims submitted by an aggrieved bidder on public procurement matters.

Furthermore, Daphne Broerse et notes that the Public Procurement Act provided also for additional non-binding complaint procedures which are applicable during the tender phase. The Public Procurement Act promotes the informal settlement of complaints as follows:

> [T]o set up informal complaint review commissions that could address complaints during an early stage of the tender procedure (and therefore prevent court proceedings). If the contracting authority has not set up a review commission (or the review commission does not respond to the complaint), tenderers can during the tender procedures also submit a complaint to the National Public Procurement Expert Commission (Commissie van Aanbestedingsexperts). The complaint procedures are relatively informal and do not suspend an ongoing tender procedure. In addition, any advice from the review commission or the National Public Procurement Expert Commission is not legally binding. The complaint procedures are therefore not a formal requirement to request (provisional) relief from the courts.[373]

The Dutch Civil Code, as other continental codes, provides for actions in tort, delicts and quasi delicts and for actions based on breach of contract as the basis for liability (article 6:74). In this respect, Book 6 of the Dutch Civil Code on the law of obligations, Title 6.3 Tort (unlawful acts), article 6:162 defines a 'tortious act' as follows:

> - 1. A person who commits a tortious act (unlawful act) against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof.
>
> - 2. As a tortious act is regarded a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour.

[373] Daphne Broerse, Jan Jakob Peelen and Bart Vis Broerse, 'Public Procurement in the Netherlands: Overview' (*Thomson Reuters: Practical Law*, 1 June 2023) <https://uk.practicallaw.thomsonreuters.com/3-522-7902?transitionType=Default&contextData=%28sc.Default%29&firstPage=true> accessed 10 August 2023.

> - 3. A tortious act can be attributed to the tortfeasor [the person committing the tortious act] if it results from his fault or from a cause for which he is accountable by virtue of law or generally accepted principles (common opinion).[374]

Therefore, a person who commits a tort, delict or quasi-delict is 'obliged to compensate the resulting damage that another person suffers.'[375] The elements of compensation based on actions in tort, delict or quasi-delict are '(i) the imputable unlawfulness, (ii) the damage and (iii) the causal connection between these two elements.'[376]

Causation from a Dutch law perspective is dependable on the specific case, in particular 'whether the claimant takes the position (i) that the contract put out to tender should have been awarded to him, or (ii) that he was wrongly deprived of the chance to make a bid for the contract.'[377]

Litigation arising from a request for damages in the Netherlands is founded on a primary action:

> To establish the unlawfulness (in the course of which the issue of causation is usually also addressed) and secondly, the so-called 'follow-up proceedings for the determination of damages' to determine the amount of the damage. An order for compensation of damage to be assessed by the court – and therefore the commencement of follow-up proceedings for the determination of damages - will be given if the court believes that the damage cannot be estimated in the judgment in the main action. At that stage the onus on the claimant is to show only that there is a likelihood of damage (including loss of opportunity of being awarded the contract.[378]

Hebly and Wilman identify a number of criteria that have emerged from Dutch case law, and which have been adopted by the Dutch courts in order to award compensation for damages suffered. These criteria include the following:

---

[374] Dutch Civil Code (1992), Article 6:162 (DCC) (Dutch Civil Code).
[375] J.M. Hebly and F. G. Wilman *Damages for Breach of Public Procurement Law. The Dutch Situation*, in Duncan Fairgrieve & Francois Lichère (eds), *Public Procurement Law. Damages as an Effective Remedy* (Bloomsbury Publishing 2011), 77.
[376] ibid. 78 and T. Beumers and W.V. Boom *Tortious and Contractual Liability from a Dutch Perspective,* in Ernst Karner (ed*), Tortious and Contractual Liability – Chinese and European Perspective* (Vienna: Jan Sramek Verlag 2021), 223 - 245.
[377] ibid.
[378] ibid. 81.

i) the loss of profits based at times on the product's profit margin or based on the reasonable profit expectations in the specific matter at hand;
ii) the costs incurred, which include indirect costs (overheads) pertaining to legal proceedings for the award of damages; and
iii) costs for the drawing up of a tender depend on the case in question.[379]

If an aggrieved tenderer is able to demonstrate that s/he would have had to receive a contract (positive interest/lost profit), lost profits are the standard measure of damages awarded. Yet the aggrieved bidder has to prove that he/s would have obtained the contract.[380] The bid preparation and bid participation costs are generally considered subsidiary claims in case a lost profit claim fails.[381]

Daphne Broerse et state that most remedies for breaches of public procurement regulations are granted in summary proceedings by the civil courts, which provisional measures obtained in these proceedings are often considered the final resolution of the dispute. Broerse et note that some of the remedies granted by summary proceedings include the termination of an ongoing tender procedure, re-tender, allowing a candidate to take part in the tender procedure and award a public contract to a specific bidder:

> Once the tender procedure has resulted in the conclusion of a contract, the Public Procurement Act provides legal grounds on which third parties can claim the annulment of the contract. These grounds include the violation of a number of essential public procurement regulations such as publication requirements and the obligation to provide bidders the opportunity to initiate summary proceedings during the mandatory standstill period between notification of the decision to award a public contract and the actual conclusion of that contract with the winning bidder (see Question 9). Case law suggests, however, that the grounds for annulment in the Public Procurement Act are not exhaustive. A claim to annul a contract must be made against the contracting authority, as well as against the party that was awarded the contract.

[379] ibid. 82-83. Hebly and Wilman, with respect to costs associated with the drawing up of the tender add that these costs are considered to be 'residual item'. A rule of thumb is that such costs will only be compensated if an action because of loss of profits, or lost opportunity, is not possible."
[380] Schebesta (n 153) 87.
[381] ibid. 89-90.

> In addition to provisional measures or the annulment of a contract, bidders can also claim damages resulting from a breach of public procurement regulations. Claims for damages can in general not be made in summary proceedings. Depending on the circumstances, claims for damages can be based on either breach of (pre-)contractual obligations or tort.[382]

With respect to the prescriptive period, the Dutch Civil Code stipulates that the prescriptive period for an action based on compensation in damages is five (5) years ('verjaring'). The limitation period of five (5) years commences:

> from the day following the day on which the injured party became aware both of the damage and of the person responsible. In any case, a legal claim for damages in the Netherlands (or for payment of a fine) shall become time-barred twenty years after the event in which the damage was caused or the fine became due. It is therefore a matter of actual knowledge and not a mere suspicion of damage or the question of which person is liable for the damage. This is in line with the established case law of the Dutch Supreme Court.[383]

In a case concerning the limitation period to file an action for damages, the Court held that once the case is time-barred, the right of action for compensation in damages is lost.

> Art. Section 3:310(1) of the Dutch Civil Code provides, insofar as it is relevant here, that a legal action for compensation for damage is time-barred by the expiry of five years after the start of the day, following that on which the injured party became aware of both the damage and the person liable for it. According to settled case-law of the Supreme Court, the requirement that the injured party has become aware of both the damage and the person liable for it must be interpreted as meaning that this is an actual reputation, so that the mere presumption of the existence of damage or the mere presumption of which person is liable for the damage, is not enough. The limitation period of art. Article 3:310(1) of the Dutch Civil Code does not start to run until the day after that on which the injured party is actually able to bring an action for compensation for the damage suffered by him. This will be the case if the injured party has obtained sufficient certainty –

[382] Broerse et (n 373).
[383] Remko Roosjen, 'Limitation Period for Claims for Damages in the Netherlands' (*MAAK*, 11 May 2022) <https://www.maak-law.com/limitation-period-for-claims-for-damages-in-the-netherlands/> accessed 11 August 2023.

> which does not have to be an absolute certainty – that damage was caused by inadequate or incorrect actions of the person concerned. The answer to the question of when the limitation period started to run depends on the relevant circumstances of the case.[384]

Damages are normally paid by a monetary compensation but there is also the possibility under article 6: 103 of the Dutch Code for the award of non-cash damages:

> Damage is compensated in money. The court may, nevertheless, grant another kind of compensation than a sum of money if the injured party has requested so. When the liable person, after such a judgment, has not supplied another compensation within a reasonable period of time, the injured person regains the right to demand a compensation in money.[385]

In this perspective, Hebly and Wilman add that 'There are instances where the court, for example, prohibited the contracting party from (further) carrying out a contract already entered into, by way of non-cash damages after a breach of procurement law.'[386]

Damages claims appear to be rarely instituted in the Netherlands, not only because it is 'usually not easy for an (allegedly) aggrieved tenderer to succeed in such a claim', but also due for instance to:[387]

> the existence of attractive possibilities for legal protection in proceedings for interim relief, the preference for (or a chance of) the contract being awarded over a financial compensation and the fear of harming the relationship with the contracting party.[388]

Bovis remarks that in the Netherlands the party claiming the damages:

> [H]as to prove that it suffered genuine damage and to provide evidence that it had a good chance of winning the contract had the contracting authority followed the provisions of the Public Procurement Directives.[389]

[384] Supreme Court, 22 April 2022, ECLI:NL:HR:2022:627.
[385] Article 6:103 (DCC) (Dutch Civil Code).
[386] Helby and Wilman (n 375) 86.
[387] ibid. 88.
[388] ibid.
[389] ibid. 395.

So, under Dutch law, an aggrieved bidder has to prove that he would have won the public contract, that he has suffered genuine damage through evidence that it would have a good chance of winning the contract should the contracting authority had adhered to the Directives. These are all preconditions for the filing of a claim for damages arising out of a breach of EU law on public procurement.

The Dutch judicial review system of public procurement has been described succinctly as follows:

> A tenderer seeking financial compensation (damages), or the execution of the contract or the tender procedure to be suspended, or the annulment of the contract, must file suit in a civil court. Suspension of the contract or the tender procedure (interim measures) can be sought in special preliminary relief proceedings (or interim injunction proceedings) dealing with the case on a provisional and short-term basis ('kortgeding procedure' or procedure 'voorlopige voorziening"). In the first instance, the case will be reviewed by a court of first instance (rechtbank). The decision of the rechtbank can be appealed in the Court of Appeal (Gerechtshof or short Hof). The decision of the Hof can be appealed in the Supreme Court (Hoge Raad). The Dutch court system in general is regulated in an Act of Parliament, the Wet op de Rechterlijke Organisatie. With the Hoge Raad[390] there is a last-instance general court of law reviewing public procurement decisions, which like the rechtbank and the Hof fulfils the requirements of a court of law set forth in the Dorsch and Salzman judgements.[391]

Under Dutch law, damages can be claimed even if the decision is not set aside. The requirements are that the claimant has suffered a loss (pecuniary or otherwise), there has been a breach of law, causality is present (cause and effect meaning the loss must be caused by the breach of law) and there is accountability. Dutch case law shows that these damages can go far beyond tender costs.[392] Penalty payments are a possibility in the Netherlands in order to ensure that the court ruling is executed by the procurement authority or entity.[393]

[390] The procedure before the Hoge Raad is as a court of cassation. The Hoge Raad examines then only at a possible violation of the law or insufficient motivation by the court of appeal.
[391] OECD, 'Public Procurement Review and remedies systems in the EU', Sigma Papers No. 41, GOV/SIGMA (2007), 88.
[392] ibid. p.89.
[393] ibid.

Schebesta agrees with Hebly and Wilman that damages claims in the Netherlands are brought both under contract law and in particular under general tort law. Damages claims are regularly brought in full court procedures and not *in interim* proceedings:[394] 'In the legislative history of the implementation of the Remedies Directives, the Dutch legislator presumed that an action in tort would be the regular cause of action for procurement damages claims.'[395]

Schebesta refers also to precontractual liability in the Netherlands which is based on the principle of *bona fide*:

> In Plas/Valburg, the court held that where the precontractual relationship is governed by a requirement of redelijkheid en billijkheid (fair dealing), a right to damages can arise. Accordingly, three different situations of negotiations are distinguished: the negotiations can be terminated without any costs to the parties; the negotiations are at such an advanced stage, that the costs incurred by the parties must be reimbursed; or the termination of the negotiations is considered to be contrary to good faith and fair dealing. Where termination is unlawful, both the negative and positive interest (lost profits) must be reimbursed. The degree of pre-contractual commitment in the negotiations is therefore intrinsically linked to the types of damages which are recoverable through pre-contractual liability.[396]

Schebesta states that Dutch law attributes full compensation in case of damages, even though this is not explicitly laid down by law: 'The aim of Tort law is primarily compensatory. In addition, a preventive or deterrent purpose is also recognized, but not a penalizing or retributive one.'[397] The constitutive elements of tort law, according to Schebesta comprise the following:

(i) a tortuous act,
(ii) attributability thereof to the tortfeasor,
(iii) damage,
(iv) causality, and
(v) relativity.[398]

[394] Schebesta (n 153) 77.
[395] ibid.
[396] ibid. 78.
[397] ibid.
[398] ibid. 81.

The tort provision does not define damage. However, it is understood to comprise three elements: '(i) a causal element, that is damage occurs as a result of a certain event; (ii) an element of comparison, that is comparison between the situations with and without the damage causing event; and (iii) a hypothetical element.'[399]

Dutch courts place a lot of importance on the juridical interest, that aggrieved bidders need to show that they are suitable and have submitted a valid bid in order to demonstrate sufficient interest to receive judicial standing.[400] When unable to demonstrate actual loss, a claimant can be regarded as enjoying insufficient self-standing interest.[401]

The concept of damages in Dutch law is not defined explicitly, with patrimonial damage including:

> *damnum emergens* and loss of profit, further reasonable costs in order to limit the damage occurring, in order to establish liability, and to cover the incasso proceedings for payment. Article 6:106 BW covers immaterial damage. Damage to the image of the aggrieved tenderer is not usually assumed to constitute part of the compensable losses. Statutory interest is granted according to 6:83 starting from the point of the wrongful act, 6:105 regulates losses which have not yet materialized. Damage is compensated in money, but there is a possibility for *in natura* claims.
>
> (…)
>
> Heads of damages are therefore not subject to a strict *numerus clausus* but to a list which is more or less open and contingent upon the finding of loss.[402]

There are several examples of courts using the lost chance in relation to recoverable damage,[403] giving discretion to the judge to quantify the damage in the way most suited to the nature of the loss.

The principles of the Dutch system of damages in public procurement have been summarised as follows:

---

[399] ibid.
Schebesta quotes MH Wissink & WH Van Boom, *The Netherlands. Damages under Dutch Law*, in U Magnus (ed), *Unification of Tort Law: Damages* (The Hague, Kluwer, 1996) 146.
[400] Rechtbank's-Gravenhage, 8 May 2009, ECLI:NL:RBSGR:2009:BI3892.
[401] Rechtbank Maastricht, 28 August 2003, ECLI:NL:RBMAA:2003:AI1604.
[402] Schebesta (n 153) 87.
[403] ibid. 90.

i) The Dutch system can be characterized as a pragmatic system, less concerned with dogmatic rigidity.

ii) Lost profits, bid costs, and compensation for lost chances – are possible, but nothing is guaranteed.

iii) Where a tenderer can squarely prove that s/he would have been the successful tenderer, lost profits are attributable.

iv) In principle, full compensation including the lost profits is the regular head of damage. However, the burden of proof is onerous, as the claimant will have to prove that s/he would have been awarded the contract, implying that the aggrieved bidder must have had a valid bid.

v) Where this is not the case, the question is recast as one of a lost business opportunity, and if that fails, the negative interest is discussed. The Netherlands seems particularly averse to granting bid cost claims, the reason being that the economic risk of participating in a tender procedure rests with the tenderer. Therefore, bid costs are rarely recovered, unless a claim is based on pre-contractual liability.[404]

In a case that has been heard by the Dutch Court of Appeal, the injured party claimed that the contracting authority had made substantial modifications to the contract during its term, and to this effect the injured party claimed the loss of profit for missing out of the contract. The Court of Appeal held that this claim could only succeed if it is sufficiently plausible that the claimant could have won the contract if it could have submitted a tender for that contract. Therefore, the claimant injured party carries the burden of proof:

> Contrary to what V&R Ateliers argues, it cannot, however, suffice for a claim for compensation with the mere assertion that there has been such a substantial change in the performance of the tender. While it is true in itself that it may be unlawful towards unsuccessful tenderers to make a material change to the contract without re-tendering, the claim for compensation of lost profit due to the failure of that modified contract can only succeed if it is sufficiently plausible that V&R would have been awarded the contract if it had been able to tender for the modified contract. If that conclusion cannot be drawn, the alleged unlawful act or breach of

[404] ibid. 92-93.

> contract on the part of the Municipality has not led to damage for V&R. The Court of Appeal endorses the opinion of the District Court that V&R has provided insufficient facts for the conclusion that it would have been awarded the amended contract. If that conclusion cannot be drawn, the alleged unlawful act or breach of contract on the part of the Municipality has not led to damage for V&R. The Court of Appeal endorses the opinion of the District Court that V&R has provided insufficient facts for the conclusion that it would have been awarded the amended contract. If that conclusion cannot be drawn, the alleged unlawful act or breach of contract on the part of the Municipality has not led to damage for V&R. The Court of Appeal endorses the opinion of the District Court that V&R has provided insufficient facts for the conclusion that it would have been awarded the amended contract.[405]

In cases where lost opportunities to win a public contract were claimed, the Dutch Appeal Court referred to a decision of the Dutch Supreme Court which provides that if a party has missed out on an opportunity as a result of an unlawful act of the contracting authority, then the claimant has a right to seek damages. The damage for which compensation is sought by the plaintiff has to consist in a missed opportunity:

> to realize his plans, and that the uncertain answer to the question whether the zoning plan at the time included the residential destination for the staff residence of plaintiff would have come about should be expressed in the determination of the size of that probability, and therefore in the damage calculation. In the present case there is undeniably a condicio sine qua non connection between the non-compliance and the missed opportunity. If there is no reason to assume in advance that this chance is nil or very small, the damage must be determined by way of estimate, if necessary. The circumstance that, as the Court of Appeal has considered, 'it cannot be established with sufficient certainty' that the Council and the Provincial Executive would have cooperated in 1992 with the 'residential purposes' designation, is an uncertainty ...[406]

[405] The Hague Appeal Court 22, September 2015, pub electr ECLI:NL:GHDHA:2015:2466.
[406] Supreme Court 19 June 2015. Pub electr ECLI:NL:HR-2015:1683.

In an interesting case of 27 July 2022[407], which involves damages for the infringement of competition law, the District Court of Amsterdam delivered a judgment in which it:

> Addressed three main issues regarding the bundling of damage claims by specialised claims entities in one action: (i) the standing of the claimants, (ii) the applicable law, and (iii) the validity of the assignments. This is an important judgment for victims of cartels and private enforcement across the EU, as it confirms the legality of the 'assignment model' by which entities, such as the lead plaintiff CDC, effectively bundle multiple damage claims in one single action. By choosing Dutch law as the law applicable to all damage claims, the Court guarantees and facilitates the victims' path to compensation for damages caused by the Trucks cartel.[408]

This decision shows that Dutch courts are interpreting domestic law in line with EU law, particularly with respect to the general principle of effectiveness and equivalence.

4.3.1. Concluding Remarks

Therefore, Dutch law, like Italian law, provides for *damnum emergens* which includes the costs incurred by the bidder for bid preparation, participation costs and legal costs for the award of damages (although as stated above bid costs are rarely awarded), *lucrum cessans* and loss of chance. The Dutch system entails also that the aggrieved bidder proves juridical interest and actual loss through an onerous burden of proof.

4.4. French Civil Law on damages

Gabayet notes that:

> The rules applying to damages for breach of EC public procurement law are the same as those applicable generally for the liability of public authorities before an administrative court. It could be considered as a 'public tort law', and

[407] Rechtbank Amsterdam, Vonnis van 27 juli 2022, ECLI:NL:RBAMS:2022:4466, C/13/639718 / HA ZA 17-1255 e.a.
[408] Vera Keraudren and Till Schreiber, 'Trucks Cartel: District Court of Amsterdam Confirms the Possibility for Entities to Bundle Multiple Damage Claims in One Action and Applies Uniformly Dutch Law to Those Claims' (*Lexology*, 4 November 2022) <https://www.lexology.com/library/detail.aspx?g=d48170dc-e884-4210-b482-4f9b8b85b466> accessed 11 August 2023.

> probably best translated as public bodies' extra-contractual liability ('la responsabilité extra-contractuelle des personnes publiques'). This liability is not specific to breaches of public procurement procedure. The general liability rules apply broadly to all French administrative law. [409]

The remedy of damages in French public procurement law stems from the generally applicable provisions of the Civil Code relating to extra-contractual responsibility, also referred to as *responsabilité aquilienne*, and namely article 1240 (previously numbered article 1382): 'Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer.'[410]

It can be inferred from this provision that all heads of damages are recoverable under French law.[411] Indeed, it is sometimes maintained that French extra-contractual responsibility is a loss-based regime wherein any consequential loss may be recovered as contrasted with a rights-based regime wherein the question of recoverability of damages is resolved by the recognition, or not, of a victim's right to claim compensation.[412] The letter of the law is clearly worded in terms of 'reparation'. To be sure, French tort law is defined by the principle of *restitutio in integrum* (*réparation intégrale*) and thus the question of recoverable and non-recoverable damages is resolved by reference to the obligation of any tortfeasor to reinstate the victim in his/her previous position had it not been for the tort committed, rather than by reference to the victim's right to be indemnified.[413]

In consequence of that principle, the French courts have admitted of restitution in kind (*réparation en nature*), that is by repairing or undoing the harm done, as well as restitution by way of indemnification (*réparation en equivalent*). The latter is generally categorised into three: material damages (*préjudice matériel*); moral damages (*préjudice moral*); and bodily damages or damages that ensue from physical harm (*préjudice corporel*).[414] French jurisprudence as well as scholarship has held material damages to include both actual loss

[409] Nicolas Gabayet, *Damages for Breach of Public Procurement Law: A French Perspective*, in Duncan Fairgrieve & François Lichère (eds.), *Public Procurement Law: Damages as an Effective Remedy* (Bloomsbury Publishing, 2011), 7-8, 7.
[410] **Translation**: "Any fact whatever of man, which causes harm to another, obliges him by whose fault it is caused to make reparations."
[411] Dorota Leczykiewicz, *Loss and its Compensation in the Proposed New French Regime of Extra-contractual Liability* in Jean-Sébastien Borghetti and Simon Whittaker (eds), *French Civil Liability in Comparative Perspective* (Hart Publishing Oxford 2019), 183.
[412] ibid. 183 fn 9.
[413] ibid. 201.
[414] Eva Steiner, *French Law: A Comparative Approach* (2nd edn, Oxford University Press, 2018), 259.

(*damnum emergens*) and loss of profits (*lucrum cessans*).[415] This is inferred on the basis of analogy reasoning since article 1231-2 specifies with respect to contractual liability that: 'Les dommages et intérêts dus au créancier sont, en général, de la perte qu'il a faite et du gain dont il a été privé (…)'.[416] Thus, both actual loss and lost profits are clearly covered. Scholarship and jurisprudence have also recognised the possibility of damages for loss of chance (*la perte d'une chance*) since the loss of an opportunity to obtain some advantage, other than profits, also comes down to being deprived of a foreseeable and probable gain.[417]

In 2017, the French Government embarked on a project of reform of the law on civil liability. The objectives of this reform were to codify principles deriving from case law, to provide better protection to victims, and to set out provisions which can be applied for more predictability.[418] In this respect, the 2017 proposals included provisions specifying what heads of damages are recoverable, or rather reparable (*le préjudice réparable*).[419] In particular the proposed article 1235 provides that 'Est réparable tout préjudice certain résultant d'un dommage et consistant en la lésion d'un intérêt licite, patrimonial ou extrapatrimonial.'[420] The proposed article 1238 also provides that 'Seule constitue une perte de chance réparable, la disparition actuelle et certaine d'une éventualité favorable.'[421]

These proposed provisions clearly show that French law recognises actual loss and loss of profits (patrimonial damages), forms of moral or extra-patrimonial damages as recoverable heads of damages as well as loss of chance even if these are not expressly contemplated in the current civil code. In fact, these provisions codify existing jurisprudence and doctrine.[422] While these proposals have not been introduced to the Civil Code, yet they have been included in

[415] ibid. 260.
[416] Philippe Conte, Patrick du Maistre & Stéphanie Fournier, *Responsabilité Civile Delictuelle* (4th edn, Presse Universitaires de Grenoble, 2015), para. 29.
Translation: "The damages and interests due to the creditor are, in general, for the loss he has suffered and for the gain of which he has been deprived (…)".
[417] ibid, para. 44. See also Steiner (n 414) 262.
[418] Leczykiewicz (n 411) 182.
[419] Projet de réforme de la responsabilité civile du 13 mars 2017 (Ministère de la Justice), Chapitre IV – Les effets de la responsabilité, Section 1- Dispositions communes aux responsabilités contractuelle et extracontractuelle, Sous-section 1 - Le préjudice réparable (Articles 1235-1238);
<http://www.justice.gouv.fr/publication/Projet_de_reforme_de_la_responsabilite_civile_13032017.pdf>
accessed on 10 October 2020.
[420] **Translation**: "All loss/harm which is certain, which results from a tort and which consists of the injury of a legitimate interest, patrimonial or extra-patrimonial, is reparable".
[421] **Translation**: "Only the actual and certain loss of an advantageous opportunity constitutes loss of chance".
[422] Groupe de réflexion sur l'avant-projet de réforme du droit de la responsabilité civile, *Observations et propositions de modification présentées dans le cadre de la consultation publique ouverte par la Chancellerie* (Association Française des Docteurs en Droit), 2 and 9.

2020 Senate proposal for legislative amendment to the Code specific to extracontractual liability (the proposed article 1238 has been renumbered as article 1237).[423]

The general rule of tort contained in article 1240 is also proposed to be amended to state simply: 'Chacun est responsable du dommage causé par sa faute.'[424] The change of wording would not change the general principles of French tort law as have been exposed above. It is rather intended to provide more legal clarity by expressly acknowledging the three requirements for a finding of extracontractual liability: (1) loss (*dommage*); (2) fault of the tortfeasor (*faute*); and (3) a causal link between the fault and the ensuing damage (*lien de causalité*).[425] In fact the Senate proposal states that the proposed amendment would merely *modernise* the classical rendering of the general principle of tort.[426]

4.4.1. Competence and jurisdiction of French fora with respect to damages

The French legal system applies a strict division between the jurisdiction of the administrative courts and the jurisdiction of the ordinary civil courts.[427] Generally, a contract is considered to fall under the administrative jurisdiction if it is concluded by or on behalf of a public entity, or if the object of the contract is in the public interest or contains provisions which are not generally imposed in private relations.[428] Therefore, most public contracts fall under the jurisdiction of the administrative courts.[429] This applies for both pre-contractual matters as well as for post-contractual matters.[430]

Pre-contractual matters in particular are almost invariably subject to the jurisdiction of the administrative court since French law applies a principle of severability of acts carried out pre-

[423] Proposition de loi portant réforme de la responsabilité civile du 29 juillet 2020 (N° 678 Sénat); <https://www.senat.fr/leg/ppl19-678.pdf> accessed on 10 October 2020.
[424] **Translation:** "One is liable for the damage caused by his fault".
[425] Steiner (n 414) 254.
[426] Proposition de loi portant réforme de la responsabilité civile du 29 juillet 2020 (N° 678 Sénat), 7 (n 410).
[427] In the Blanco case (Tribunal des Conflits, 8/2-1873, Receuil Dalloz 1873, 317), the Tribunal distinguished between activities of a government body in public services *à gestion publique (administratif)* and *à gestion privée (industriel et commercial)*.For activities *industriel et commercial,* civil law is the applicable law and the general court is the competent court. On the other hand, for administrative services only, the administrative judge has jurisdiction and administrative rules are applicable, those rules '*qui varient suivant les besoins du service'*. The French government decided that 'La Poste' is indeed a *public service pur commercial*, so La Poste is a *service public à gestion privée.*
[428] European Commission, *Public Procurement in the European Union: Practical Guide on Remedies*, 90; <http://www.sigmaweb.org/publicationsdocuments/35027835.pdf> accessed on 10 October 2020.
[429] ibid.
[430] François Lichère and Nicolas Gabayet, *Enforcement of the EU Public Procurement Rules in France* in Steen Treumer & François Lichère (eds), *Enforcement of the EU Public Procurement Rules* (Denmark: DJØF Publishing, 2011), 299.

contractually and the contract itself (*la théorie de l'act détachable*).[431] In this respect, even if a contract is deemed to be governed by private law, and thus subject to the jurisdiction of the ordinary civil courts, acts such as opening a call for tenders, formulating the tender documents, awarding the contract, and approvals of related acts are governed by administrative law. Indeed, an action of the plaintiff may contest the legality of an act of public administration rather than the contract itself or its terms.

Within the administrative jurisdiction, the courts of first instance are the regional administrative courts (*les tribunaux administratifs*). Their decisions may be appealed before the administrative courts of appeal (*les cours administratives d'appel*), and appellate decisions are subject to review before the Council of State (*le Conseil d'Etat*) which acts as an instance of cassation.[432] The administrative courts are competent to hear both actions for the annulment of administrative acts related to the procurement procedure and actions for damages.[433]

4.4.2. France's Public Procurement Code and Code of Administrative Justice

Historically, the principal legislation on public procurement rules was the *Code des marchés publics* which regulated the procurement of works, supplies and services. This code was abrogated by the ordinance of 23 July 2015[434] which transposed Directive 2014/24. The ordinance was further substantiated by the decree of 25 March 2016[435]. Another decree of 25 March 2016[436] revisited the transposition of the transposed Directive 2009/81 on procurement in the fields of defence and security. The Directive 2014/23 on concessions was transposed by an ordinance of 29 January 2016[437] which was further substantiated by a decree of 1 February 2016[438]. These legislative acts were ratified by the French Parliament, so as to be formally

[431] Bovis (n 9) 382.
[432] Lichère & Gabayet (n 430) 299.
[433] Bovis (n 9) 382-383.
[434] L'ordonnance nº 2015-899 du 23 juillet 2015 relative aux marchés publics; <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000030920376/2020-10-12/> accessed on 12 October 2020.
[435] Décret n° 2016-360 du 25 mars 2016 relatif aux marchés publics; <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000032295952/2019-03-31/?isSuggest=true> accessed on 12 October 2020.
[436] Décret n° 2016-361 du 25 mars 2016 relatif aux marchés publics de défense ou de sécurité; >https://www.legifrance.gouv.fr/loda/id/JORFTEXT000032296743/2019-03-31/?isSuggest=true> accessed on 12 October 2020.
[437] Ordonnance n° 2016-65 du 29 janvier 2016 relative aux contrats de concession; <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000031939947/2019-03-31/?isSuggest=true> accessed on 12 October 2020.
[438] Décret n° 2016-86 du 1er février 2016 relatif aux contrats de concession; <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000031963717/2020-10-12/> accessed on 12 October 2020.

recognised as statutory law, by means of the enactment of the so-called *Loi Sapin II* of 9 December 2016[439]. The *Loi Sapin II* also mandated the French Government to codify all the rules relating to the award of public contracts, concessions, public procurement partnerships and most contracts of an administrative law nature as well as to codify principles established in case law.[440] The result is the *Code de la commande publique*[441] which entered into force on 1 April 2019 and which groups all types of procurement under a single appellation.[442]

Despite this, the *Code de la commande publique* does not provide for any remedies. Rather the remedies available derive from the *Code de justice administrative*[443] which regulates the administrative courts since the general rule is that contracts regulated by the *Code de la commande publique* fall within their jurisdiction.[444] There are several proceedings which provide remedies in public procurement matters. These may be categorised into actions on the merits and expedited proceedings.

4.4.3. Actions on the merits

The *Code de justice administrative* contemplates two principal actions on the merits which apply to administrative law in general: *le recours pour excès de pouvoir* and *le recours de plein contentieux*. However, these remedies have been substantially altered in the field of public procurement by the case law of the *Conseil d'Etat*.

Pursuant to a *recours pour excès de pouvoir* the court may only declare the nullity of a precontractual administrative act. In terms of the principle of a*cte détachable du contrat,* each act leading to the conclusion of the public contract is severable from the rest of the acts and from the contract itself.[445] The necessary consequence is that a successful plaintiff does not

[439] Loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique;
<https://www.legifrance.gouv.fr/loda/id/JORFTEXT000033558528/?isSuggest=true> accessed 12 October 2020.
[440] François Lichère, *Transposition of the Public Procurement Directive in France: between overimplementation and questionable implementation* in Steen Treumer & Mario Comba (eds), *Modernising Public Procurement: The Approach of EU Member* (UK: Edward Elgar Publishing, 2018), 93-111, 93-94.
[441] Code de la commande publique;
<https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000037701019?tab_selection=all&searchField=ALL&query=code+de+la+commande&page=1&init=true> accessed 12 October 2020.
[442] Lichère (n 440) 94.
[443] Code de justice administrative; available at
<https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070933?tab_selection=all&searchField=ALL&query=justice+administrative&page=1&init=true> accessed 12 October 2020.
[444] Schebesta (n 153) 138.
[445] Lichère & Gabayet (n 430) 312.

necessarily achieve the annulment of the contract contested and may have to go through another court in this respect.[446]

An action for the annulment of the public contract and comprising a damages claim can only be made through the so-called "full" action – the *recours en plein contentieux* (also known as the *recours de pleine jurisdiction*). Traditionally, direct recourse to this remedy was only available to the signatories of the contract. The 'Tropic Travaux'[447] decision of the *Conseil d'Etat* opened up this remedy by allowing unsuccessful bidders to challenge the validity of the contract or to claim damages.[448] The remedy has become known as the *recours Tropic* or, formally, as the *recours de pleine jurisdiction en contestation de validité du contrat.* Therefore, after this decision the *recours pour excès de pouvoir* only had utility for a third party to the contract who were not unsuccessful bidders. Another decision of the *Conseil d'Etat* – the 'Tarn-et-Garonne' decision[449] – later changes this situation by opening up the *recours Tropic* to all third parties prejudiced by the contract.[450] This specific remedy of third parties has become known as the *recours Tropic 2.* In that particular case a member of the Tarn-et-Garonne Council, the elected regional assembly, contested the award of a contract for the leasing of cars for the Council.

Gabayet notes that pursuant to a *recours Tropic* an unsuccessful bidder:

> can ask that a contract be annulled after it has been signed or that they be paid compensation for a loss of profits or a loss of bid costs because of the illegality committed during the awarding procedure.[451]

To be precise, apart from bringing a standalone action for damages, in an action for annulment of the contract a damages claim may also be brought. Schebesta cites the opinion rendered by the *Conseil d'Etat* in the 'Rebillon Schmit Prevot' case:[452]

> In order to obtain compensation for rights violated, the ousted contestant has the opportunity to bring before the judge (juge du contrat) a claim for damages,

[446] ibid.
[447] CE, 16 juillet 2007, n° 291545, Société Tropic Travaux Signalisation - Publié au recueil Lebon; <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000018744539?isSuggest=true> accessed 15 October 2020.
[448] Schebesta (n 153) 139.
[449] CE, 4 avril 2014, n° 358994, Département de Tarn-et-Garonne - Publié au recueil Lebon; <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000028823786/> accessed 15 October 2020.
[450] Hugo Flavier and Charles Froger, 'Administrative Justice in France: Between Singularity and Classicism' (2016) BRICS Law Journal 80, 105.
[451] Gabayet (n 409) 14.
[452] CE, 11 mai 2011, n° 347002, Société Rebillon Schmit Prevot - Publié au recueil Lebon; <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000023997044/> accessed 15 October 2020.

being accessory or complementary to the claims for the termination or cancellation of the contract. He may also bring a separate action in full proceedings, with the exclusive aim of claiming compensation for damage suffered as a result of the illegality of the contract from which he was ousted.[453]

The *Conseil d'Etat* has more recently effected some clarifications on the application of the *recours Tropic*. Taken together, it would seem that the case law of the *Conseil d'Etat* is looking to define the limits of this remedy. In one case it accepted, while this was not the point at issue, that the *recours Tropic 2* is available against contracts signed since the 4th of April 2014, the date of the 'Tarn-et-Garonne' decision, or against modifications signed since the same date even if the base contract has been signed before.[454] In another case, the *Conseil d'Etat* held that the two (2) month prescription from contract award notice, which it had set out in the 'Tropic Travaux' decision for works contracts, will run even where the notice does not indicate that the contract has already been signed.[455]

4.4.4. Expedited proceedings

The *Code de justice administrative* also provides for expedited proceedings which are available to unsuccessful bidders, namely: the *référé précontractuel* and the *référé contractuel* – both of which transpose the precontractual and post-award remedies contemplated in the Remedies Directives – and the *référé-suspension* and *référé-provision* which are particular to French law. The *référé précontractuel*, *référé-suspension* and *référé-provision* are interlocutory in nature and only result in an interim order. On the other hand, the *référé contractuel*, while still being an expedited procedure, usually results in a final order.

Pursuant to a *référé précontractuel*, in terms of articles L551-1 – L551-12 of the *Code de justice administrative*, a judge may order the contracting authority to comply with its obligations, the suspension of the procurement procedure, the setting aside of unlawful decisions relating to the procurement procedure as well as the removal of any clauses destined to be included in the contract.[456] Where the contracting authority is a contracting entity, in terms of the Utilities Directive (2014/25), the judge may only order that the entity complies with its obligations and

[453] Schebesta (n 153) 139.
[454] CE, 20 nov. 2020, n° 428156, Association Trans'Cub et autres - Mentionné dans les tables du recueil Lebon; <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000042545455?tab_selection=all&searchField=ALL&query=428156+&page=1&init=true> accessed 07 August 2023.
[455] CE, 3 juin 2020, n° 428845, BEAH - Mentionné dans les tables du recueil Lebon; <https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-06-03/428845> accessed 07 August 2023.
[456] Lichère & Gabayet (n 430) 304.

may impose upon it penalties.[457] This is the principal remedy to prevent the conclusion of a public contract.

The interim remedy given pursuant to a *référé-suspension* as provided for in article L521-1 of the *Code de justice administrative*, is the suspension of an administrative act pending a decision on the merits in ordinary administrative law action or in a *recours Tropic*.[458] Given that the suspension of the procurement procedure may be ordered as a result of the *référé précontractuel,* the utility of the *référé-suspension* may be questioned. This said, an unsuccessful *référé précontractuel* does not preclude the plaintiff from instituting a main administrative law action or a *recours Tropic* action. In such a scenario the *référé-suspension* may be used to obtain another suspension of the procedure.[459] It is also of wider scope than the *référé précontractuel,* since it may be instituted against any administrative decision whereas the latter may only be instituted in relation to acts in a procurement procedure.[460]

Given that the *référé précontractuel* and the *référé-suspension* only result in an interim order which remedies the administrative act challenged, the plaintiff cannot obtain damages through these proceedings. This is also in line with the principle of *restitutio in integrum* since the nature of such precontractual measures is to reverse or suspend the prejudicial effects of irregular administrative acts.

The interim measure of the *référé-provision* is different in this respect. In terms of article R541-1 of the *Code de justice administrative* a plaintiff may, even without instituting an action on the merits, request the administrative court to order a payment provided that the actual loss or loss of chance suffered as a result of not being awarded the contract is not seriously contestable.[461] It is nonetheless an interim order since the payment is intended to be provisional pending an action for damages. However, should a subsequent action for damages not be instituted, the interim order for payment becomes final, as provided for in article R541-4.

The remedy provided pursuant to a *référé contractuel*, as envisaged in articles L551-13 – L551-23 of the *Code de justice administrative*, is an exceptional one. In particular, it cannot be availed of when the plaintiff has already made use of the *référé précontractuel*, unless the

[457] ibid.
[458] ibid. 306.
[459] ibid.
[460] ibid.
[461] ibid. 307.

contracting authority has not respected the interim order issued pursuant to a *référé précontractuel*. As Lichère and Gabayet note:

> The purpose of this particular interlocutory procedure is actually to enable the claimant to have a claim when infringements of the awarding authority would preclude him from efficiently using the 'référé-précontractuel' procedure.[462]

Pursuant to a *référé contractuel,* an administrative court may order the suspension of the execution of the contract and in some cases even the annulment of the contract with *ex tunc* effect.[463] If the latter remedy is considered to be contrary to the general interest the court may order the *ex nunc* termination of the contract, or the reduction of the duration of the contract or that a financial penalty be imposed on the contracting authority.[464] Case law has also applied this remedy with deferred effect, that is, ordering the annulment or termination of the contract at a future date to give opportunity for a new procurement procedure to be concluded.[465] In accordance with article L551-16, no damages may be claimed in a *référé contractuel* unless as counter-claims to the initial claim, presumably to be brought by the successful bidder or by the contracting authority itself.

4.4.5. French law on Damages with respect to public procurement

The question of damages in a *recours de plein contentieux* (as modified by case law) is regulated by the general law of torts. Thus, in a successful claim for damages, loss, fault and causality must be proven. A significant advantage for the plaintiff is that French administrative law adheres to the adage *toute illégalité de l'administration est fautive* (all illegal administrative acts comprise fault).[466] Therefore, as Gabayet observes:

> To be awarded damages, the claimant simply has to prove three things: [1] a breach of a procurement provision during the tendering procedure, [2] loss and [3] a causal link between the two. There is nothing else – such as negligence, intention or breach of duty to care – to prove.[467]

---

[462] ibid. 316.
[463] ibid. 318.
[464] ibid.
[465] CE, 1 juin 2011, n° 346405, Société KONE - Publié au recueil Lebon; <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000024115582/> accessed 15 October 2020.
[466] CE, 26 janv. 1973, n° 84768, Ville de Paris c/ Driancourt – Publié au receuil Lebon; <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000007645197> accessed 16 October 2020.
[467] Gabayet (n 409) 8.

Gabayet also notes that case law has considered that there are three principal resolutions to any damages claim in public procurement matters:[468]

a) The unsuccessful bidder proves that he was not devoid of any chance of being awarded the contract (*dépourvu de toute chance d'emporter le marché*[469]) and is awarded damages for bidding costs. The notion of devoid of any chance of winning is quite a low threshold and is generally met where the unsuccessful bidder proves that his offer met the selection criteria although competing offers were better in terms of the award criteria.[470] Gabayet remarks that 'the claimant will be awarded damages as long as there was more than a 0 per cent chance of being awarded the contract.'[471]
b) The unsuccessful bidder proves that he had a serious chance of being awarded the contract (*privé d'une chance sérieuse d'emporter le marché*[472]), and to this effect bidder is awarded damages for loss of profits. In some cases courts may award more widely construed loss of chance damages such as the loss of chance that an unsuccessful claimant might suffer in future tenders or even the loss they suffer in terms of their reputation.[473] For a determination of a serious chance of winning the courts generally assess the claimant's offer in relation to the award criteria like the capability and guarantees offered by the claimant or a comparison of the prices.[474] Other factors taken into account are whether the claimant's offer placed second[475] and the number of bidders.[476] Gabayet claims that this exercise undertaken by the administrative courts 'runs close to the judges second-guessing the awarding authority's decision'.[477]
c) The unsuccessful bidders fail to prove that had the tendering procedure been lawful he would not have been devoid of any chance of being awarded the contract. As stated previously, a claim for bidding costs is only unsuccessful when the claimant had zero per

[468] ibid.
[469] CE, 18 juin 2003, n° 249630, Groupement d'entreprises solidaires ETPO Guadeloupe, Société Biwater et Société Aqua TP - mentionné aux tables du recueil Lebon; <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000008139005?tab_selection=cetat&searchField=NUM_DEC&query=249630&page=1&init=true&dateDecision=> accessed 16 October 2020.
[470] Roxana Vornicu, 'Procurement Damages in the UK and France - Why So Different?' (2019) European Procurement & Public Private Partnership Law Review 14.4. 222, 228.
[471] Gabayet (n 409) 10.
[472] CE, 13 mai 1970, n° 74601, Monti c/ Commune de Ranspach - publié au recueil Lebon; <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000007640326?tab_selection=cetat&searchField=NUM_DEC&query=74601&page=1&init=true&dateDecision=> accessed 16 October 2020.
[473] Vornicu (n 470) 228.
[474] Gabayet (n 409) 11. See also Vornicu (n 470) 228.
[475] Vornicu (n 470) 228.
[476] Gabayet (n 409) 11.
[477] ibid.

cent chance of winning the contract, that is, when the claimant would not even have been selected.

This three-tiered approach to the award of damages remains a constant in French administrative law. Bell and Lichère have recently restated this approach rather more simply: 'If the bidder had no chance of winning the contract (lack of capacity, for instance), he will not be compensated. If he was not deprived of any chance to win the contract (a valid bid but badly ranked), he will have its bid costs compensated. If he had a serious chance of winning the contract (he was very likely to win had the illegality not occurred), he will be compensated for the loss of profits.'[478]

4.5. A pro aggrieved bidder culture?

It is widely acknowledged that damages are more often claimed, and more often awarded, in France. Lichère and Gabayet comment that: 'It is remarkable that the courts grant damages quite often for the bid costs and not rarely for loss of profits.'[479] Schebesta likewise claims that out of Germany, the Netherlands and United Kingdom 'damages awards are regularly claimable only in France with a relatively high number of damages award'[480] and that '[o]nly in France do courts regularly award lost profits'.[481] Bell and Lichère also observe that 'In France, damages for a wrongfully rejected bidder in administrative award procedures are quite generous when compared with other jurisdictions.'.[482] Given the interim remedies available through expedited proceedings this is quite surprising; indeed, the possibility of such interim procedures would tend to the correction of tendering irregularities prior to the award of the contract thus precluding the availability of an action for damages later on. Nonetheless, a number of characteristics of French law might explain this phenomenon.

One reason is that proving the fault of the adjudicating authority is easy, given that any irregular act in the tendering procedure constitutes fault *ipso jure*. Another reason is that there is no required threshold for the gravity of the breach of public procurement rules.[483] In particular, as long as the unsuccessful bidder can prove that he had more than zero per cent chance of being

[478] John Bell and François Lichère, *Contemporary French Administrative Law* (Cambridge University Press, 2022), 290.
[479] Lichère & Gabayet (n 4) 321.
[480] Schebesta (n 153) 3.
[481] ibid. 192. The reason for this may be possibly the Blanco judgment where there are special rules which vary according to the needs of the service. 'ses règles spéciales qui varient suivant les besoins du service'.
[482] Bell & Lichère (n 478) 290.
[483] Vornicu (n 470) 228.

awarded the contract then his bidding costs are recoverable. Indeed, this is 'quite favourable to the claimant'.[484] Vornicu has even gone as far as to state that the French approach to damages in public procurement remedies is outrightly 'pro victim'.[485]

Tied to this notion of a pro victim culture is the notion that private actions for damages serve as an effective deterrent to adjudicating authorities.[486] Gabayet notes that the possibility of recovering bidding costs on the sole condition of an illegal administrative act in the tendering procedure 'may be regarded as a sanction for public authorities who have committed illegalities in the course of a tendering procedure'.[487] This deterrent or sanctioning purpose of private damages action is further evidenced by the fact that access to review is not subject to any fee[488] and even legal costs seem to be relatively cheap.[489] Viewed holistically then, the French system of damages is not solely aimed at vindicating the victim of an irregular tendering procedure but also at reducing illegal acts in tendering.

Finally, the phenomenon may also be explained in terms of the high number of actions for damages instituted. Whether the predisposition to award damages caused the high number of actions filed or the other way round remains a moot point. However, certainly the more actions filed, the more the normalisation of granting damages, the more the sophistication of the courts in this respect and the more the legal certainty.[490] In this sense it may be observed that the French system of damages in public procurement matters is quite a mature one when compared with other jurisdictions.

4.6. The damages provided for in the Remedies Directives

As a precondition for a claim of damages, the aggrieved bidder has to prove the damage suffered/the fault and the causal link between the wrongful conduct/breach/fault and the ensuing damages suffered.

The Remedies Directives stipulate that remedies arising from a breach of procurement rules have to be both real and adequate and that as much as possible, breaches should be remedied

[484] Gabayet (n 409) 9.
[485] Vornicu (n 470) 228.
[486] ibid.
[487] Gabayet (n 409) 10.
[488] European Commission (n 312) 41.
[489] Lichère & Gabayet (n 430) 300.
[490] Schebesta (n 153), 151; Gabayet (n 409) 15.

in kind, and that it is only when breaches cannot be remedied in kind that financial compensation should be considered, as a substitute.

The wording of Directive 89/665/EEC (public sector), namely that Member States review procedures are to include 'award damages to persons harmed by an infringement' need to be further elaborated so as to harmonise as much as possible the heads of damages for breaches of public procurement in the Members States.[491] Yet at times, Directive 89/665/EEC provides for alternative penalties, rather than damages, which comprise the imposition of fines on the contracting authority and the shortening of the duration of the contract (similar wording is found in article 2e (1) of Directive 92/13/EEC). So, when it comes to penalties, Directive 89/665/EEC specifies what are these mandatory penalties, as opposed to the generality and the lack of consistency in the application of damages as espoused in the Remedies Directives.

Contrary to Directive 89/665/EEC, the Utilities Remedies Directive 92/13/EEC is more prescriptive and elaborates that:

> Where a claim is made for damages representing the costs of preparing a bid or of participating in an award procedure, the person making the claim shall be required only to prove an infringement of Community law in the field of procurement or national rules implementing that law and that he would have had a real chance of winning the contract and that, as a consequence of that infringement, that chance was adversely effected.[492]

Therefore, it transpires that Directive 92/13/EEC is bolder than Directive 89/665/EEC in the field of damages, in the sense that it includes "real chance" as one of the heads of damages. This leads one to ask whether there is scope for more harmonisation of damages in both directives?

Furthermore, given that Directive 2007/66/EC which amended Directive 89/665/ECC and Directive 92/13/EEC, provided particularly for the ineffectiveness of a public contract, yet this Directive stopped short of proposing the remedies in such circumstances, leaving the Member States with a *carte blanche*: 'The consequences of a contract being considered ineffective shall be provided for national law.'[493] Therefore, a situation arises whereby the EU legislator is specifically identifying the three heads of an ineffective public contract but at the same time

[491] Directive 89/665/EEC, Article 2(1)(c).
[492] Directive 92/13/EEC, Article 7.
[493] Directive 2007/66/EC, Article 2(d)(2).

the Member States are left with full discretion to apply the remedies that they wish and deem fit in such a delicate area of public procurement law.

The issues raised, and others, will be discussed and analysed in Chapter 6 which is dedicated to proposed amendments to the Remedies Directives, whereby it will be shown that there is scope for Member States to shed some of their judicial autonomy with respect to damages, and to prepare the way for more harmonisation of damages in the Member States.

4.7. Should there be a *numerus clausus* on damages?

For compensation in damages to arise there has to be a breach of a public procurement provision by the public authority in the tendering process, which breach has resulted in a loss to the aggrieved bidder due to the fault of the public authority, and the resultant causality between the fault and the damage ensuing to the aggrieved bidder. Should the domestic courts adopt a more liberal approach, as characterised by the French system whereby the claimant has to prove breach of a procurement provision during the procurement process, loss and causal link between the two, without the need to prove 'negligence, intention or breach of a duty of care'?[494]

In damages resulting from a breach of an EU law on public procurement, which include the total or partial suspension of the public contract and improper action of the public authority which prevents the bidder from winning the public contract, and which results in damages for the aggrieved bidder, it is being proposed that the domestic courts take into consideration the following heads of damages, which are basically common in the jurisdictions under study, on a case by case basis, as follows:

i) Patrimonial/material rights:
   - *Damnum emergens*, including the costs of participation in the tender, bid preparation costs and the legal costs in connection with the proceedings for the award of damages;
   - *Lucrum cessans*, namely the actual profit that the candidate would have earned in case of award, based on the bid submitted for tender;

ii) Loss of other business opportunities (chances);

iii) Curricular damage;

iv) the legal interest accrued from the date of conclusion of the contract up to the date of actual compensation of the damage; and

[494] Gabayet (n 409) 8.

v) Demonstrable loss of other opportunities.

Penalty clauses are also to be considered, independently of the proof of damages.

Another pertinent question that one has to consider is whether these heads of damages are effective enough for the redress sought by the aggrieved bidder and therefore whether moral damages should be considered too.

Another question which also merits further examination is whether once that liability in damages is proved, the quantification of damages should be expressed statutorily or whether this issue of quantification should be left to the discretion of the national courts to be adjudicated on a case-by- case basis.

CHAPTER 5: THE HARMONISATION OF REVIEW BODIES

5.1. Council Directive of 21 December 1989 on the coordination of the laws, regulations, and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts[495] (The Public Sector Remedies Directive)

While the Public Sector Remedies Directive has significantly harmonised the nature of national remedies available in the field of public procurement, the forum before which those remedies are sought is largely left to the Member States to regulate and establish in terms of form and competence. Indeed, the Directive can only be said to require Member States to establish review bodies for the effective and rapid enforcement of procurement rules.[496]

In the field of public procurement remedies, there are two other directives, one on utilities[497] and another directive amending Council Directives 89/665/EEC and 92/13/EEC with regard to the improvement of the effectiveness of review procedures concerning the award of public contracts, which directives will be analysed later on in this chapter.

In its third recital, the Public Sector Remedies Directive identifies the opening-up of public procurement to EU-wide competition as a principal rationale for the *acquis* on public procurement. It continues to state that 'for it to have tangible effects, **effective and rapid remedies** must be available[498] in the case of infringements of Community law in the field of public procurement'.[499] The fourth recital refers to the market access for the public procurement market namely that if the remedies are inadequate or ineffective, this will deter/restrict 'Community undertakings from submitting tenders in the Member State in which the contracting authority is established; whereas, therefore, the Member States concerned must remedy this situation', therefore having a deleterious effect to the four freedoms which are at the heart of the EU's internal market.[500]

The Utilities Remedies Directive, which directive applies also to concessions, contains similar wording on adequate and effective remedies, stipulating that:

---

[495] Directive 89/665/EEC.
[496] Bovis (n 9) 198, 230; Arrowsmith (n 10) 929.
[497] Directive 92/13/EEC.
[498] This wording is repeated in recital 6 of Directive 92/13/EEC.
[499] Directive 89/665/EEC, third recital (emphasis added).
[500] ibid, fourth recital.

> Whereas the existing arrangements at both national and Community levels for ensuring its application are not always adequate;
>
> Whereas the absence of effective remedies or the inadequacy of existing remedies could deter Community undertakings from submitting tenders, whereas, therefore, the Member States must remedy this situation.[501]

The Utilities Remedies Directive goes beyond the Public Sector Remedies directive and refers to the judicial autonomy of the Member States stating that 'account must be taken of the specific nature of certain legal orders by authorising the Member States to choose between the introduction of different powers for the review bodies which have equivalent effects'.[502]

The fourth paragraph of the Public Sector Remedies Directive article 1(1) expressly addresses the obligation to the Member States and provides that 'Member States shall take the measures necessary to ensure that (…) decisions taken by the contracting authorities may **be reviewed effectively and, in particular, as rapidly as possible**'.[503] The same wording is also replicated in the Utilities Remedies Directive, which stipulates that the Member States offer a rapid and effective remedy may be said to constitute the central principle which defines the enforcement of EU public procurement law.[504]

Articles 2(8) and (9)[505] of the Public Sector Remedies Directive and the Utilities Remedies Directive respectively may otherwise be said to lay down a number of minimum criteria regarding the nature of the composition and functions of domestic fora:

---

[501] Directive 92/13/EEC, second and third recitals.
[502] Directive 92/13/EEC, seventh recital.
[503] Directive 2007/66/EC, Article 1(1) (emphasis added).
[504] Collin Swan, 'Lessons from Across the Pond: Comparable Approaches to Balancing Contractual Efficiency and Accountability in the US Bid Protest and European Procurement Review Systems' (2013) Public Contract Law Journal 29, 33.
[505] "Article 2 (8). The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.
Article 2 (9). Whereas bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measures taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 177 of the Treaty and independent of both the contracting entity and the review body.
The members of the independent body referred to in the first paragraph shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following

a) The decisions of first instance bodies must be effectively enforceable.
b) If first instance review bodies are not judicial in character, they must give reasons for their decisions in writing.
c) If first instance bodies are non-judicial, their decisions must be subject to a review by a judicial body that is a 'court or tribunal'[506] within the meaning of article 267 of the Treaty on the Functioning of the European Union ("TFEU").[507] That review must cover alleged illegal measures taken at first instance and alleged defects in the exercise of the powers conferred on the first instance body.
d) The second instance body must be independent of both the contracting authority and the first instance review body.
e) The members of the second instance body must have the same security of tenure that is afforded to national judges and, at least the President of such body must have the same legal and professional qualifications required of members of the judiciary.
f) The procedure before the second instance body must guarantee the *audi alteram partem* principle, namely that both parties to the lawsuit are heard.
g) The decisions of the second instance body must be legally binding.

Otherwise, the Member States are free to also choose how to set up their own domestic fora in line with the principle of procedural autonomy. Article 2(2) of the Public Sector Remedies Directive even expressly provides that different review bodies may be established to decide on pre-contractual remedies and post-contractual remedies respectively.

---

a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding."

[506] Bovis (n 19) 500.
Bovis notes as follows "According to settled case-law, in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law, and whether it is independent".

[507] Treaty on the Functioning of the European Union [2012] Official Journal C 326, 26/10/2012, Article 267: "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of the Treaties;
(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.
If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

The Public Sector Remedies Directive also provides some minimum harmonisation of procedural elements linked to access to the review bodies. Article 2c establishes minimum time limits of ten or fifteen calendar days (depending on further conditions) for aggrieved bidders to apply for review in the case of Member States opting to time-bar public procurement reviews. This same wording is found in article 2C of the Utilities Remedies Directive. This codifies the ECJ's case law which holds that such time limits, in accordance with the principle of effectiveness, must be reasonable and cannot render virtually impossible or excessively difficult the exercise of any rights.[508] Article 1(3) also provides that the Member States must make review procedures at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement. The ECJ has added in the *Grossmann Air Service* case that a person who has not sought the review of the specifications for an invitation to tender may not challenge them after the decision for award since this would impede the objectives of speed and effectiveness of the Remedies Directive.[509]

5.2. General observations on the approximation of first instance fora

Focus will now be directed to a comparative analysis of review bodies in Malta, France, Italy and the Netherlands in order to identify whether further minimum harmonisation of review bodies is necessary to truly achieve a single public procurement market. However, some general observations are made on the approximation of first instance and second instance bodies in view of what has already been stated. Principal factors for the comparative assessment of the chosen systems are thus identified.

Article 2(9) of the Public Sector Remedies Directive clearly indicates that first instance review bodies need not be judicial bodies. A distinction is often made along these lines between those Member States whose first instance bodies are the administrative and/or ordinary courts, and those Member States who have established special quasi- or non-judicial public procurement review bodies.[510] The latter are usually contained within the respective Member State's administrative structure, often within the respective Ministry for economic affairs although in some Member States the review body falls within the competition authority. It can roughly be said that the ordinary or administrative courts are the first instance procurement review bodies

[508] Case C-327/00, *Santex v Unità Socio Sanitaria Locale and others* EU:C:2003:109 [2003] ECR I-01877, para 54 and 55.
[509] Case C-230/02, *Grossmann Air Service v Austria* EU:C:2004:93 [2004] ECR I-01829, para 37.
[510] Roberto Caranta, *Many Different Paths, but Are They All Leading to Effectiveness?* in Steen Treumer & François Lichère (eds), *Enforcement of the EU Public Procurement Rules* (1st edn, Djøf Publishing, 2011) 55.

in twelve Member States, whereas special review bodies have been set up in the other fifteen Member States.[511]

While Finland has opted for judicial review at first instance, it has established a Market Court (the *Markkinaoikeus* in Finnish or the *Marknadsdomstolen* in Swedish) which has a special jurisdiction over market law, competition law, public procurement law and intellectual property law cases.[512] This may be seen as a third halfway option. It retains the body within the judiciary, with all the benefits and guarantees that this might offer, such as having more consistent case law across the ordinary courts and the specialised court, having trained judges as adjudicators, and having professional administrative support and a running registry already available. At the same time, a panel of judges with specialised knowledge of the field is offered to complainants, which in the field of procurement might often be rather knowledgeable themselves on particular questions of procurement law. In other Member States, for instance Luxembourg, this balance is found in that while award procedures may be challenged before a non-judicial body, a claim for damages must in all cases be made before the courts.

The distinction between the courts and the special review bodies is rather superficial in that it reveals no difference in Member State policy other than the fact that some opted to create special bodies, whereas others utilised the existing capacity of their judiciary. The European Court of Justice has indeed invariably held the special procurement bodies of the Member States to be "courts or tribunals" within the meaning of article 267 of the TFEU and thus having judicial character and being capable of making preliminary references. This, irrespective of the domestic classification of such special bodies as quasi- or non-judicial bodies.

For example, the Austrian regional review bodies (the *Vergabekontrollsenate*) which have now been abolished,[513] the Polish appeals chamber hosted within the Public Procurement Office (the *Krajowa Izba Odwoławcza*),[514] the German regional review bodies (the *Vergabekammern*)[515], the special tribunals of the autonomous communities of Spain which are

[511] European Commission, Directorate-General for Regional and Urban Policy, *Stock-taking of administrative capacity, systems and practices across the EU to ensure the compliance and quality of public procurement involving European Structural and Investment (ESI) Funds: final report,* Publications Office (2016) <https://data.europa.eu/doi/10.2776/311087> accessed 20 January 2021; and Marco Camboni, Sophie Garrett, Adrien Lantieri and Pete Floyd, *Study to explore data availability at the national level in order to develop indicators for evaluating the performance of the Remedies Directives – Annex 2, Country Fiches* (August 2018) <https://ec.europa.eu/docsroom/documents/33982> accessed 20 January 2021.
[512] ibid. 57; ibid 71.
[513] Case C-92/00, *HI v Stadt Wien* EU:C:2002:379 [2002] ECR I-05553.
[514] Case C-465/11, *Forposta and ABC Direct Contact v Poczta Polska* EU:C:2012:801 [2012] OJ C 38/8.
[515] Case C-549/13, *Bundesdruckerei v Stadt Dortmund* EU:C:2014:2235 [2014] OJ C 421/17.

administrative bodies within the executive (the *Tribunales de contratos públicos en Comunidades Autónomas*),[516] and the Danish complaints board (the *Klagenævnet for Udbud*),[517] were all considered to be a "court or tribunal" by the ECJ. In all probability, all of the Member States' special review bodies constitute "courts or tribunals" under EU law.

Indeed, beyond the context of article 267 of the TFEU, the factors which are taken into account in this respect, 'such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent',[518] must in any case be met by these special review bodies irrespective of the fact that they are not required of first instance bodies by the Public Sector Remedies Directive. The European Court of Human Rights (ECtHR) has held that the fundamental right to an effective remedy protected by article 13 of the European Convention on Human Rights (ECHR) must still be respected by non-judicial review bodies.[519] As such, non-judicial bodies must nonetheless afford procedural safeguards,[520] be independent,[521] and must give binding decisions.[522] In this sense, the distinction between Member States having judicial review bodies and those having special non-judicial or quasi-judicial bodies becomes rather superficial.

To the contrary more significant, albeit nuanced, differences can be found across the review bodies of the Member States. Some Member States have different review systems in place depending on whether the value of the contract at issue is above or below a certain threshold. In Germany and Finland, for example, the special bodies (non-judicial in the case of Germany, judicial in the case of Finland) only have jurisdiction over contracts above the EU thresholds which are established in accordance with Directive 2014/24 on public procurement.[523] Below those thresholds, recourse is had before the ordinary courts. In Malta the special review body, the Public Contracts Review Board, may only review award decisions for contracts below a national threshold which does not correspond to the EU thresholds.[524]

[516] Case C-203/14, *Consorci Sanitari del Maresme v Corporació de Salut del Maresme i la Selva* EU:C:2015:664 [2015] OJ C 389/7.
[517] Case C-396/14, *Højgaard and Züblin v Banedanmark* EU:C:2016:347 [2016] OJ C 260/3.
[518] *Consorci Sanitari* (n 497) para. 17. See also: Case C-54/96, *Dorsch Consult v Bundesbaugesellschaft Berlin* EU:C:1997:413 [1997] ECR I-04961, para. 23.
[519] *Klass and Others v Germany,* (1978) Series A no 28, para. 67.
[520] ibid.
[521] *Leander v Sweden* (1987) Series A no 116, para. 77.
[522] ibid. para 82.
[523] European Commission (n 511) 84 and 71.
[524] ibid. 148.

Another point of difference is the role of national authorities, namely the procurement, competition and anti-corruption authorities, in carrying out some form of review themselves. In some countries filing a complaint with the contracting authority itself or with the central procurement authority is a precondition to seeking remedies before the first instance review bodies. This has been the case for example in Cyprus,[525] Hungary,[526] and Slovakia.[527] In Italy and in Denmark, while not a precondition, not only may a complaint be filed before the anti-corruption and competition offices respectively, but these authorities have extensive functions which range from giving advisory opinions to challenging the regularity of procurement procedures themselves.[528] In other Member States, contracting authorities and central procurement authorities are often allowed to handle complaints, conferring also powers to cancel a procurement procedure.

Article 2(9) of the Remedies Directive specifically allows first instance review to be conducted by non-judicial bodies. As has already been discussed, this refers to bodies which are not able to make preliminary references (notably, taking into consideration factors of independence, *inter partes* procedure, and whether it applies rules of law). The special review bodies of the Member States are as a general rule considered to be judicial bodies, irrespective of their domestic categorisation. In this light, it would seem that any administrative authority which has some review function is to be considered a first instance review body in terms of the Remedies Directive. The procedures and practices adopted by such administrative authorities in this "review function" would thus be bound to comply with the requirement of the Remedies Directives. Despite this, the Member States rarely consider such procedures as falling under the Directive as first instance review. This may be seen from studies undertaken or commissioned by the European Commission,[529] and even from the Country Reports which the Member States submit to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs of the European Commission.[530] It is not clear therefore, to what extent the Remedies Directives govern, or should be deemed to govern, review processes conducted by administrative organs, these often being the contracting authorities themselves.

[525] ibid. 51.
[526] ibid. 102.
[527] ibid. 190.
[528] ibid. 116 and 57.
[529] European Commission (n 511); Camboni, Garrett, Lantieri and Floyd (n 511).
[530] European Commission, Country Reports and Information on EU Countries <https://ec.europa.eu/growth/single-market/public-procurement/country-reports_en> accessed 31 August 2021.

The possibility of having recourse to alternative dispute resolution in order to obtain the remedies afforded within the Remedies Directive is another point of consideration which must be taken into account. So far this is a unique feature of the Dutch and Portuguese systems. The Netherlands has set up a Committee of Procurement Experts (the *Commissie van Aanbestedingsexperts*) within the Ministry Economic Affairs and Climate Policy to conduct mediation between contracting authorities and complainants.[531] Indeed, it has been reported that this Committee has by far and large subsumed the courts' case load with regard to complaints on administrative acts before the closing date for the submissions of tender.[532]

Article 476 of the Portuguese Public Contracts Code (the *Código dos Contratos Públicos*) expressly provides the possibility of alternative dispute resolution to resolve any dispute arising from procurement procedures or from public contracts.[533] Therefore, the administrative acts which may be challenged by alternative dispute resolution are various and may include acts adopted in the context of a procurement procedure and acts in relation to procurement documentation.[534] A specialised institution for the administration of arbitration and mediation cases on public procurement has been established (the *Associação Portuguesa da Contratação Pública*).[535] Undoubtedly arbitration seems to be the more popular form of alternative dispute resolution, and this due to the fact that Annex XII to the Public Contracts Code lays down model arbitration rules and in terms of which a contracting authority may bind prospective tenderers or contractors to submit their grievances to arbitration when issuing a procurement procedure.[536]

[531] Business.gov.nl, Tendering Rules, <https://business.gov.nl/regulation/tendering-rules/> accessed 31 August 2021.
[532] Monika Chao-Duivis and Evelien Bruggeman, 'Procurement Law in the Netherlands A general overview over the system and two peculiarities considered in more detail - Annual Conference of the European Society of Construction Law' – Bucharest, 24 and 25 October 2018' (European Society of Construction Law International Conference Faculty of Law, University of Bucharest Conference Proceedings 2018), section 3.1.
[533]Diario Da Republica Eletronico,
<https://dre.pt/web/guest/legislacao-consolidada//lc/168155479/202108311250/exportPdf/normal/1/cacheLevelPage?_LegislacaoConsolidada_WAR_drefrontofficeportlet_rp=indice> accessed 31 August 2021.
[534] Maria João Mimoso and Maria do Rosário Anjos, 'Administrative arbitration in public procurement: a look at Portuguese law' (2019) vol 9(1) Juridical Tribune (Tribuna Juridica), Bucharest Academy of Economic Studies, Law Department, 203.
[535]Mediação e Arbitragem para Contratação Pública <https://www.medplat.pt> accessed 31 August 2021.
[536] Mimoso and Anjos (n 534) 203.

5.3. General observations on the approximation of second instance fora

It has already been observed that if the first instance bodies are "non-judicial" in character, then their decisions must be subject to a review by a judicial body that is a "court or tribunal" within the meaning of article 267 of the TFEU.

This requirement most likely stems from the ECJ's case law on the right to an effective remedy. The ECJ has long held in the *Johnston v. Chief Constable* case that:

> the requirement of judicial control (…) reflects a general principle of law which underlies the constitutional traditions common to the Member States (…) [and] is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[537]

In the *Heylens* case the ECJ also interpreted this general principle as requiring 'the existence of a remedy of a judicial nature against any decision of a national authority'.[538]

As has already been discussed, special review bodies, even if considered to be non-judicial domestically, may be considered to be bodies of a judicial character in terms of article 267 TFEU and satisfying the exigencies of the general principle of access to a judicial remedy. In consequence, the second instance bodies may also be special bodies considered to be quasi- or non-judicial bodies domestically. Indeed, the *Dorsch Consult* case, one of the foundational cases of the ECJ on what constitutes a 'court or tribunal',[539] specifically concerned a preliminary reference by a second instance public procurement review body.[540]

In this case, the review body was the German Federal Supervisory (the *Vergabeüberwachungsausschuß des Bundes*), which was set up within the federal competition authority (the *Bundeskartellamt*) and acted as a second instance review to the review made by an administrative organ at first instance (the German review system of the time has since been

[537] Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary* EU:C:1986:206 [1986] ECR 01651, par. 18.
[538] Case 222/86, *Unectef v. Heylens and others* EU:C:1987:442 [1987] ECR 04097, para. 14.
[539] Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (2nd edn, Oxford University Press, 2014) 61 et seq.; and European Union Agency for Fundamental Rights and Council of Europe, 'Handbook on European law relating to access to justice' (2016) Luxembourg: Publications Office of the European Union. 32, fn 68. <https://www.echr.coe.int/documents/handbook_access_justice_eng.pdf> accessed 16 April 2023.
[540] Case C-54/96, *Dorsch Consult v Bundesbaugesellschaft Berlin* EU:C:1997:413 [1997] ECR I-04961, para 23.

replaced through subsequent reforms).[541] Therefore, it can be deduced that second instance bodies may be established to be similar to the first instance special procurement review bodies, which is a practice in roughly half the Member States. That is, as long as they satisfy the *Dorsch Consult* criteria in order to be deemed a court or tribunal for the purposes of article 267 of the TFEU.

The vast majority of Member States have opted to make their ordinary or administrative courts, defined as such in their domestic systems, the second instance review bodies.[542] The exceptions seem to be the Czech Republic and Slovakia. Both Member States have a special second instance body but have the courts act as the third and fourth instances of review.[543] Therefore, in all the Member States there is access to the courts at some stage of the appellate system. Moreover, most Member States seem to offer second and third instance review, although some systems also have a fourth instance.[544]

5.4. Guiding considerations for comparative assessment

A number of considerations may be drawn from the above discussions, acting as guidance on what terms the Maltese, French, and Dutch systems are to be comparatively assessed. These jurisdictions represent respectively public procurement review systems where the first instance forum is a specialised procurement body, whether an administrative court or the district civil court.

Firstly, the composition of the review bodies and their place in the national judiciary or administration are considered. As has been observed already, this is of less importance than it may seem since the concept of a "court or tribunal" under EU law encompasses a wide range of review bodies which may not be classified under the judiciary domestically. It is worth further assessing the role of administrative complaints and of alternative dispute resolution even though these may not be identified as review systems themselves. Both may be seen as alternatives to the formal remedies established for the purposes of the Public Sector Remedies Directive.

---

[541] Organisation for Economic Co-operation and Development (OECD), 'Competition Policy in OECD Countries 1996-1997', DAFFE/CLP(99)23, p. 126; and also: Bundeskartellamt, Information leaflet on the legal protection available in the award of public contracts. <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Bekanntmachungen/Bekanntmachung%20-%20Public%20Procurement%20Information%20leaflet.html?nn=3590560> accessed 02 September 2021.
[542] Camboni, Garrett, Lantieri and Floyd (n 511).
[543] ibid. 39 and 149, for the Czech Republic and Slovakia respecively.
[544] ibid.

Secondly, the appeals systems of the respective Member States are considered. In particular, whether the appeal takes the form of a trial *de novo* or is an appeal on points of law (cassation) is considered.[545]

Thirdly, the effectiveness of the respective remedies systems is assessed on the basis of access to the review bodies especially in light of the costs related therewith.

Fourthly, the rapidity of the review systems is assessed in light of time limits imposed domestically for review bodies to hear cases, if any, and also the reported average time it takes to resolve disputes.

5.5. The Maltese public procurement review system

5.5.1. Composition and character of the review bodies

The special review body at first instance is the Public Contracts Review Board (PCRB). The PCRB is established as a permanent body by Regulation 80 of the Maltese Public Procurement Regulations.[546] It is composed of a Chairman and two other members, while also having a permanent secretariat. The independence of the PCRB is safeguarded by specific rules restricting the removal of its members to cases of proven inability to perform the functions of Board member,[547] and disqualifying members of the PCRB from hearing a case in the circumstances as would disqualify a judge in a civil suit.[548]

The PCRB is given a wide jurisdiction. It hears cases on pre-contractual remedies (namely, the review of acts before the closing date for submission of tenders, and the review of acts after the closing date for submission of tenders principally the award decision) and cases on post-contractual remedies, including the ineffectiveness of contracts. This is irrespective of whether the procurement in question falls within the EU thresholds and, therefore, within the ambit of the EU directives. Additionally, the PCRB hears any cases assigned to it in a public call for tenders or quotations even if such process is not deemed to be public procurement *per se* under

[545] Martin Shapiro, 'Appeal' (1980) Law & Society Review, vol. 14, no. 3, 645 et seq. <https://doi.org/10.2307/3053195.> accessed 16 April 2023.
[546] Public Procurement Regulations 2016.
[547] ibid. Regulation 82.
[548] ibid. Regulation 85.

the relevant Regulations. This said, the pre-contractual remedy to challenge acts after the closing date for submission of tenders is not open with respect to procurement procedures for contracts having a lesser value than €5,000.[549] It seems that in this case interested parties may challenge such procurement procedures before the ordinary civil courts, although there is no knowledge of this of ever ever having been resorted to.

The Board's jurisdiction is complemented by wide powers in terms of Regulation 90 of the Public Procurement Regulations. This provision in particular empowers the PCRB to cancel procurement procedures and to grant interim measures. It also vests the PCRB with all the powers of the ordinary civil courts, including the power to liquidate and award damages.

Any decision of the Board may be appealed before the Court of Appeal in its superior jurisdiction, composed of three judges. The Court of Appeal is the highest appellate instance, there being no right of further appeal. Yet, the Maltese judicial system provides also for the retrial of cases in specific circumstances. The Maltese judicial system does not distinguish between administrative and civil courts.

5.5.2. Nature of the review

Despite the Board's wide jurisdiction and powers, the review it may carry out has been circumscribed by principles of Maltese administrative law. In the *SaniClean* case, the Court of Appeal has expressly held that the Board may not substitute its discretion for that of the tender evaluation committees in the sense that it must not adjudicate the procurement procedure being challenged itself.[550] In this sense, the most common remedy granted by the Board is to revert the tender dossier to the respective committee for re-evaluation since it would overstep its competence if it determines whether a particular tender offer should be disqualified or be recommended for award.

The delineation of the boundaries of the PCRB's competence by the Court of Appeal is in all likelihood a spillover of principles of judicial review of administrative action in general. General judicial review of administrative acts entails an examination of the validity of that act, and not of whether it is factually correct or error-free. The validity of an administrative act may

[549] ibid. Regulation 270.
[550] *SaniClean Joint Venture vs. St Vincent de Paul Long Term Care Facility et*, Court of Appeal [20 July 2020] Case. no. 97/2020, 19.

be challenged for its unconstitutionality in various cases, namely, because the act is *ultra vires* the authority of the administrative body, due to procedural defects especially *vis-à-vis* the principles of natural justice, because the act constitutes an abuse of power either because it is done for improper purposes or on the basis of irrelevant consideration, and because the act is contrary to law.[551] The *SaniClean* suggests that the Board's competence of review is in this sense is limited to reviewing the legality and procedural regularity of the acts in question. The motivation of the Court of Appeal in that case also suggests that the acts being challenged must be reviewed in terms of their reasonableness as well.[552]

5.5.3. Nature of the appeals system

The Maltese judicial system is a two-tier instance system (first instance and appeal), there is no cassation, however there are limited grounds for the retrial of a case. The Court of Appeal in its superior jurisdiction hears and determines appeals on points of law and of fact arising out of public procurement. This does not mean, however, that the Court of Appeal conducts a trial *de novo per se.* For instance, in the *Cherubino* case, the Court of Appeal has held that it could not, as a general rule, disturb the findings of the tender evaluation committee unless this is warranted for grave and serious reasons.[553] Secondly, in most cases the Court of Appeal limits itself to a review of the correctness, legally and factually, of the decision of the Public Contracts Review Board.

5.5.4. Administrative complaints

The General Contracts Committee is given the express power to formally investigate complaints and make recommendations to the Director of Contracts who has the ultimate discretion to decide on the matter.[554] The Committee is established by law to assist and advise the Director of Contracts, who heads the central procurement authority being the Department of Contracts, and is made up of the Director himself and up to ten other members who are usually appointed from amongst senior or retired civil servants. There is nothing in the law which regulates how these complaints are to be treated or even what may be complained of.

[551] Code of Organisation and Civil Procedure, Article 469A.
[552] *SaniClean Case* (n 550) 19.
[553] *Cherubino Limited vs Id-Direttur (Ġenerali) tal-Kuntratti et*, Court of Appeal [6 February 2015] Case. no. 426/2014, 8.
[554] Public Procurement Regulations 2016, Regulation 72(e).

Nonetheless, a certain *modus operandi* may be deduced from the limited powers given to the Director of Contracts in order to remedy any situation of irregularity – cancellation of the procurement procedure. The Director of Contracts is entitled to cancel any procurement procedure at any stage of the process, whether it being before or after the award of the contract, if it is found that the procurement procedure is irregular or discriminatory.[555] One of the principal ways in which discriminatory or irregularities are determined, is by means of complaints from aggrieved bidders. Regulation 15 of the Public Procurement Regulations expressly requires that any decision to cancel a procedure is to be made in writing, must include the findings and must state the reasons leading to that decision. The decision may be challenged before the PCRB and there is a further right of appeal before the Court of Appeal. No damages are awarded for cancellation of a procurement procedure.

Since the Director of Contracts, the Department of Contracts, and even the contracting authorities are not formally empowered to order the tender evaluation committee to re-evaluate complaints, the principal use of complaints seems to be to attack tenders which exclude the complaining bidder from participating. Participating bidders with an interest of being awarded the tender may have no interest to cancel the procurement procedure unless it is to deny a competitor of a contract which has already been awarded. The problem here is that it is seen to be particularly unfair by industry to have a tender cancelled after the tender offers, in particular the financial bids, have been disclosed only to have a quasi-identical tender re-issued.[556]

5.5.5. Alternative dispute resolution

While arbitration is used for post-contractual disputes arising from public contracts, there is no possibility to seek the procurement remedies envisaged by the Remedies Directive through alternative dispute resolution mechanisms.

5.5.6. Cost of review proceedings

When filing an application for precontractual remedies, the aggrieved bidder has to pay a deposit for the filing of the case.[557] The deposit is set at 0.5 percent of the estimated value of

[555] ibid. Regulation 15.
[556] The Malta Chamber of Commerce, Report on Public Procurement Reform 2021 <https://contracts.gov.mt/en/NewsAndInfo/Pages/DG(Contracts)-And-ChamberOfCommerceRecommendations.aspx> accessed on 9 September 2021, 19.
[557] Public Procurement Regulations 2016, Regulations 262(2) and 273.

the public contract capped at a maximum of fifty thousand Euros (€50,000). In its decisions on precontractual remedies the PCRB decides whether the deposit paid is to be refunded to the complaining bidder. As a general rule, the deposit is refunded if the aggrieved bidder is successful in its challenge and forfeited if the challenge is dismissed.

The deposit which aims at deterring frivolous and vexatious cases is largely seen to be excessive especially in relation to remedies before closing date for a call for tenders. The Malta Chamber of Commerce and Industry has even suggested that the deposit in these cases should be capped at €2,500.[558] Still, an argument may be made that the requirement to pay such a deposit is perfectly compatible with the principle of effectiveness enshrined in the Remedies Directives, as well as in article 47 of the Charter of Fundamental Rights. In the *Orizzonte Salute* case, the ECJ has already stated that judicial costs are part of detailed procedural rules which must not compromise the principle of effectiveness of the Remedies Directive, which principle is guaranteed by the right to judicial protection guaranteed by the Charter.[559] In this case, the ECJ decided that the Italian judicial fees under review did not adversely affect the effectiveness of national remedies notwithstanding that, the fees payable with respect to public procurement review were higher than the fees payable in cases of administrative review or in ordinary civil proceedings. A principal consideration of the ECJ was that the principle of equivalence requires that actions based on an infringement of EU law are treated equally to similar actions in national law, and not that the different national procedural rules should be rendered equal. In the case of the Maltese deposit, which is a prerequisite of the review procedure, is applicable to all public procurement review cases including cases with respect to procurement procedures falling below the EU thresholds and therefore falls outside the scope of the EU Directives on procurement.

5.5.7. Duration of review proceedings

The Maltese Public Procurement Regulations place a lot of emphasis on the rapidity of review proceedings placing tight time limits both on the parties' submissions and on the review bodies' decisions. The proceedings before the Public Contracts Review Board are particularly reliant on online services to further speed up processes.

[558] The Malta Chamber of Commerce Report (n 556) 26.
[559] 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] OJ C 389/5, para 47-48.

Where an aggrieved bidder applies to the PCRB for remedies before the closing date of a call for tenders, the contracting authority and any interested parties must file a reply within five (5) days from when the application is uploaded on the PCRB's website.[560] The PCRB decides the case with urgency and in no more than one sitting, except in exceptional circumstances.[561] Where an aggrieved bidder applies for remedies with respect to decisions taken after the closing date of call for tenders replies, the contracting authority and any interested parties must submit a reply within ten (10) days from when the application is published on the PCRB's notice board.[562] The PCRB is also obliged to send a copy of the application by electronic means to all the bidders.[563] While not obliged to hear the case with urgency, the PCRB is again, in principle, to decide the case in one hearing and give its decision on the same day of the hearing.[564] Otherwise, the decision must be given by not later than six (6) weeks from the date of the hearing.[565]

The PCRB is not bound by any time limits with respect to the post-contractual remedy of ineffectiveness of the contract. The authorities and the contractors have a limit of twenty (20) days from the date of service of the application to file their replies.[566] Both the twenty (20) day limit and the service of the application follow the ordinary procedural rules which usually apply in ordinary civil cases.

All decisions of the PCRB may be appealed before the Court of Appeal within twenty (20) days from the date of the decision and the authorities and other interested parties have a further twenty (20) days, from date of service of the appeal, within which to file their reply.[567] The hearing at appeal must be set at an early date, but in no case later than two (2) months from when the appeal is brought before the Court of Appeal.[568] The Court of Appeal is further bound by a limit of four (4) months from the date of filing the appeal within which to give judgment.[569]

The time restrictions described above are a unique feature of the public procurement review system and in stark contrast with the system dealing with ordinary civil and commercial

[560] Public Procurement Regulations 2016, Regulation 264.
[561] ibid. Regulation 265.
[562] ibid. Regulation 276.
[563] ibid.
[564] ibid.
[565] ibid.
[566] ibid. Regulation 279.
[567] ibid. Regulations 284 and 285.
[568] ibid. Regulation 286.
[569] ibid.

disputes. Among European countries, Malta has one of the highest indicators of increasing backlog and of long duration for case resolution, the latter calculated to be 440 days in a Council of Europe study on the basis of 2018 data.[570] According to Malta's last monitoring report which the Member States are required to submit to the European Commission, and based on 2017 data, the average duration of cases at first instance was of 1.38 months and that at second instance was of one (1) month.[571] The implementation of the Remedies Directives locally may thus be considered to have had an exceptionally positive effect with respect to improving the duration of proceedings.

Apart from the reliance on strict time limits and on electronic notification of applications at first instance, the Court of Appeal is also empowered to impose a penalty between one thousand Euros and five thousand Euros (€1,500) if it considers that any appeal before it is vexatious or frivolous.[572] The aim is clearly to reduce the case load of the review bodies.

5.6. The French public procurement review system

5.6.1. Composition and character of the review bodies

The review bodies in public procurement matters are only the administrative courts.[573] Exceptionally, some matters relating to public contracts may sometimes fall within the jurisdiction of the ordinary civil courts. However, the remedies provided for under the Remedies Directives, both pre-contractually and post-contractually, are in essence challenges to administrative acts namely, the opening a call for tenders, formulating the tender documents, awarding the contract, and approvals of related acts. Given the French principle of severability of acts carried out pre-contractually and the contract itself (*la théorie de l'act détachable*) the regularity of a public procurement procedure, which is what the Remedies Directives seek to entrust to private enforcement, is invariably subject to the administrative courts.[574]

[570] Council of Europe, 'European judicial systems CEPEJ Evaluation Report 2020 Evaluation cycle (2018 data) - Part 1 Table, graphs and analyses' (2020), available at <https://rm.coe.int/evaluation-report-part-1-english/16809fc058> accessed 10 September 2021, p. 113.
[571] 'Malta Country Report to the European Commission under Directive 2014/23/EU on the award of concession contracts, Directive 2014/24/EU on public procurement and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors' (2018), available at <https://ec.europa.eu/growth/single-market/public-procurement/country-reports_en> accessed 10 September 2021, p. 17.
[572] Public Procurement Regulations 2016, Regulation 288.
[573] Lichère and Gabayet (n 430) 299.
[574] Bovis (n 9) 382.

The review bodies are therefore, as a rule, the administrative courts. At first instance these are the regional administrative courts (*les tribunaux administratifs*). [575] The administrative courts of appeal (*les cours administratives d'appel*) act as second instance bodies and, finally, there is a possibility of review before the Council of State (*le Conseil d'Etat*) which acts as an instance of cassation.[576] These instances are established and regulated by the Code of Administrative Justice (*Code de justice administrative*). The first instance administrative courts and the administrative courts of appeal, are designated according to the city where they are seated, with the respective courts of appeal have jurisdiction over a number of first instance courts.[577] Each of these courts is organised in a number of chambers, usually entrusting public procurement matters to one or more of these chambers which also have jurisdiction over other administrative matters.[578] Therefore, these chambers are by no means specialised on public procurement law, or at least not solely on public procurement law.

The French administrative courts are given a wide jurisdiction to hear cases on both pre-contractual remedies and for the post-contractual remedy of ineffectiveness of contracts provided for in the form of the *référé précontractuel*[579] and the *référé contractuel*[580] respectively.[581] The French remedies system also relies heavily on domestic administrative remedies, namely the *recours pour excès de pouvoir* and the *recours de plein contentieux.* No distinction is made between public contracts falling within the EU thresholds and public contracts below these thresholds. Indeed, any administrative act in relation to a procurement procedure is brought within the jurisdiction of the administrative courts.

5.6.2. Nature of the review

The Council of State has invariably held that the review of procurement processes by the administrative courts must be limited to what is commonly understood to be judicial review. This has been emphasised particularly in relation to the precontractual remedy (the *référé*

[575] Lichère & Gabayet (n 430) 299.
[576] ibid.
[577] Code of Administrative Justice, Article 221-2 et seq.
[578] ibid. Articles 221-4 and 221-8.
[579] ibid. Article L551-1.
[580] ibid. Article L551-13.
[581] See also in this respect: Hugo Flavier & Charles Froger, 'Administrative Justice in France - Between Singularity and Classicism' (2016) Vol III Issues 2, BRICS Law Journal, 94 et seq. <https://doi.org/10.21684/2412-2343-2016-3-2-80-111> accessed 16 April 2023.

précontractuel) since it is most often in this type of review that administrative acts such as, the drawing up of the tender, or the rejection of tenderers, or award decisions, that are challenged.

By way of illustration, the Council of State has expressly held that the competence of the administrative judge in the precontractual remedy is limited to controlling 'manifest errors of appreciation' of a tender offer.[582] Likewise, it has held that the manner with which the tender evaluation committee has evaluated a tender offer does not fall under the remit of the administrative judge's competence however, using different evaluation methods for different tender offers would fall under such remit since that behaviour would be in breach of the principle of equality of treatment.[583]

As regards the contracting authorities' discretion to choose and define the selection and award criteria, the administrative judge's competence is to review whether these are irregular, in particular if they give advantage to certain economic operators to the detriment of others.[584] It has otherwise held that the administrative judge's review may assess whether any criteria, when a contract is awarded according to the best price-quality ratio, have been given a weighting which is "manifestly excessive".[585] This said, the Council of State has expressly held that it is the contracting authorities' discretion to define the criteria, and their weighting according to their own needs, and the administrative judge is not competent to substitute this discretion for his own.[586]

5.6.3. Nature of the appeals system

The French appellate system in procurement review is two-tiered in the case of the *recours pour excès de pouvoir* and the *recours de plein contentieux*. The administrative courts of appeal hear appeals on points of fact and on law. The courts of appeal undertake a trial *de novo* of the case.[587] Decisions of the administrative courts of appeal may be appealed at final stage before

[582] CE, 23 janvier 2012, n° 346970, Commune de Six-Fours-les-Plages - Publié au recueil Lebon; <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000025284563> accessed 11 September 2021; and CE, 17 juin 2015, n° 388596, Société Philip Frères - Mentionné dans les tables du recueil Lebon, para. 6; <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000030750275/> accessed 11 September 2021.
[583] CE, 20 janvier 2016, n° 394133, Derichebourg Polyurbaine - Mentionné dans les tables du recueil Lebon, para. 7; <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000031938415/> accessed 11 September 2021.
[584] CE, 10 mai 2006, n° 288435, Société Schiocchet - Mentionné dans les tables du recueil Lebon, <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000008255724/> accessed 11 September 2021.
[585] CE, 7 mai 2013, n° 364833, Département de Paris - unpublished, para. 6; <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000027397730/> accessed 11 September 2021.
[586] CE, 10 juin 2020, n° 431194, Ministère de la défense - Mentionné dans les tables du recueil Lebon, para. 3 and 6; <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000041986881/> accessed 11 September 2021.
[587] Code of Administrative Justice, Article L211-2.

the Council of State which only acts at that stage as a court of cassation, that is, pronouncing itself solely on points of law.[588]

In the case of the expedited remedies – the *référés précontractuel* and *contractuel*; there is only the possibility of an appeal to the Council of State as a Court of Cassation.[589] This is in stark contrast to the development of the Maltese appeals system. In the Maltese system, appeals in civil and administrative matters, are as a rule "cassation" appeals, that is, appeals only on points of law. In public procurement law an exception has been made to allow appeals on points of law and on fact. In the French system, where administrative decisions are usually subject to a trial *de novo* before the courts of administrative appeal, an exception has been made for appeals from decisions pursuant to the expedited remedies.

5.6.4. Administrative complaints

Unlike other Member States, particularly Malta, there is no formal power given to the administrative authorities to receive and investigate complaints in relation to public procurement procedures. This can probably be explained by the fact that in France there is no regulatory authority sanctioning the conduct of procurement procedures by contracting authorities, whereas in Malta this function is assumed by the Director of Contracts. The review of administrative action remains the sole prerogative of the administrative courts.

This said, French contracting authorities are empowered to cancel a tender procedure.[590] One of the reasons for cancellation may in particular be the lack of competition in the tender procedure as a result of anti-competitive behaviour of economic operators.[591] In practice, it cannot be excluded that a determination of a lack of competition may follow from information obtained from complaining economic operators. Still there is no formal power to receive complaints, and any such cancellation of a procedure by contracting authorities is at their own discretion and not at the option of a higher regulatory authority which polices their conduct.

[588] ibid. Article L111-1.
[589] ibid. Articles R551-6 and R551-10.
[590] French Public Procurement Code, Article R2185-1.
[591] Ministère de l'Economie, des Finances et de la Relance, 'Fiche Technique – L'abandon de procédure', (2019), p.11,<https://www.economie.gouv.fr/files/files/directions_services/daj/marches_publics/conseil_acheteurs/fiches-techniques/mise-en-oeuvre-procedure/FT33%20_Abandon_de_proc%C3%A9dure_01042019.pdf> accessed 18 November 2021.

5.6.5. Alternative dispute resolution

Within the French system of review there is no possibility to seek the procurement remedies envisaged by the Remedies Directives through alternative dispute resolution mechanisms. French law however, expressly envisages the possibility of conciliation, mediation and arbitration for disputes arising from the performance of public contracts.[592]

5.6.6. Cost of review proceedings

Unlike the Maltese review system where the matter of costs has been a rather polemic issue, the French system does not seem to suffer from any problem of prohibitive cost to access procurement remedies. In fact, access to review is not subject to any fee or deposit.[593] According to Lichère and Gabayet, even legal costs, including lawyers' fees, are relatively fair in the field of procurement.[594]

5.6.7. Duration of review proceedings

The French review system is arguably very similar to the Maltese system when it comes to imposing time-limits on the review bodies and on the complainants. This is especially true when it comes to the French expedited procedures. A demand for a precontractual remedy (the *référé précontractuel*) may be filed at any time before the conclusion of the public contract in question,[595] and the administrative court must rule on the matter within twenty (20) days.[596] A demand for the post-contractual remedy (the *référé contractuel*) must be filed within thirty-one (31) days from when a notice of the conclusion of the contract has been published or, if a notice has not been published, within six (6) months from the conclusion of the contract.[597] The administrative court must rule on the matter within a month from the filing of the demand.[598] Decisions pursuant to both the *référés précontractuel* and *contractuel* may be appealed before the Council of State as a court of cassation within 15 days.[599]

[592] French Public Procurement Code, Articles L2197-1 and L2197-6.
[593] European Commission (n 312) 41.
[594] Lichère & Gabayet (n 430) 300.
[595] Code of Administrative Justice, Article L551-1.
[596] ibid. Article R551-5.
[597] ibid. Article R551-7.
[598] ibid. Article R551-9.
[599] ibid. Articles R551-6 and R551-10.

An application in terms of the *recours pour excès de pouvoir* or the *recours de plein contentieux* must be filed within two (2) months from the date of when the administrative decision being challenged was published or notified to the addressee.[600] Unlike the expedited procedures, there is no time-limit imposed on the administrative courts within which to issue their decision. Decisions of the administrative courts in this sense may be appealed before the administrative courts of appeal within two (2) months.[601] The decisions on appeal may in turn be appealed before the Council of State, as a court of Cassation, within fifteen (15) days.[602]

Similar to the Maltese scenario, France also has one of the highest indicators of increasing backlog and of long duration for case resolution– the latter calculated to be 420 days in a Council of Europe study on the basis of 2018 data.[603] According to France's last monitoring report which the Member States are required to submit to the European Commission, and based on data gathered for the years 2017, 2018 and 2019, the average duration of cases at first instance, not being expedited proceedings, was of 1 year, 1 month and 25 days.[604] This figure cannot be directly compared with the average of 1.38 months that it takes for Maltese cases to be decided at first instance since, as has already been explained, the Maltese system only admits of the "expedited" remedies that are imposed by the Remedies Directives.[605] It seems natural to compare these only with the French *référés précontractuel* and *contractuel* which must be decided within a month. In this sense both the Maltese and French systems treat the precontractual and contractual remedies of the Remedies Directives as urgent proceedings making them strikingly more rapid and efficient than ordinary administrative remedies in the respective national systems.

[600] ibid. Article R421-1.
[601] ibid. Articles R811-2 and R811-3.
[602] ibid. Article R811-9.
[603] Council of Europe, 'European judicial systems CEPEJ Evaluation Report 2020 Evaluation cycle (2018 data) - Part 1 Table, graphs and analyses' (2020), <https://rm.coe.int/evaluation-report-part-1-english/16809fc058> accessed 22 November 2021, 113.
[604] 'Rapport à la Commission européenne relatif à l'application de la Règlementation en matière de marchés publics pour la période 2017-2019' (2021), <https://ec.europa.eu/growth/single-market/public-procurement/country-reports_en> accessed 22 November 2021, 20.
[605] 'Malta Country Report to the European Commission under Directive 2014/23/EU on the award of concession contracts, Directive 2014/24/EU on public procurement and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors' (2018), <https://ec.europa.eu/growth/single-market/public-procurement/country-reports_en> accessed 22 November 2021, 17.

5.7. The Dutch public procurement review system

5.7.1. Composition and character of the review bodies

The review bodies in the Dutch system are the district civil courts (the *rechbanken*), although exceptionally special law may subject review to the administrative courts' jurisdiction.[606] The civil courts' jurisdiction derives from a mixture of ordinary civil law and public procurement law. The civil courts' competence to hear and decide applications for precontractual remedies is based on the principle of precontractual liability which has largely been developed by the courts themselves.[607] To the contrary, the post-contractual remedy of rendering a contract ineffective is expressly regulated in the Public Procurement Act of 2012 (the *Aanbestedingswet* 2012).[608] Injunctive relief, including the suspension of a tender process, are also the competence of the civil courts by virtue of their general powers in summary proceedings under the Code of Civil Procedure (the *Wetboek van Burgerlijke Rechtsvordering*).[609] The civil courts may in all cases award damages under the general tort regime of the Civil Code Book 6 (the *Burgerlijk WetboekjBoek 6*).[610]

Decisions of the first instance civil courts may be appealed before one of the four respective regional Courts of Appeal (the *gerechsthoven*). Decisions of the Courts of Appeal may further be appealed to the Dutch Supreme Court (the *Hoge Raad*).

5.7.2. Nature of the review

Dutch procedure is particularly flexible since it is possible for complainants to institute civil summary proceedings, civil proceedings on the merits or a combination of both.[611] It also makes no difference whether an action is based on pre-contractual responsibility or in tort since

[606] The jurisdiction of the administrative courts never applies to European public procurement law, with rare exceptions such as the Wet personenvervoer 2000.
[607] Schebesta (n 153) 78.
[608] Dutch Public Procurement Act 2012, Articles 4.15-4.20, available at <https://wetten.overheid.nl/BWBR0032203/2019-04-18#Deel4_Hoofdstuk4.4> accessed 11 December 2021.
[609] Dutch Code of Civil Procedure, Article 254 <https://wetten.overheid.nl/BWBR0001827/2021-07-01#BoekEerste_TiteldeelTweede_AfdelingVeertiende_Artikel254> accessed 11 December 2021.
[610] Dutch Civil Code, Book 6 Article 162, <https://wetten.overheid.nl/BWBR0005289/2020-07-01#Boek6_Titeldeel3_Afdeling1_Artikel162> accessed 11 December 2021.
[611] Wouter-Jan Berends, 'Judicial Protection in the Field of Public Procurement: 'The Transposition into Dutch Law of Directive 2007/66/EC Amending the Remedies Directives' (2010) Vol. 27 Issue 71 Utrecht Journal of International and European Law 17, 20.

both actions are substantively the same with regard to quantification of damages.[612] This is in stark contrast to the French system where there are distinct procedures giving distinct powers to the judge seised.

Another evident distinction is that whereas the nature of the review in the French and Maltese systems is grounded in the administrative law concept of "judicial review", the nature of the review in Dutch law is grounded on civil law concepts such as precontractual responsibility and tort. It is practically impossible to assess whether this distinction makes the Dutch review system more lenient on contracting authorities or not. However, the preliminary reference referred by the Dutch Supreme Court in the *Connexxion Taxi Services* case seems to suggest this. One of the questions referred by the Supreme Court was whether the Dutch system which restricts the courts' power to a merely "marginal" review of the decisions of contracting authorities is in conformity with the EU law.[613]

The "marginal" review means that the Dutch courts' review of tender decisions is limited to an examination of their reasonableness.[614] Whereas the reasonableness of the contested act of a contracting authority is key in the French and Maltese review systems, the review extends to an examination of the lawfulness of the act. Sometimes the review may even extend to the factual appreciation of the contracting authority if this is manifestly erroneous. Whereas the ECJ left this question unanswered, the Opinion of Advocate General Campos Sánchez-Bordona indicates that a mere review of the reasonableness of decisions of contracting authorities would fall foul of the Remedies Directives. According to the Advocate General the review of procurement decisions requires an assessment of lawfulness vis-à-vis the observance of the rules of the invitation to tender, verification of the decisive facts which the administration may have determined incorrectly, and an assessment into the merits of the case, and finally a determination of whether the principles of natural justice have been observed by the contracting authority.[615]

[612] Schebesta (n 153) 78. See, also Hebly & Wilman (n 396) 77.
[613] Case C-171/15, *Connexxion Taxi Services BV v Staat der Nederlanden (Ministerie van Volksgezondheid, Welzijn en Sport) and Others* EU:C:2016:948 [2016], para 26.
[614] ibid.
[615] ibid. para 73.

5.7.3. Nature of the appeals system

The Dutch appellate system in procurement review is two-tiered. The Courts of Appeal undertake a trial *de novo* of the case on points of fact and on law.[616] Decisions of the Courts of Appeal may be appealed at final stage before the Supreme Court whose function is that of cassation, that is, pronouncing itself solely on points of law and of a proper motivation.[617] If an appeal from a first instance judgment only concerns a point of law, the parties may agree to appeal directly in cassation before the Supreme Court.[618] First instance decisions on provisional injunction may be appealed before the Courts of Appeal or before the Supreme Court directly.[619]

5.7.4. Administrative complaints

The Committee of Procurement Experts (the *Commissie van Aanbestedingsexperts*) has been set up within the Ministry of Economic Affairs and Climate Policy which has the function of hearing complaints and giving non-binding advice.[620] There are two main differences between the Dutch Committee and the Maltese General Contracts Committee when it comes to dealing with complaints. Firstly, is the fact that the Dutch Committee has a very clear function of issuing a non-binding opinions and has also issued detailed rules of practice regarding the handling of complaints.[621] On the contrary, Maltese law does not prescribe any specific outcome for complaints heard by the General Contracts Committee and there are no rules of practice governing the conduct of the complaint procedure or even of how complaints may be received and by whom.

Secondly, the Dutch Committee is better set up to handle complaints impartially. There is definitely a relationship between the Committee and the Dutch Ministry for Economic Affairs and Climate – the Committee is housed within the Ministry. The Minister has the power to appoint, re-appoint and to suspend the members of the Committee furthermore, the budget of

[616] Dutch Code of Civil Procedure, Article 332
[617] ibid. Article 398, paragraph 1.
[618] ibid. Article 398, paragraph 2.
[619] ibid. Article 337 and 401a, respectively.
[620] Article 2, paragraph 2, of the Decree of the Minister of Economic Affairs of March 4, 2013, no. WJZ / 3008668, establishing the Committee of Procurement Experts, published in the Government Gazette no. 2013, 6182 on the 7th March 2013. See also Article 4.27 of the Public Procurement Act.
[621] Chris Jansen, Joop Janssen and Jacobien Muntz-Beekhuis, *Extra-Judicial Complaints Review: First Experiences of the Dutch Public Procurement Experts Committee* in *International Public Procurement Conference, Book of Proceedings, 14th-16th August, Dublin, Ireland* (2014), 1233.

the Committee is financed by the Ministry, and the Ministry and the Committee share staff.[622] Notwithstanding the above, the Committee's impartiality and independence is warranted by the Decree which establishes the Committee.[623] The Committee's members are selected for their expertise in public procurement and are not public officers. To the contrary the Maltese General Contracts Committee is chaired by the Director of Contracts himself, whose office is responsible for conducting tender procedures, and the functions of the General Contracts Committee also include advising contracting authorities and making recommendations for the award of contracts.[624] Therefore, in the Maltese complaints system there is no arm's length between the Committee and contracting authorities. In the Dutch system, the contracting authorities themselves may bring issues to the Committee for resolution.[625] However, this feature has been criticised for being impractical since contracting authorities do not actually need to submit complaints.[626]

Since 2019 the Dutch Ministry of Economic Affairs and Climate Policy has been working on developing measures to amend the Public Procurement Act to ease the case load of the Committee of Procurement Experts and to provide other avenues for bidders to raise complaints. In particular, the intended measures include obliging all contracting authorities to set up a complaints desk to be the first port of call for bidder complaints free of charge, and to limit the Committee's remit solely to complaints made before the date of tender submission.[627]

5.7.5. Alternative dispute resolution

As has already been indicated, the Committee of Procurement Experts has the function of mediating between parties.[628] The considerations already made with respect to the Committee also apply to the Committee in its mediation function. An important characteristic of the Committee's procedure is that it is the Committee itself which decides whether to go for mediation or whether to issue a non-binding opinion, and not the complainant.[629] It has been

[622] ibid. 1232.
[623] Article 3(2) of the Decree establishing the Committee of Procurement Experts.
[624] Public Procurement Regulations 2016, Regulation 72.
[625] Article 7(1) of the Decree establishing the Committee of Procurement Experts.
[626] Jansen, Janssen & Muntz-Beekhuis (n 621) 1234.
[627] Ministry for Economic Affairs & Climate Policy, Public Procurement Monitoring Report of the Netherlands (2021) <https://www.rijksoverheid.nl/documenten/rapporten/2021/04/30/public-procurement-monitoring-report-of-the-netherlands> accessed 18 December 2021, 8.
[628] Article 3(2) of the Decree establishing the Committee of Procurement Experts.
[629] ibid. 1236.

observed that the Committee has been so far reluctant to conduct mediation processes and invariably opts to issue a non-binding opinion.[630]

The Dutch system also admits arbitration to disputes relating to tender procedures if this possibility is envisaged in the tender documents.[631] This is unlike the French and Maltese systems which only admit arbitration in post-contractual disputes. The use of arbitration for tender disputes seems however, to have fallen into disuse.[632] Arbitration under the auspices of the Arbitration Council for Construction Disputes (the *Raad van Arbitrage voor de Bouw*) was a very popular form of dispute settlement for tenders for public works contracts.[633] The reason was that arbitration was the default dispute resolution method for works tenders under the Uniform Tender Rules (the *Uniform Aanbestedingsreglement*) of 1986, 1991 and 2001 but these has since been repealed and replaced by other rules where the specific provision for default arbitration has been removed.[634]

5.7.6. Cost of review proceedings

The Dutch review system suffers from high costs of proceedings. The Committee of Procurement Experts had been specifically introduced in 2012 since costs to pursue remedies before the courts were deemed to be prohibitive to small and medium sized enterprises.[635] The Dutch monitoring report submitted to the European Commission in 2021 has again indicated 'that economic operators are hesitant to go to court because of high costs (especially in the case of SMEs)'.[636] It is for this reason that the introduction of a legal obligation to set up complaints desks housed within each and every contracting authority, and which are without cost to bidders is being considered.

---

[630] ibid.
[631] Dutch Public Procurement Act, Article. 4.26.
[632] Association of the Councils of State and Supreme Administrative Jurisdictions, 'Recent case-law of the Court of Justice of the European Union and of the (Supreme) Administrative Courts in public procurement litigation', Netherlands National Report (2015) <https://www.aca-europe.eu/index.php/en/seminars/475-seminar-in-helsinki-from-22-to-23-october-2015> accessed 18 December 2021, 3.
[633] Schebesta (n 153) 76.
[634] Sylvia de Mars, *The Influence of Recent Developments in EU Procurement Law on the Procurement Regulation of Member States: A Case Study of the UK, the Netherlands and France* (PhD, University of Nottingham 2010) <http://eprints.nottingham.ac.uk/12208/1/536559.pdf> accessed 18 December 2021, 29 et seq.
[635] Jansen, Janssen & Muntz-Beekhuis (n 621), 1232.
[636] Ministry for Economic Affairs & Climate Policy, 'Public Procurement Monitoring Report of the Netherlands' (2021) 7
<https://ec.europa.eu/docsroom/documents/47780/attachments/1/translations/en/renditions/native> accessed 16 April 2023

5.7.7. Duration of review proceedings

The Dutch review system is similar to the Maltese and French systems in that it imposes a time limit of thirty (30) days from when a notice of the conclusion of the contract has been published or, if a notice has not been published, six (6) months from the conclusion of the contract within which to file an application for the post-contractual remedy of rendering a contract ineffective.[637] Since precontractual remedies are governed by the ordinary provisions and principles relating to precontractual liability and tort, the ordinary five (5) year prescriptive term applies.[638] This said, it is common practice for contracting authorities to specify a term for the filing of objections in the tender document itself.[639] According to the last monitoring report submitted by the Netherlands to the European Commission, first instance courts tend to plan court sessions within two (2) months for injunctive relief, and judgment is usually issued within six (6) weeks.[640] The Committee of Procurement Experts is considerably faster having a track record of processing complaints concerning urgent tender procedures within thirty (30) days, and other complaints within seventy-two (72) days.[641]

The time limit for filing an appeal before the Courts of Appeal is of three (3) months.[642] In the case of appeals from judgments in summary proceedings, this term is reduced to four (4) weeks.[643] An appeal in cassation before the Supreme Court must also be brought within a time limit of three (3) months for ordinary proceedings and within eight (8) weeks for summary proceedings.[644]

5.8. Conclusions drawn from the comparative assessment

From the above assessment it seems that the character of the forum, that is whether it is a specialised procurement review body, the administrative courts or the civil courts, does not

[637] Dutch Public Procurement Code, Article 4.15, para 2.
[638] Dutch Civil Code, Book 3 Articles 307-310, available at <https://wetten.overheid.nl/BWBR0005291/2021-07-01#Boek3_Titeldeel11_Artikel307> accessed 19 December 2021.
[639] Daphne Broerse, Jan Jakob Peelen & Bart Vis, *Public procurement in The Netherlands: overview* (Thomson Reuters Practical Law, 2013) <https://uk.practicallaw.thomsonreuters.com/3-522-7902?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a266879> accessed 19 December 2021.
[640] Ministry for Economic Affairs & Climate Policy, 'Public Procurement Monitoring Report of the Netherlands' (2021), 8.
[641] Jansen, Janssen & Muntz-Beekhuis, (n 620) 1236.
[642] Dutch Code of Civil Procedure, Article 339, para 1.
[643] ibid. Article 339, para 2.
[644] ibid. Articles 402, para 1 and 2.

pose a problem for European harmonisation of procurement remedies. Indeed, all these may be considered to be first instance "courts" in the sense of article 267 of the TFEU.

What is more concerning for European harmonisation is that each of the jurisdictions assessed, but especially the Netherlands, seems to have a different remit of review which is in any case ill-defined in national law. It is rather national case law itself which shapes, often ambiguously, the extent of the judicial review to be conducted by first instance bodies. This marks a significant point of divergence in the implementation of the public procurement *acquis* within the Member States since where a decision might be impugned in some Member States for being manifestly erroneous factually, that same decision might not be impugned in other Member States, like the Netherlands, where the reasonableness of an act undertaken in the context of a tender procedure is sufficient to save it from being called into question. This creates review systems which are more lenient in some Member States and more stringent in others. The ECJ failed to take the opportunity to approximate the extent of review in the *Connexxion Taxi Services* case. Some clarity in this respect would be a welcome introduction.

A second point which might need a harmonising measure, relates to the cost of accessing the public procurement remedies provided in the Remedies Directive. Whereas in France such cost seems to be non-existent, in both Malta and the Netherlands it has become a contentious issue. The prohibitive costs firstly raise an issue *vis-à-vis* the principle of an effective remedy since they are effectively barring excess to review bodies. Secondly, they are also contradictory to the principles of fair competition and equal treatment since it is invariably the smaller economic operators which are excluded from making use of such remedies.

A final point of divergence is the use of informal remedies such as complaints systems for pending tender procedures. Whereas some jurisdictions like France do not formally envisage the receipt and processing of such complaints, other jurisdictions like the Netherlands have adopted highly developed systems which are still being refined. Their advantage is self-evident. Firstly, if complaints are handled correctly, contracting authorities may save their own time and resources by correcting errors and avoiding litigation which suspends tender procedures. Secondly, obtaining a remedy through filing a complaint with the administrative authorities is cheaper and faster for bidders than litigation. Filing a complaint may also be a way for bidders to gauge their case and avoid unnecessary or frivolous litigation.

Finally, the review bodies or courts would benefit if such complaint systems are in place. In the Dutch experience, a significant portion of their case load would be dealt with by the complaints system. The absence of any mention of such an informal remedy in the Remedies Directive may lead to hesitation in some Member States. In those Member States primed to use a complaints system, the absence of even some minimal harmonisation at EU level might lead to abuse by contracting authorities, which may have an interest in resolving disputes in this manner which is obviously less transparent than ordinary court litigation.

CHAPTER 6: PROPOSED CHANGES TO THE REMEDIES DIRECTIVES

Proposed changes to the Remedies Directives – Towards maximum harmonisation of damages

6.1. Introduction

This thesis has sought to examine whether there is need for further harmonisation of damages with respect to public procurement. It is clearly evident, at least from the Member States under study, that every Member State has its own laws of damages, which in some cases vary quite a lot from one Member State to another. For instance, in France, where damages are considered to their maximum extent, the damages arising out of public procurement include *damnum emergens, lucrum cessans,* loss of chance and moral damages. Damages will be awarded if one establishes the causal link between the *faute* and the ensuing damage.

In the Netherlands, same as in France, damages comprise *damnum emergens* (costs incurred, legal proceedings for the award of damages, bid preparation costs and bid participation costs), *lucrum cessans*, and loss of chance (namely, the loss of opportunity to win the public contract). Costs seem to be the residual damages if an action for loss of profits or lost opportunity is not possible.

One question which arises is whether there should be a cap on damages or should the domestic courts be free to decide on the damages on a case-by-case basis.

This question seems to confirm that there is need for the harmonisation of remedies in the field of public procurement. Therefore, to this end, amendments to the Remedies Directives will be proposed, given that damages remain to a certain extent unregulated. This despite the coming into force of the amending Remedies Directive 2007/66, which is the first substantial amendment to both Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts ("the Public Sector Remedies Directive") and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors ("the Utilities Remedies Directive").

6.2. The types of damages and the shedding away of judicial autonomy in the field of damages

In summation, the types of damages that have been identified throughout this study are :

i) *Damnum emergens* (material damages), which includes the costs of participation in a tender;
ii) *Lucrum cessans* (loss of profits);
iii) Loss of chance, namely demonstrable loss of business opportunities. Plaintiff has to prove that if there was no breach then the injured bidder would have stood a good chance to be awarded the contract;
iv) Curricular damage which prevents the company from enhancing its professional curriculum;
v) Legal interest from the date of conclusion of the public contract to the date of compensation;
vi) Penalty clause independently of the proof of damages, for instance, for delay in the execution of the public contract and for non-performance of obligations; and
vii) Non-pecuniary damages (moral damages).

For these damages to be awarded, an onerous burden of proof is placed on the injured bidder, who must show that he had a valid bid and that through that bid he should have been awarded the public contract.

Some of these forms of damages are also found in an action for damages that can be brought against the European Union in terms of article 268 TFEU and the second paragraph of article 340 TFEU, whereby the European Union can be held to be non-contractually liable for any compensation in damages that may be caused by the European Union's institutions or servants as a result of the performance of their duties. In this respect, Lenaerts notes that the damage has to be proved and attributes the following criteria for damages, which criteria are based on the Court of Justice jurisprudence:

i) The damage for which compensation is sought must be actual and certain:

> By contrast, damage that is purely hypothetical and indeterminate does not confer an entitlement to compensation. The damage claimed by the applicant may include material damage in the form of a reduction in a person's assets

(*damnum emergens*) or loss of profit (*lucrum cessans*), non-material damage and future damage.[645]

ii) Loss of profit - Lenaerts states that under this head of damages, the applicant must show that 'it was legitimately entitled in all the circumstances to make the profit and was only frustrated by the unlawful act of the Union institution.'[646]

iii) Nonmaterial damage – 'Where non-material damage is found, equitable damages (rendered *ex aequo et bono*) or sometimes symbolic damages may be awarded.'[647]

iv) Future loss or damage – On this head of damages, Lenaerts argues that there has been a positive change in the Court of Justice jurisprudence, in the sense that the Court:

> moderated its stance under the second paragraph of what is now Art. 340 TFEU when it held that a claim for compensation for damage that was to materialize only in the future, yet was foreseeable with sufficient certainty, was admissible. It reached this view on the grounds that it might prove necessary to prevent even greater damage to bring the matter before the Court as soon as the cause of damage was certain, and that most Member States recognised an action for declaration of liability based on future damage which was sufficiently certain.[648]

Regarding the *quantum* of damages, Lenaerts observes the following:

> The award of damages is intended to restore the injured party's financial situation to what it would have been in the absence of the unlawful act or as close as possible thereto. The quantum of the damage is therefore generally determined by comparing the actual assets of the person concerned with his notional assets in the event that he had not been affected by the wrongful act. An 'exact assessment' of the damage sustained is needed, but an approximate determination based on sufficiently reliable facts, preferably collected by an expert, will suffice if it is not possible to make an exact assessment.[649]

[645] Koen Lenaerts, Ignace Maselis & Kathleen Gutman, *EU Procedural Law* (UK: Oxford University Press, 2015) 528-529.
[646] ibid.
[647] ibid.
[648] ibid. 530.
[649] ibid.

Schebesta observes, with respect to the quantum of damages, that compensation in damages has to be 'commensurate' with the infringement:

> The requirements regarding the calculation of damages deriving from EC law is another question that merits attention. Despite the general provision in the Procurement Directive that the effect of the powers granted to the review body - including the award of damages - is left to the national legal system if not governed by the Directive, one must take the general principles into account: Under Member State liability that compensation "must be commensurate with the loss or damage sustained so as to ensure the effective protection for their rights".[650] The damages are therefore compensatory in nature, that is they are neither nominal nor necessarily punitive.[651]

v) Compensation in kind – Lenaerts notes that here too there was a shift in the Court's jurisprudence, mainly due to the ruling in *Galileo International Technology v Commission*, in which the General Court held that article 268 TFEU and the second paragraph of article 340 TFEU:

> Do not preclude the grant of compensation in kind and that the Union courts have the power to impose on the Union[652] any form of reparation that accords with the general principles of non-contractual liability common to the laws of the Member States, including, if it accords with those principles, compensation in kind, if necessary in the form of an injunction to do or not to do something.[653]

vi) Lenaerts also lists damage in case of the unlawful collection of a charge or the withholding of a payment, but this form of damage is outside the scope of this work.

vii) Lenaerts mentions other head of damages which include what he terms as the damage passed on to others, default and compensatory interest and that the 'Currency exchange rate for an award of damages to the extent applicable is that prevailing on the date of the judgment.'[654]

---

[650] *Brasserie and Factortame* (n 202) para 82.
[651] Hanna Schebesta, *Community Law Requirements for Remedies in the Field of Public Procurement: Damages,* European Procurement & Public Private Partnership Law 1/2010, 33.
[652] ibid. 531.
[653] Case T-279/03 Galileo International Technology and Others v Commission [2006] E.C.R. II-1291, para.63.
[654] Lenaerts, Maselis & Gutman, *EU Procedural Law* (n 645) 532-534.

With respect to precontractual remedies, the following remedies have been identified throughout this thesis:

i) The costs of the work time that was actually carried out by the bidder for the preparation of the tender to be submitted (the development of the work model);[655]
ii) Travel costs in connection with the compilation of the tender;
iii) General business costs (including applied know-how);
iv) Costs of legal counsel, accountant's advice, administrative expenses.

Hanna Schebesta comments that:

> Despite recent and substantial amendments to the Public Procurement Enforcement Directive 89/665/EC, the Directive leaves damages widely unregulated. The article clarifies EC requirements for damages in the field of public procurement by drawing on alternative sources of EC law.[656]

Schebesta adds that:

> One of the most contentious heads of damages is whether bidders should be compensated for the preparation of a bid. This concerns specifically the repeatedly iterated principle that in a tendering procedure, economic operators must bear the economic risks inherent in their activities the preparation of a tender bid being such an economic risk since competing for a contract never involves certainty as to the outcome of the procedure. Accordingly the CFI concluded that "It follows that the charges and expenses incurred by a tenderer in connection with his participation in a tendering procedure cannot in principle constitute damage which is capable of being remedied by an award of damages."[657]

[655] See Case T-160/03 *AFCon Management* para 98, Case T 13/96 *TEAM v Commission* paras 70-72, and Case T-203/96 *Embassy Limousine*s paras 75 and 97 regarding the right to reparation for losses incurred in connection with the preparations of a tender.
[656] Schebesta (n 651) 23.
[657] ibid. 33-34. Schebesta quotes Case T-160/03 *AFCon Management*, para 98, also Case T 13/96 *TEAM v Commission*, para 71, and Case T-203/96 *Embassy Limousines*, para 97: "As regards a tendering procedure, those economic risks include, in particular, the costs relating to preparation of the tender. The expenses thus incurred therefore remain the responsibility of the undertaking which chose to take part in the procedure, since the opportunity to compete for a contract does not involve any certainty as to the outcome of the procedure."

Yet, when there is proof that the bidder has been unjustly and unfairly excluded from the procurement process, then the aggrieved bidder has a right to reclaim, as a minimum, the costs for the preparation of the bid.

The Court in *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Stadt Wien* pronounced that:

> Since Directive 89/665 does no more than coordinate existing mechanisms in Member States in order to ensure the full and effective application of the Directives laying down substantive rules concerning public contracts, it does not expressly define the scope of the remedies which the Member States must establish for that purpose.[658]

It is argued that if there are no EU law requirements with respect to damages, then one has to look at the issue of damages from the legal perspective of each Member State. Yet, the Member States are obliged to award damages by keeping in view the general principles of EU law:

> The absence of detail in the secondary legislative instrument does not mean, however, that the national system of damages is free of requirements emanating from the European level. As alternative sources of law we can identify general principles of EC law, primary law, the regulation of public procurement in secondary legislation, and other sectors of secondary legislation. Most pertinent among the principles of EU law are the requirements of effectiveness and equivalence/non-discrimination, and – if framed as a third independent criterion rather than part of the effectiveness limb – effective judicial protection. This case law is commonly discussed under the heading of the term 'procedural autonomy'.[659]

Interestingly 'since contracting authorities in most cases constitute public bodies, and therefore State entities, the case law on Member State liability under Francovich and Brasserie can be an applicable source of EC law requirements.'[660] The *Francovich* case concerned the failure of the legislature to act '(i)t follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State

[658] Case C-92/00 *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Stadt Wien* [2002] ECR I-5553 para 58.
[659] Schebesta (n 651) 26.
[660] ibid.

can be held responsible is inherent in the system of the Treaty.'[661] The *Francovich* case lays down the conditions for liability for a Member States's failure to take all the measures necessary to achieve the result prescribed by a Directive. The conditions to be satisfied are:

(i) individual rights, namely that the Directive should confer a specific right to the individual;
(ii) ascertainability of the right's content, namely clarity; and
(iii) causality between the breach and loss/damage suffered.

In contrast to *Francovich, Brasserie du Pecheur SA v Germany (Case C-46/93)* and *R. v Secretary of State for Transport Ex p. Factortame Ltd (No.3) (Joined Cases C-46/93 and C-48/93) 1996* extended the Francovich principle on non-implementation to incorrect or incomplete implementation, or indeed any other kind of infringement:

> It was in Francovich that the Court founded an obligation to make good loss and damage from breach of a Member States' obligation under Community law. In Brasserie du Pecheur, an individual's rights to claim damages for violations of Community law were extended to "whatever the organ of the State whose act or omission was responsible for the breach". Based on the assumption that where contracting authorities are public bodies, and that a breach of the public procurement rules is qualified under the Brasserie-criteria, this paper argues that the Member State liability case law is pertinent to damages claims for breach of EC law public procurement rules.[662]

6.3. Member States liability for breaches of EU law

Under EU law, damages feature in the jurisprudence on effective judicial protection, in particular the *Francovich* case and the subsequent *Brasserie du Pecheur* case whereby it was held that liability in damages arose when:

i) A right granted by EU law has been breached;
ii) The breach is manifest and serious; and
iii) There is the nexus between the breach and the harm.

[661] Case C-479/93 *Andrea Francovich v Italian Republic* [1995] ECR I-3843, para 35.
[662] Schebesta (n 6), 27-28.

The same judgment states that, claims for damages fall within the judicial autonomy of the Member States as long as the principles of equivalence and effectiveness are observed.

Neither *Francovich* nor *Brasserie du Pecheur* were public procurement cases; the first public procurement case was *Commission v Portugal*.[663] This judgment held that liability should not be conditioned by the proof of fault, as otherwise this would result in inadequate judicial protection.[664]

In *Strabag and Others*, while the Court recognised that article 2(1)(c) of Directive 89/665/EEC falls within the judicial autonomy of the Member States, the Court of Justice delved into whether the Directive:

> [I]nterpreted in the light of the general context and aim of judicial remedy of damages, precludes a national provision from making the award of damages conditional on a finding that the contracting authority's infringement of the law on public contracts is culpable, even if there is a presumption of such culpability.[665]

In *Spijker*, the Court of Justice built on the *Francovich* and *Brasserie du Pecheur* cases, rather than on *Strabag*, and the Court of Justice held that article 2(1)(c) gives:

> [C]oncrete expression to the principle of State liability for loss and damage caused to individuals as a result of breaches of EU law for which the State can be held responsible. According to case-law developed since the adoption of Directive 89/665, but which is now consistent, that principle is inherent in the legal order of the Union. The court has held that individuals harmed have a right of reparation where three conditions are met: the rule of EU law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious, and there must be a direct causal link between the breach and the loss or damage sustained by the individuals.[666]

---

[663] *Commission v Portugal* (n 167); see also *Commission v Portugal* (n 172).
[664] *Commission v Portugal* (n 167), para 31, "ne saurait neanmoins être considerée comme un système de protection juridictionnelle adéquat dans le mesure où elle exige la preuve d'une faute ou d'un dol commis par les agents".
Translate: "they cannot nevertheless be considered as an adequate system of judicial protection in insofar as it requires proof of a fault or fraud committed by the agents"
[665] *Strabag and Others* (n 12).
[666] *Spijker* (n 180) para 87.

6.4. How Damages are determined and estimated under the Public Sector Remedies Directive

Council Directive 89/665/EEC (the Public Sector Directive) stipulates that Member States shall ensure the following measures as part of their review procedures:

> (a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;
>
> (b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;
>
> (c) award damages to persons harmed by an infringement.[667]

Article 2(1)(c) makes the first reference to damages, namely that a Member State is obliged to award damages to injured bidders. Yet the reference to damages is too vague and has been left to the interpretation of the individual Member States. Later on, in article 2(6), the Public Sector Directive states 'Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.'[668] This stipulation seems to be included to limit the damages that may be awarded.

Article 2(7) paragraph 2, adds that:

> Except where provided for in Articles 2d to 2f, the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law.
>
> Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in

[667] Directive 89/665/EEC, Article 2(1).
[668] Directive 2007/66/EC, Article 2(6).

> accordance with Article 1(5), paragraph 3 of this Article or Articles 2a to 2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement.[669]

Yet again, no reference is made to what type of damages may be awarded. This is left in the remit of the Member States as a result, presumably, of judicial autonomy. The Advocate General in *Combinatie Spijker Infrabouw* considered the meaning and effect of article 2(7) of the Utilities Remedies Directive:

> [W]hich provides that where damages are sought in relation to bid costs, claimants need only prove a breach of the applicable procurement rules, that they had a real chance of winning the contract, and that chance was adversely affected by the breach in question.[670] In other words, they need not establish that 'but for' the breach they would have won the contract, or that it eliminated entirely their chances of doing so. This provision is important both for its absence from Directive 89/665 and for its limited applicability: it does not apply to the remedies of set aside or ineffectiveness, and only applies to damages inasmuch as these relate to bid costs. The Advocate General inferred from this that the legislature wished to leave it open to Member States to apply different approaches to causation in other situations.[671]

The question arises whether the institute of damages should be left to the discretion of the Member States, in such a sensitive area of the internal market where public procurement constitutes an important element of the EU's GDP. It is felt that there is space for harmonisation of damages in the Member States, at least in the type of damages that may be claimed and may be awarded. One cannot harmonise the *quantum* because the *quantum* has to be adjudicated by the review body on a case-by-case basis.

The same can be said with respect to the burden of proof. This must be seen according to the particular jurisdiction that is overseeing the case.

Roberto Caranta depicts the current situation on damages arising out of the Remedies Directives as "a bold spirit, but timid rules", stating that:

---

[669] ibid. Article 2(7) paragraph 2.
[670] Case C-558/08 *Combinatie Spijker Infrabouw*, Opinion of AG Cruz Villalon, para 93-97.
[671] Abby Semple, *A practical guide to public procurement* (Oxford University Press 2015) 209.

> Directive 89/665/EEC, the first remedies directive, provided aggrieved economic operators with three remedies very much in line with French administrative law traditions, namely: interim relief, annulment and damages.
>
> Under article 2(5), the Member States may make annulment a condition precedent to damages. If this option is not chosen, the second phrase of Article 2(6) (now article 2(7)) allows the Member States to 'provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement'. Many Member States have availed themselves of this option.
>
> Directive 92/13/ECC on damages in the utilities sectors goes one step beyond Directive 89/665EEC by providing under Article 2(7) that damages for bid cost are only conditioned on the proof of a real chance of winning the contract.
>
> The provisions on damages were not directly affected by the amendments brought about by directive 2007/66/EC. This directive however introduced cases of ineffectiveness of the contract concluded in breach of EU law, therefore somewhat limiting the potential scope of application of Article 2(7) of Directive 89/665/EEC.
>
> Legislative harmonisation concerning damages is very 'light'. More specifically, the remedies directives are totally silent both on the conditions for liability and, beyond the very limited rules in Article 2(7) of Directive 92/13/EEC, about the heads of recoverable damages and the burden of proof.[672]

The OECD's Public Procurement Review and Remedies Systems in the European Union, makes the following observation on damages:

> With regard to the calculation of damages, the tender costs (damnum emergens) can be reimbursed in all Member States. Differences apply to lost profits (lucrum cessans). At least in Denmark, Finland, Germany, Hungary, Latvia, Lithuania, the Netherlands, Portugal, Sweden and the United Kingdom, lost profits can be awarded, and in France if the claimant had a serious chance of winning the contract (more than just a chance). As mentioned above, usually the tenderer has

[672] Caranta (n 179) 2-3.

to prove that he/she would have had a real chance of winning the contract that was affected by the unlawful decision. If complainants do not satisfy this condition, they are merely entitled to the reimbursement of tender costs.[673]

6.5. Suggested amendments to the Directive in the field of damages

To this effect, it is proposed that article 2(1)(c) be amended to read as follows:

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

For a claim for damages to materialise, the following three elements have to concur:

a) *The act of the institution has to be unlawful, and this has to result in a sufficiently serious breach of a rule of law intended to confer rights to individuals;*
b) *The damage must be real, certain and quantifiable. It shall be incumbent on the injured bidder to bring forward the evidence of its existence and quantum; and*
c) *The nexus between the conduct of the contracting authority and the damage caused to the injured bidder has to established, which damage must be proved.*

Damages include, but not limitedly, the following heads:

i) *Damnum emergens, including the costs of participation in a tender and the costs to contest the legality of the procurement procedure;*
ii) *Lucrum cessans, depending on the quantum and the duration of the public contract;*
iii) *Loss of chance to be awarded the public contract, including loss of business opportunities and other costs in connection with participating in the procurement process;*
iv) *Demonstrable loss of other opportunities to participate in and win other tenders;*
v) *Curricular damage which captures all situations that prevent the injured bidder from enhancing its professional curriculum through professional and technical experience, which experience would allow the bidder to participate in other future procurement processes;*
vi) *Legal interest from the date of conclusion of the public contract to the date of compensation.*
vii) *A penalty clause may be levied independently of the proof of damages, including for delay in the execution of the public contract and for non-performance of obligations.*

[673] OECD (n 391) 24.

viii) Non-pecuniary damages."

Furthermore, the Public Sector Directive is silent on precontractual damages. To this effect, while recognising that this may be expensive and difficult to prove, yet it is proposed that the following heads of precontractual damages are included via a new subparagraph, namely article 2(1)(d) to read as follows:

> *"During the pre-contractual stage the injured bidder may claim inter alia the following damages:*
>
> *i) The costs of the work time that was actually carried out by the bidder for the preparation of the tender to be submitted;*
> *ii) Travel costs in connection with the compilation of the tender;*
> *iii) General business costs (including applied know-how); and*
> *iv) Costs of legal counsel, accountant's advice and other administrative expenses pertaining to the compilation of the tender.*"

Interestingly, the Public Sector Remedies Directive, article 2e, states as follows:

> In the case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) which is not covered by Article 2d(1)(b), Member States shall provide for ineffectiveness in accordance with Article 2d(1) to (3), or for alternative penalties. Member States may provide that the review body independent of the contracting authority shall decide, after having assessed all relevant aspects, whether the contract should be considered ineffective or whether alternative penalties should be imposed.[674]

This effectively means that Member States, besides applying the provisions of article 1(5), article 2(3) or article 2a(3), have an option of either providing for ineffectiveness in terms of article 2d(1) to (3) or apply alternative penalties. So now we have the introduction of penalties rather than damages. The review bodies of the Member States have the option of either considering the public contract ineffective, or to apply 'alternative penalties'. The introduction of 'alternative penalties' further complicates the remedies scenario, because it sets a different platform for remedies, away from the application of damages.

[674] Directive 2007/66/EC, Article 2e(1).

The Public Sector Remedies Directive, provides some clarity on what is intended to be a penalty namely, the imposition of fines on the contracting authority or the shortening of the duration of the contract:

> Alternative penalties must be effective, proportionate and dissuasive. Alternative penalties shall be:
>
> - the imposition of fines on the contracting authority; or,
> - the shortening of the duration of the contract.[675]

Yet, these penalties are directed towards the contracting authority that has published the tender and towards the tenderer who has been awarded the public contract and not towards the injured bidder.

Interestingly, the last sentence of article 2e(2) makes it clear that damages are out of the picture, namely that: 'The award of damages does not constitute an appropriate penalty for the purposes of this paragraph.'[676]

Furthermore, it can be observed that article 2e of the Public Sector Remedies Directive is reproduced *verbatim* in article 2e of the Utilities Remedies Directive.

6.6. Damages provided for in the Utilities Remedies Directive

Council Directive 92/13/EEC, the Utilities Remedies Directive, also provides its own legal base for damages arising out of public procurement infringements, which at times, are different from damages under the Public Sector Remedies Directive.

The first reference to damages is found in the preamble of the Utilities Remedies Directive:

> Whereas claims for damages must always be possible;
>
> Whereas, where a claim is made for damages representing the costs of preparing a bid or of participating in an award procedure, the person making the claim is not be required, in order to obtain the reimbursement of his costs, to prove that the contract would have been awarded to him in the absence of such infringement;[677]

[675] Directive 2007/66/EC, Article 2e(2).
[676] ibid.
[677] Directive 92/13/EEC, Preamble.

The Utilities Remedies Directive goes a step further than the Public Sector Remedies Directive. The Utilities Remedies Directive is unequivocally clear that the costs of preparing the tender and the costs for participating in the award procedure are to be classified as heads of damages. Furthermore, the injured bidder does not need to prove that the contract would have been awarded to him in the absence of such infringement. Therefore, the fact itself of an infringement of public procurement rules is of itself a legal basis for compensation in damages.

Additionally, article 2(1)(d) of the Utilities Remedies Directive states that 'in both the above cases, to award damages to persons injured by the infringement.'[678] This wording is identical to that of article 2(1)(c) of the Public Sector Remedies Directive, namely 'to award damages to persons injured by the infringement', adding the proviso:

> Where damages are claimed on the grounds that a decision has been taken unlawfully, Member States may, where their system of internal law so requires and provides bodies having the necessary powers for that purpose, provide that the contested decision must first be set aside or declared illegal.[679]

Furthermore, article 2(6) of the Utilities Remedies Directive stipulates that:

> [T]he effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.
>
> Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.[680]

Therefore, whilst this sub-article confirms that damages may be awarded, it fails to provide details on damages which may be claimed by the aggrieved bidder.

However, article 2(7) refers to the costs for the preparation of the bid and the costs associated with the participation in an award procedure, which heads of damages had already been mentioned in the preamble, as being two possible head of damages.

[678] ibid. Article 2(1)(d).
[679] ibid.
[680] ibid. Sub Article 2(6).

> Where a claim is made for damages representing the costs of preparing a bid or of participating in an award procedure, the person making the claim shall be required only to prove an infringement of Community law in the field of procurement or national rules implementing that law and that he would have had a real chance of winning the contract and that, as a consequence of that infringement, that chance was adversely affected.[681]

However, in this case, the aggrieved bidder simply has to prove that an infringement of EU law in the field of procurement or national rules implementing that law has taken place, that he would have had a real chance of winning the contract, and that, as a consequence of that infringement, the chance was adversely affected. Yet it is difficult to prove that the tenderer would have had a real chance of winning the tender.

Therefore, article 2(7) introduces the element of loss of chance, an element which is not mentioned, for instance, in the Public Sector Remedies Directive. For the element of chance to satisfy the criteria as a head of damages, the following elements need to subsist:

i) Proof of an infringement of EU law in the field of public procurement or a Member State's national law implementing that law;
ii) Prove that as a result of the abovementioned infringement, the injured bidder would have had a real chance of winning the public contract; and
iii) That as a consequence of that infringement, that chance was adversely affected, in the context of the public procurement process.

The element of chance as a head of damages, has been under consideration in the UK case *European Dynamics v HM Treasury*.[682] In this case, the Court held that this element of chance involves:

> Looking at projections and/or historical data to determine the value of the contract(s) in question, and in the case of a framework agreement taking account of the share of the work that the claimant might have expected to win. The percentage profit which the claimant would have earned on this amount is then calculated with reference to its actual pricing and accounts or other available

[681] ibid. Sub Article 2(7).
[682] *European Dynamics SA v HM Treasury* [2009], EWHC 3419 (TCC) (23 December 2019), see, in particular, para 22.

evidence and this amount discounted to reflect the payment of damages in advance of when amounts under the contract would have been paid.[683]

Therefore, contrary to the Public Sector Remedies Directives, the Utilities Remedies Directive provides more detail in defining and delineating which heads of damages are to be applied.

This leads to the understanding that there is need for harmonisation of the heads of damages in such an important public procurement sector. Not only harmonisation of the heads of damages across the Member States, but also harmonisation of damages in the Remedies Directives themselves, given that the latter provide for different heads of damages. This level of inconsistency and incoherency needs to be addressed, because it does not augur well for the principle of legal certainty, equivalence, non-discrimination and legitimate expectations which are general principles at the heart of EU law.

6.7. The need for clarity, certainty and consolidation with respect to damages – Proposed drafting for amendments of the Remedies Directives

The lack of consistency and coherency when dealing with damages is a cause of concern. Not only the Public Sector Remedies Directive and the Utilities Remedies Directive contain different provisions with respect to damages, and which need to be addressed, but also the heads of damages need to be clearly specified so as to achieve further harmonisation levels across the Member States.

To this effect, two propositions are provided. Firstly, it is proposed that either the Public Sector Remedies Directive and the Utilities Remedies Directive are merged with a view to have common provisions on damages. Alternatively, the provisions on damages should be revamped and elaborated with the heads of damages and then reproduced *in toto* in both Directives. Furthermore, new provisions on precontractual damages are suggested to be introduced.

Consequently, it is proposed that the current references to damages in article 2(1)(c) of both the Public Sector Remedies Directive and the Utilities Remedies Directive should be amended to read as follows:

[683] Semple (n 671) 227.

A) Pre-contractual damages

"*During the pre-contractual stage, the injured bidder may claim inter alia the following damages:*

i) The costs of the work time that was actually carried out by the bidder for the preparation of the tender to be submitted;
ii) Travel costs in connection with the compilation of the tender;
iii) General business costs (including applied know-how);
iv) Costs of legal counsel, accountant's advice and other administrative expenses pertaining to the compilation of the tender.

B) Post-award damages

"*Post-award damages include, without being limited to, the following:*

For damages to be awarded, the following three elements have to concur:

a) The act of the institution has to be unlawful and this has to result in a sufficiently serious breach of a rule of law intended to confer rights to individuals;
b) The damage must be real and certain and the injured bidder has to bring forward the evidence of its existence and quantum; and
c) There needs to be the nexus between the conduct of the contracting authority and the damage cause to the injured bidder, which damage must be proved.

Damages include, without being limited to, the following heads:

i) Damnum emergens, including the costs of participation in a tender and to contest the legality of the procurement procedure;
ii) Lucrum cessans, depending on the quantum and the duration of the public contract;
iii) Loss of chance to be awarded the public contract, including loss of business opportunities and other costs in connection with participating the procurement process;
iv) Demonstrable loss of other opportunities to participate in and win other tenders;
v) Curricular damage which captures all situation that prevent the injured bidder from enhancing its professional curriculum through professional and technical

experience, which experience would allow the bidder to participate in other future procurement processes;

vi) *Legal interest from the date of conclusion of the public contract to the date of compensation*

vii) *A penalty clause may be levied independently of the proof of damages, including for delay in the execution of the public contract and for non-performance of obligations.*

viii) *Non-pecuniary damages.*"

C) *Quantum*

The quantum of damages shall be at the absolute and sole discretion of the national courts of the Member States.

D) *Burden of proof*

The burden of proof shall lie on the aggrieved bidder."

6.8. Review bodies under the Public Sector Remedies Directive

The preamble of the Directive provides for the scenario that public procurement has now been liberalised and open to competition between the Member States themselves and the Member States and third countries respectively. Therefore, the Public Sector Directive insists on the necessity of transparency and non-discrimination. But this is not enough, there needs to be effective and rapid remedies in case of breaches of EU law or domestic law which is implementing EU law. The preamble notes that 'the absence of effective remedies or inadequacy of existing remedies deter Community undertakings from submitting tenders in the Member State in which the contracting authority is established'.[684] If this results to be the case, then the free movement of goods, services, persons and capital, which are the heart of the internal market will be impaired.

Article 1 of the Public Sector Directive adds that the:

> Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2014/24/EU or Directive 2014/23/EU. Decision taken by the contracting authorities may be reviewed

[684] Directive 2007/66/EC, Preamble.

> effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of public procurement or national rules transposing that law.[685]

This introduces the principle of rapid decision taking with respect to the infringement of public procurement rules.

Yet although the Directive sets the scene for effective, adequate and rapid remedies, it falls short from elaborating on the form and type of forum that will be provided for such remedies. Article 2(2) for instance is quite general and stipulates that '[t]he powers specified in paragraph 1 and articles 2d and 2e may be conferred on separate bodies responsible for different aspects of the review procedure.'[686] Therefore, the Directive does not specify the type and form of the forum but leaves this to the discretion of the individual Member States in line with the principle of judicial autonomy. Article 2(3) then states that '[w]hen a body of first instance, which is independent of the contracting authority, reviews a contract award decision'.[687]

The Directive emphasises the independence of the 'body of first instance' from the contracting authority.[688] If one had to consider the Public Contracts Review Board, which is the body of first instance under Maltese law, one doubts whether the PCRB conforms with article 2(3), in view that the PCRB members are appointed by the Prime Minister of Malta, who in that capacity also wears the hat of head of the public sector, which effectively means that he is also the "executive" head of the contracting authority. Therefore, at first instance, there seems to be a potential conflict of interest arising out of the fact that the Prime Minister of Malta appoints also the members of the PCRB. Doubts appear justified as to what extent the PCRB as the first instance body in matters of public procurement, is independent and impartial.

Furthermore, article 8 states that 'Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced'.[689] Here the Directive does not legislate on how these decisions can be 'effectively enforced' and is left to the individual discretion of the Member States. This leaves quite a vacuum, because one can interpret this that once that a decision has become *res judicata*, one can proceed with a garnishee order in

[685] ibid. Article 1.
[686] ibid. Article 2.
[687] ibid. Article 2(3).
[688] ibid.
[689] ibid. Article 8.

the case of an award of damages. However, there may be other cases where the decision may state that the tender has to be issued anew or cases where the aggrieved tenderer has to be awarded the tender. The lack of harmonisation of rules in this sphere may lead to incoherency and discrimination between the laws of the Member States.

Article 2(9) refers to review bodies which are not judicial in character. In this case, these bodies have to always provide 'written reasons for their decisions'.[690] It is proposed that the review bodies, whether at first instance or not, should always be judicial in character, given the technicality of the public procurement regulations and their application/implementation, and considering also the complexity of today's public contracts. Review bodies at first instance should at least be comprised of two lawyers who are well-versed in public procurement law, with one acting as chairman, and another member who is knowledgeable and technical on the public procurement issue in question. In this regard reference is to be made to the second sentence of the first proviso of article 2(9) which reads as follows:

> Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 234 of the Treaty and independent of both the contracting authority and the review body.[691]

In this case, if we take by way of example the Maltese scenario, it is the Court of Appeal in its superior jurisdiction which reviews the decision of the first instance review body on points of law only. Yet, if due to the fact that the body of first review has failed to take into consideration the facts and circumstances of the case and/or has failed to interpret them correctly, then the Court of Appeal's hands are tied because the Court of Appeal can only review the case on points of law. Therefore, the importance of having a judicial body at first instance stems also from this consideration in this important field of remedies.

The second proviso of article 2(9) of the Public Sector Remedies Directive, reads as follows:

> The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At

[690] ibid. Article 2(9).
[691] ibid.

> least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.[692]

It is submitted that the wording of article 2(9) should be clarified by stipulating mandatorily, that irrespective of whether there is "*any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it"*. Furthermore, any aggrieved person by a decision of a body of first instance has a right of appeal at second instance, which right of appeal on points of law is not limited, together with the *proviso* that in the case of a first instance body of review which is not judicial in character, the aggrieved bidder shall have a right of appeal not only on points of law, but also on points of fact.[693]

By virtue of this, the law would provide all the necessary safeguards, including constitutional to the aggrieved bidders. Yet ideally, this second instance body of review should be the Court of Appeal, as duly composed according to the judicial procedure of the individual Member States.

Furthermore, article 2a, subparagraph 2, second sentence, regarding the standstill period, states that:

> Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.[694]

The wording of this paragraph certainly requires improvement in the sense that it should be clearly specified whether the 'independent review body' is a first instance body or otherwise.[695] It is suggested that for the sake of clarity and legal certainty, it should be stated that in the case of exclusions, the aggrieved tenderer should have recourse to remedies at first and second instance.

---

[692] ibid.
[693] ibid.
[694] ibid. Article 2a(2).
[695] ibid.

Article 2d, paragraph 3, on ineffectiveness of public contracts, leaves much to be desired. As it stands, it leaves a lot of discretion to the national courts that could lead to legal uncertainty, discrimination, lack of coherency and transparency in matters involving delicate procurement processes:

> Member States may provide that the review body independent of the contracting authority may not consider a contract ineffective, even though it has been awarded illegally on the grounds mentioned in paragraph 1, if the review body finds, after having examined all relevant aspects, that overriding reasons relating to a general interest require that the effects of the contract should be maintained. In this case, Member States shall provide for alternative penalties within the meaning of Article 2e(2), which shall be applied instead.
>
> Economic interests in the effectiveness of the contract may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences.[696]

Not only it is not clear whether this is a first instance body or a second instance body, but this stipulation is also sanctioning "illegality" in cases of 'overriding reasons relating to a general interest', without defining what these overriding reasons are. So here the European Union is itself derogating from the rule of law principle because of what the Directive terms as 'overriding reasons relating to a general interest'![697] This is quite perplexing, because this provision of the law can be used to bypass the legality of the public procurement process.

Yet again, the legislator tries to interpret economic interests by defining them as those interests that 'would lead to disproportionate consequences.'[698] This begs the question whether we are on the side of the rule of law and legality, or on the side of statutory intended loopholes to avoid the public procurement process? It is noteworthy that this same article 2d, paragraph 3, does not even stipulate what happens when such circumstances occur, for instance, what are the remedies for the aggrieved bidder who has been proven correct? The complete restitution of the costs of the public contract? And what is the penalty for the perpetrator of the ineffectiveness, namely the contracting authority?

[696] ibid. Article 2d(3).
[697] ibid.
[698] ibid.

6.9. Review bodies under the Utilities Remedies Directive

The preamble of the Utilities Remedies Directive emphasises that the 'absence of effective remedies or the inadequacy of existing remedies' could deter economic operators from participating in the tendering process, with detrimental effects on competition, price, quality and the like.[699] *Ergo*, 'appropriate review procedures' have to be available for aggrieved economic operators in order to challenge any infringement of EU law or the domestic law which implements that law.[700] The desired effect can only be achieved if 'effective and rapid remedies' are made available.[701] The preamble acknowledges that this has to take into consideration the principle of judicial autonomy '[w]hereas account must be taken of the specific nature of certain legal orders by authorising the Member States to choose between the introduction of different powers for the review bodies which have equivalent effects.'[702]

The preamble also refers to a few options for this to be achieved, which includes:

> [T]he power to intervene directly in the contracting entities' procurement procedures such as by suspending them, or by setting aside decisions or discriminatory clauses in documents or publications.
>
> Whereas the other option provides for the power to exert effective indirect pressure on the contracting entities in order to make them correct any infringements or prevent them from committing infringements, and to prevent injury from occurring;
>
> Whereas claims for damages must always be possible*;*[703]

Another interesting part of the preamble calls upon the European Commission to take the necessary action *sua sponde* when it 'considers that a clear and manifest infringement has been committed during a contract award procedure'.[704] In such instance, the European Commission is duty bound to raise the infringement both with the competent authorities in the Member State concerned and also with the contracting authority. The ultimate result should be the rapid

[699] Directive 92/13/EEC, Preamble.
[700] ibid.
[701] ibid.
[702] ibid.
[703] ibid.
[704] ibid.

correction of the infringement. To this effect, conciliation services should be available to solve the dispute amicably.

Article 1(1) of the Utilities Remedies Directive stipulates that Member States:

> Shall take the measures necessary to ensure that, as regards contacts falling within the scope of Directive 2014/25/EU or Directive 2014/23/EU, decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of procurement or national rules transposing that law.[705]

Therefore, the Utilities Directive emphasises that the review should be effective and rapid, given the nature of the infringement of EU law or national law. Moreover, Member States, as per article 1(3), have to ensure that the review procedures are available:

> under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.[706]

Yet, the Utilities Directive stops short of defining what are these detailed rules which the EU Member States may establish, thus leaving a lot of discretion on the Member States, with the result being lack of uniformity, equivalence and legal certainty of what these detailed rules are. Therefore, there is space for more harmonisation in this area of law.

Furthermore, it is pertinent to observe that article 2(8)(9) regarding effective enforcement of review bodies and when review bodies are not judicial in character respectively, are the exact provisions that are found in the Public Sector Remedies Directive. This overlap could have certainly been avoided if there is one Remedies Directive that caters both for public contracts, utilities contracts and concessions.

Finally, article 2e(2) of the Utilities Remedies Directive with respect to infringements of the Utilities Directive can be further improved if it assumes a mandatory character, namely that Member States "*shall*" and not 'may':

[705] ibid. Article 1(1).
[706] ibid. Article 1(3).

> Confer on the review body broad discretion to take into account all the relevant factors, including the seriousness of the infringement, the behaviour of the contracting entity and, in the cases referred to in Article 2d(e), the extent to which the contract remains in force.[707]

For uniformity, equivalence and legal certainty to prevail, there is no room for discretion but for harmonisation of these relevant factors.

6.10. Towards more harmonisation of the bodies responsible for review procedures?

The Remedies Directives do not provide rules on the form and competence of review bodies. Review bodies are constituted according to the domestic laws of the Member States, according to their administrative law or civil law, and even by arbitration. Therefore, review bodies respect the judicial autonomy principle. But this elicits the question whether review bodies should be consistent in all Member States in terms of form and competence in order to achieve more harmonisation and integration of the internal market, given that ultimately public procurement is an economic sector which is assuming more importance for the EU's economy. This is becoming even more imperative because tenderers from across the Member States bid in other procurement markets of other Member States.

When commenting on the principle of judicial autonomy, Lenaerts observes that it is settled case law of the Court of Justice. He cites EU jurisprudence in this respect namely that:

> In the absence of [Union] rules in the field, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from [Union] law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, second, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by [Union] law (principle of effectiveness).[708]

The principle of judicial autonomy has to be seen within the perspective of the other EU law principles of equivalence and effectiveness. Judicial procedures, systems and organisations in

[707] ibid. Article 2e(2).
[708] Lenaerts, Maselis & Gutman (n 645) 107.

the Member States differ and at times they differ quite substantially as has been seen. In the absence of EU law on a particular matter, judicial autonomy sets in, whereby the Member State is to a certain extent free to adopt its own judicial systems and procedures. Yet, despite this, 'the national legal systems are under an important '*obligation de resultat''*, meaning that the enforceability of Union law rights must be ensured by virtue of the EU principles of equivalence and effectiveness.[709] Lenaerts adds that national judicial autonomy stems from the fact that EU law:

> does not have procedural law or law governing sanctions of its own, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Union law.[710]

Abby Semple recognises that even though the Remedies Directives provide only a limited degree of harmonisation, yet:

> Two general principles of EU law serve to buttress their presence in national legal systems. The principle of equivalence requires that the procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions. The principle of effectiveness requires that procedural rules must not render the exercise of rights conferred by EU law 'practically impossible or excessively difficult'[711]

This reflects the ruling on the Court in *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others et.*[712]

Yet, the Member States are still under the obligation to give full effectiveness to EU law and this can only be achieved if:

> individuals can assert before their national courts the rights that they derive from Union law. Accordingly, the Member States are under an obligation to designate the competent court or tribunal to which individuals may apply with a view to protecting the rights which they derive from the application of Union law.[713]

[709] ibid. 107.
[710] ibid. 108.
[711] Semple (n 671) 209.
[712] *Spijker* (n 180) para 91.
[713] Lenaerts, Maselis & Gutman (n 644) 108.

Therefore, in this important sector of public procurement, there is need for more harmonisation and that the procedural aspects should not be left entirely in the hands of the Member States, with the consequence being that:

> First, these national rules may impede the effective application of Union law and thereby affect its primacy and direct effect. Second, the uniform application of Union law may be jeopardised as a result of diverging national laws.[714]

Last but not least, one has also to look into the issue of time limits of the remedies. Member States are obliged to establish time limits in order to provide effective and rapid remedies in terms of the Remedies Directives. Otherwise, justice delayed is justice denied.[715] It transpires, for instance, that in the Netherlands the judicial process would normally not exceed 90 days, both for first instance and at appeal stage.

6.11. A new Regulation to replace the existing Remedies Directives?

Following this study, one may consider proposing that the current legal regime on remedies be not only consolidated, but also that the Remedies Directives be replaced with a Regulation. In this way, there will be full harmonisation of remedies in public procurement across the Member States, in particular in the areas of damages, review bodies, time limits. This move will also bring with it the removal of any remaining barriers to access to the public procurement markets of the Member States.

If this is not on the EU legislative agenda as yet, one can, as a bare minimum, consolidate the three Directives into one Directive, which Directive will be applicable to all forms of procurement across the Member States, public contracts, utilities and concessions.

Whether a Regulation replaces the legal regime or otherwise, there is need for more harmonisation of the Remedies regime, with a view to achieve more legal certainty, uniformity, equivalence, effectiveness, efficacy, celerity, clarity and non-discrimination in the application and implementation of the remedies that are afforded to the aggrieved bidder.

In particular, a new Regulation or a consolidation Directive on remedies, should establish clear heads of damages that can be availed of and review bodies that are independent and impartial both at first instance and at second instance.

---

[714] ibid. 109.
[715] See Case C-327/00 *Santex SpA v Unità Socio Sanitaria Locale n. 42 di Pavia, and Sca Mölnlycke SpA, Artsana SpA and Fater SpA* [2003] ECR I-1877 para 61.

6.12. Concluding Remarks

The Treaty on European Union ("TEU"), article 19(1), paragraph two, states that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.[716] The same obligation is also found in the Charter of Fundamental Human Rights of the European Union, article 13, namely that:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.[717]

Therefore, both the TEU and the Charter of Fundamental Human Rights of the European Union are an inspiration to move forward towards more harmonisation because it is only through enhanced harmonisation that effective legal protection can be afforded to the aggrieved tenderer/candidate.

The Remedies Directives only stipulate that Member States have to establish review bodies for the effective and rapid enforcement of procurement rules. But for there to be effectiveness and celerity in the decisions, there should be more harmonisation because otherwise one may experience discrimination which is generated by the same review bodies of the Member States who may indulge in lengthy judicial proceedings and in less effective decisions, who go out of the norm. Therefore, for the principles of effectiveness and rapidity to be achieved, one needs to move towards more standardisation and harmonisation of the review bodies of the Member States.

One has to achieve not only legal certainty but also judicial certainty. As per third recital of the Public Sector Remedies Directive, public procurement is today open to EU-wide competition and therefore the need for harmonisation is more impellent. The fourth recital refers to the market access for the public procurement market namely that if the remedies are inadequate or ineffective, this will deter/restrict 'Community undertakings from submitting tenders in the Member State in which the contracting authority is established; whereas, therefore, the Member States concerned must remedy this situation.'[718] It this is not achieved also through the review

[716] Consolidated Version of the Treaty on European Union [2016] OJ C202/1, Article 19(1) (Treaty on European Union).
[717] Charter of Fundamental Rights of the European Union (2016) Official Journal C202, Article 13.
[718] Directive 89/665/EEC, Fourth Recital.

bodies, then the imperfections in the *modus operandi* of the EU's internal market will perpetuate.

In Chapter 5, mention has been made of articles 2(8) and (9) of the Public Sector Remedies Directive and the Utilities Remedies Directive respectively, which lay down a number of minimum criteria regarding the nature of the composition and functions of domestic for a, namely:

i) The decisions of first instance bodies must be effectively enforceable.
ii) If first instance review bodies are not judicial in character, they must give reasons for their decisions in writing.
iii) If first instance bodies are non-judicial, their decisions must be subject to a review by a judicial body that is a 'court or tribunal' within the meaning of article 267 of the TFEU. That review must cover alleged illegal measures taken at first instance and alleged defects in the exercise of the powers conferred on the first instance body.
iv) The second instance body must be independent of both the contracting authority and the first instance review body.
v) The members of the second instance body must have the same security of tenure that is afforded to national judges and, at least the President of such body must have the same legal and professional qualifications required of members of the judiciary.
vi) The procedure before the second instance body must guarantee the *audi alteram partem* principle, namely that both sides are heard.
vii) The decisions of the second instance body must be legally binding.

It is proposed that the review bodies in the field of public procurement across the Member States should be constituted at first instance through an administrative law tribunal and at appeal level according to civil law, namely an appeal from the first instance administrative tribunal should he heard by an appeal court constituted in line with the judicial procedures of the Member States.

Article 2(9) of the Public Sector Remedies Directive clearly indicates that first instance review bodies need not be judicial bodies. This provision needs to be revisited with a view to aligning first instance tribunals more with the Treaty provisions and the general principles of EU law, thus first instance review bodies –oo - given also the complexity of public contra–ts - have to be judicial in character.

Review bodies should have permanence, compulsory jurisdiction, apply rules of law, independence, have security of tenure and their members should be persons with legal qualifications.

Rather than emphasising on the harmonisation of the review bodies, namely whether these should be constituted according to administrative law or civil law, one should emphasise that there should be harmonisation with respect to the review body's level of permanence, compulsory jurisdiction, the application of rules of law, independence and impartiality and security of tenure.

CONCLUSIONS

This thesis has posed the quest–on - "*Is there scope for further harmonisation measures of the current Remedies Directives with a view to achieve effective remedies*?"

It has also sought to answer two subsidiary questions, namely whether there is space for more harmonisation of public procurement law on damages and thus curtail the Member States' judicial autonomy in this area; and whether there is scope to harmonise further the review bodies in the Member States in order to achieve more effective remedies.

The thesis question was partly inspired by the Treaty on European Union's emphasis on ensuring effective legal protection for all aspects of European Union law. In fact, the Treaty on European Union stipulates that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.[719] The Charter of Fundamental Rights of the European Union reiterates the right to effective remedies 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article'.[720] In this respect, Craig and de Burca comment that 'A robust line of cases in the early 1990s highlighted the tension between the emphasis on national procedural autonomy and the requirement that national remedies must secure the effectiveness of EU rights'.[721]

Within this framework, this thesis has certainly proved that there is need for further harmonisation of the current review bodies and remedies, including the harmonisation of the heads of damages. Not only there is need for this harmonisation, but there is also the need to consolidate the three Remedies Directives into one directive in order to achieve more coherency, uniformity, legal certainty, effectiveness and equivalence . This thesis has confirmed the current approach which places emphasis on effective, adequate judicial protection and on the domestic courts' duty of sincere cooperation, namely that 'the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'.[722]

[719] Treaty on European Union, Article 19.
[720] ibid. Article 47.
[721] Craig and de Burca (n 201) 269.
[722] Treaty on European Union, Article 4(3). This article on sincere cooperation obliges the domestic courts to give effective enforcement to EU law.

In order to prove the research question, reference was made to the review bodies and the heads of damages from a selection of Member States, namely, Italy, France, the Netherlands and Malta. A review of the legal and judicial regimes of these Member States, revealed that these Member States have their own legal traditions of what comprises the heads of damages and their own review bodies set up according to their national law. With respect to damages, most Member States under review, attribute heads of damages which are much wider and diversified than the damages outlined in the Remedies Directives. The same applies to review bodies, whereby each Member State has its own review bodies which are constituted according to national law and with their own peculiarities, which after all reflects the judicial autonomy of the Member States.

Yet, it is clear that the lack of harmonisation of review bodies and heads of damages, probably in part due to the judicial autonomy of the Member State, is another obstacle to the internal market, because all economic operators in the field of public procurement expect that they are treated at a level playing field when their disputes reach the litigation stage.

Should some elements of the judicial autonomy be sacrificed in order to achieve more harmonisation in public procurement? The answer is definitely 'yes' because throughout these proposals for a change in the Remedies Directives, care has been taken not to trample on the principle of judicial autonomy, but at the same time, to suggest amendments that enhance the harmonisation of remedies while still respecting the judicial autonomy of the Member States. The suggested changes, if properly legislated and respecting the right balance, can enhance the harmonisation of effective remedies across the Member States.

The suggested amendments strike the right balance so as to find peaceful co-existence between the Member States' judicial autonomy and enhanced harmonisation in the field of effective remedies. The proposed amendments seek to bring more coherency, uniformity, equivalence and legal certainty in the Member States' *corpus* of law. This position seems to tally with Craig and de Burca's views on national remedies for EU rights, who consider the current approach to be a balancing act between effective judicial protection and national procedural autonomy:

> [I]t requires national courts to strike an appropriate, proportionality-based, case-by-case balance between the requirement of effective judicial protection for EU law rights and the application of legitimate national procedural and remedial rules. In deciding whether a national rule or principle could undermine the exercise of an EU law right, national courts must weigh the requirements of

> effectiveness and equivalence in the light of the aim and function of the national rule, bearing in mind also the importance and objective of the EU right in question.[723]

The amendments proposed to the Remedies Directives lead to better and enhanced legal safeguards, with a view to achieve effective remedies. Remedies in public procurement are already available in the Member States, but in order to have effective and rapid remedies, there is need for more harmonisation of the Member States domestic laws.

Therefore, given the proof of the lack of harmonisation of public procurement damages across the Member States, and advocating that there should be more harmonisation, the best practices in the Member States studied in this thesis have been identified, and concrete harmonisation measures that should be reflected in the Remedies Directives have been proposed. It would be up to the European Commission whether to propose draft legislation to the European Parliament and the Council with a view to harmonise further the Member States' civil law and/or administrative law to cater for harmonisation of the review bodies and the heads of damages, rather than leaving the current *status quo* whereby every Member State has its own heads of damages and review bodies.

The following heads of damages that have been identified in this thesis should be uniform across the Member States: *damnum emergens, lucrum cessans*, loss of chance, curricular damage and non-pecuniary damages. The Remedies Directives are silent on these heads of damages and therefore, there is scope for harmonisation of the heads of damages, given that the Member States already provide heads of damages that go beyond the concept of damages in the Remedies Directives, albeit in different modes and forms. It has also been suggested that legal interest should commence from the date of conclusion of the public contract to the date when compensation in damages is paid. All this depends on the aggrieved party showing that it had a valid bid and the nexus/causality between the injury/breach caused by the procurement process and the loss/damage suffered. Regarding the *quantum* of damages, this should ideally be left within the discretion of the national judge on a case-by-case basis, because the *quantum* of damages has to be commensurate with the gravity of the infringement. But the heads of damages should be harmonised across the Member States so as not to allow space for incoherent judgments.

[723] Craig and de Burca (n 201) 277.

Effective judicial protection can only be achieved if there is further harmonisation of the public procurement remedies in the Member States. This is not something new for EU law, because jurisprudence on damages in EU law is already elaborate, consistent and follows a line of case law, namely that when a right granted by the EU has been manifestly and seriously breached, and there is the link between the injury and the harm caused, then liability in damages can be found.

Therefore, one is not inventing the wheel when stating that there is need for more harmonisation of damages with a view to reach effectiveness. EU law on damages is already saturated and what is needed is the importation of this *corpus* of law into the Remedies Directives, while also capitalising on the Member States practices. Therefore, the issue of judicial autonomy arises only to a certain extent. Article 2(1)(c) of the Public Sector Directive is too vague when it stipulates 'award damages to persons harmed by an infringement'[724] without going into what constitutes the heads of damages.

Given that the concept of damages should be better defined and harmonised in the Remedies Directives, it is suggested that article 2(1)(c) of the Public Sector Directive should be amended to the effect that three elements have to subsist for a claim for damages to materialise, namely that the act of the contracting authority has to be unlawful thus resulting in a sufficiently serious breach of a rule of law intended to confer rights to individuals. The damage must be real, certain and quantifiable, and there should be the link between the conduct of the contracting authority and the damage caused to the injured bidder. This thesis has also proposed a non-exhaustive list of damages that may be accorded by the domestic court.

A list of precontractual damages, has also been proposed, as the Remedies Directives are silent on precontractual damages. These include the preparation costs for the submission of the tender, travel costs pertaining to the compilation of the tender, general business costs, legal/accountant's fees and other administrative expenses.

This work has also highlighted the fact that the Utilities Remedies Directive contains its own references to damages, and that this does not augur well for legal certainty, uniformity and coherency with respect to effective remedies. The references to damages in the Utilities Remedies Directive are more elaborate than the references to damages in the Public Sector Remedies Directive. This supports the view that there is a need not only for harmonisation of

[724] Directive 2007/66/EC, Article 2(1)(c).

the heads of damages, but also for harmonisation of damages in the Remedies Directives, possibly by consolidating the three Remedies Directives into one Directive, or better a Regulation.

Moreover, it was also proposed that there should be a common clause in the Public Sector Remedies Directive and the Utilities Remedies Directive that defines what constitutes precontractual damages and post-award damages. This proposal although elaborate, is not exhaustive (with a view to allow space for judicial autonomy). It is also proposed that the *quantum* of damages should be left to the discretion of the Member States' domestic courts and that the aggrieved bidder should provide the proof.

With respect to review bodies, the Public Sector Remedies Directive puts the onus on the Member States to take the necessary measures to ensure that the decisions taken by the contracting authorities can be reviewed effectively, adequately and as rapidly as possible. Yet the Remedies Directives fail to prescribe the form and type of forum that is capable of pronouncing effective, adequate and rapid remedies.

The Public Sector Remedies Directive simply emphasises that the body of first instance should be independent from the contracting authority and that the decisions of the review body should be effectively enforced. Yet the form is left within the discretion of the Member States. This has led to question the issue of effective enforcement, due to the fact that each Member State has its own peculiar enforcement measures, which means that through this lack of harmonisation, discrimination and legal uncertainty may arise because of the legal incoherency.

Article 2(9) of the Public Sector Remedies Directive refers also to review bodies that are not judicial in character, in which case these bodies have to provide 'written reasons for their decisions'.[725] To remedy this situation, it is proposed that these review bodies, for the sake of effectiveness, equivalence, uniformity and legal certainty, should always be judicial in character and not of a quasi-judicial nature. Review bodies at first instance, whether established under civil law or administrative law, should comprise at least two lawyers who are well-versed in public procurement law, with one acting as chairman, and another member who is knowledgeable and technical with respect to public procurement law and policy. Therefore, the

[725] ibid. Article 2(9).

Public Sector Remedies Directive should as a minimum prescribe the composition of the review body at first instance.

Article 2(9) of the Public Sector Remedies Directive adds that the first instance review body decisions have to be judicially reviewed 'by another body which is a court or tribunal within the meaning of article 234 of the Treaty and independent of both the contracting authority and the review body.'[726] Yet again, this does not provide an adequate safeguard because if the review body of first instance is not properly constituted especially in cases of quasi-judicial bodies, the review body at second instance will be hampered in the sense that the second instance review body can only review the case on points of law. Therefore, if the review body at first instance has not properly grasped the points of fact, the aggrieved party will be prejudiced because at the second instance appeal, he can only raise points of law. Thus, it has been proved that there is need for enhanced harmonisation of first instance review bodies, as the lack of harmonisation of first instance review bodies may result in ineffective remedies for the aggrieved bidder.

The Remedies Directives are presently devoid of rules on the form, competence and jurisdiction of review bodies. It is thus appropriate to remedy these lacunae by prescribing the form, competence and jurisdiction of review bodies in the Member States, while still respecting the power of the domestic legal systems of the Member States to designate their own judicial bodies.

Therefore, it is recommended that where the review body is not judicial in character, any appeal from a decision of the review body should be not only on points of law but also on points of fact. The Directives should also specify that the second instance body of review should be the Court of Appeal as properly constituted by the domestic laws of the respective Member States.

It has been clearly demonstrated that the Remedies Directives with respect to review bodies and damages do indeed lack the necessary safeguards to achieve uniformity, legal certainty, equivalence and effectiveness, and thus there is dire need for more harmonisation of at least these two areas of law. There is also need to for consolidation of the Remedies Directives, in the sense that the provisions on review bodies and the heads of damages should be similar in both directives, whether it is for the public sector or the utilities sector.

[726] ibid.

If damages and review bodies remain unregulated at an EU law level, the general principles of legal certainty, non-discrimination and legitimate expectations, which rank among the higher norms of EU law, will continue to be jeopardised. Therefore, there is space for the judicial autonomy of the Member States to be curtailed, or for the right balance to be achieved between EU law and judicial autonomy, and this in order to give effect to higher norms of EU law, namely the achievement of truly effective remedies in public procurement.

The research question has been proved, namely that there is need for more harmonisation of the review bodies and heads of damages, because divergent domestic laws may result in ineffective and incoherent application of EU law, what Koen Lenaerts refers to as having an effect on the primacy and direct effect of EU law. One cannot any longer hide behind the veil of judicial autonomy. There are aspects of the Remedies Directives that need immediate harmonisation for there to be legal certainty and full direct uniform effect of EU law in the Member States. The divergent legal norms in the Member States, as evidenced by this thesis, prove that without the much needed harmonisation of public procurement remedies, there is no effective legal protection for aggrieved tenderers.

While one speaks of legal certainty, one rarely speaks of judicial certainty. The research question on the need for enhanced harmonisation of review bodies and heads of damages, has been answered affirmatively, namely that for judicial certainty to be achieved, there has to be enhanced harmonisation of the review bodies themselves and enhanced harmonisation of the damages that are awarded by these review bodies.

Enhanced harmonisation of these aspects does not necessarily militate against the principle of judicial autonomy, rather, one can speak of judicial autonomy with an underlying base of judicial certainty. There can be no proper judicial autonomy if the judicial certainty prerequisite is lacking. Thus, review bodies have to have permanence, compulsory jurisdiction, apply uniform rules of law, and they should be characterised by independence, impartiality and security of tenure, while applying in their awards heads of damages that are uniform across the Member States, albeit for the *quantum* that has to be decided on a case-by-case basis. As it stands now, as has been proven in this thesis, each Member State has its own domestic rules and thus the need for further harmonisation of the heads of damages and review bodies.

It has also been proved that the minimum harmonisation measures offered by the Remedies Directives jeopardise the safeguards of effective remedies, which can also lead to legal or judicial barriers to access effective and rapid remedies in the internal market.

This thesis has sought to offer a contribution to the progressive development of EU public procurement law in the field of effective remedies. In particular, it has addressed the general principle of judicial autonomy and whether the time is ripe to shed some of this autonomy – with the right balance in mind - in order to move from coordination to harmonisation of this important sector in the internal market.

Ultimately in answering the research question, there is indeed scope for enhanced harmonisation measures of the Remedies Directives with respect to review bodies and heads of damages, with the ultimate aim being the achievement of effective remedies. This is due to the fact, as evidence has shown, that the current Remedies Directives and the domestic laws of the respective Member States provide for various and diversified heads of damages, while the review bodies of the Member States lack uniformity of form, competence and jurisdiction.

With the current lack of uniformity, legal and judicial certainty are jeopardised, with the ultimate effect being the inadequate significance of the effectiveness of the judicial remedy which is sought by the aggrieved bidder.

BIBLIOGRAPHY

Books:

Arrowsmith S, *Public Procurement: The Continuing Revolution* (Kluwer Law International 2002)

Arrowsmith S, *The Law of Public and Utilities Procurement* (2nd edn, Sweet & Maxwell 2005)

Arrowsmith S, *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, vol 1 (3rd edn, Sweet & Maxwell Thomson Reuters 2014)

Bell J and Lichère F, *Contemporary French Administrative Law* (Cambridge University Press 2022)

Bianca, C.M. and Bianca, M. (2018) *Istituzioni Di Diritto Privato*. 2nd edn. Milan, Italy: Giuffrè.

Borghetti J.S and Whittaker S (eds), *French Civil Liability in Comparative Perspective* (Bloomsbury Publishing, an imprint of Hart Publishing 2019)

Bovis C, *EU Public Procurement Law* (Edward Elgar Publishing 2007)

Bovis C, *EU Public Procurement Law* (2nd edn, Edward Elgar Publishing 2012)

Bovis C, *The Law of EU Public Procurement* (2nd edn, Oxford University Press 2015)

Broberg MP and Fenger N, *Preliminary References to the European Court of Justice* (2nd edn, Oxford University Press 2014)

Craig P and Búrca De G, *EU Law: Text, Cases, and Materials* (5th edn, Oxford University Press 2011)

Craig P and de Búrca G, *EU Law: Text, Cases, and Materials* (7th edn, Oxford University Press 2020)

Ellison J and Vernon P, *The International Comparative Legal Guide to: Public Procurement 2012* (4th edn, Global Legal Group 2011)

Fairgrieve D and Lichère François, *Public Procurement Law Damages as an Effective Remedy* (Hart Publishing 2011)

Fournier S and Du Chambon PM, *Responsabilité Civile Delictuelle* (4th edn, Presse Universitaires de Grenoble 2015)

Gabriel M, *Remedies and Public Procurement Laws in Europe* (3rd edn, Baker & McKenzie 2009)

García Roberto Hernández, *International Public Procurement: A Guide to Best Practice* (Globe Law and Business 2009)

Gormley LW, *Gordian Knots in European Public Procurement Law Government Procurement Agreement; Standards - Utilities - Remedies; This Volume Contains Essentially the Papers of the Expert Meeting "GPA, Standards, Utilities, Remedies: Gordian Knots in European Public Procurement Law", Organised by the Academy of European Law, Trier, in Trier, on 13 and 14 June 1996. Gordische Knoten Im Europäischen Vergaberecht* (Bundesanzeiger 1997)

Gormley, LW, *Best practice, remedies and preventing corruption in public procurement* (Aan Wil besteed. Kluwer, Deventer 2003)

Halonen K-M, Caranta R and Graells Albert Sánchez, *Transparency in EU Procurements: Disclosure Within Public Procurement and during Contract Execution* (Edward Elgar Publishing 2019)

Hebly JM, *European Public Procurement: Legislative History of the 'Utilities' Directive: 2004/17/EC* (Kluwer Law International 2008)

Helby JM, Brants WJ and Kos MZ, *European Public Procurement Law: Legislative History of the 2007 EU Public Procurement Directive on Remedies* (Kluwer Law International 2011)

Kiiver P and Kodym J, *The Practice of Public Procurement: Tendering, Selection and Award* (Intersentia 2014)

Knight L, *Public Procurement: International Cases and Commentary* (Louise Knight and others eds, 1st edn, Routledge 2007)

Koninck CD and Ronse T, *The European Public Procurement Directives and 25 Years of Jurisprudence by the Court of Justice of the European Communities: Texts and Analysis* (Kluwer Law International 2008)

Lenaerts K, Maselis I and Gutman K, *EU Procedural Law* (Janek Tomasz Nowak ed, Oxford University Press 2015)

Lenaerts K, Maselis I and Gutman K, *EU Procedural Law* (Janek Tomasz Nowak ed, Oxford University Press 2015)

Matsushita M, Schoenbaum TJ and Mavroidis PC, *The World Trade Organization: Law, Practice, and Policy* (2nd edn Oxford University Press 2006)

Melis DM, *Unpacking Transparency in Government Procurement* (CUTS International 2004)

Reich A, *International Public Procurement Law: The Evolution of International Regimes on Public Purchasing* (Kluwer Law 1999)

Sánchez-Graells A, *Public Procurement and the EU Competition Rules* (Hart Publishing 2015)

Schebesta H, *Damages in EU Public Procurement Law* (Springer International Publishing 2016)

Schoenmaekers S, Devroe W and Philipsen N, *State Aid and Public Procurement in the European Union* (Sarah Schoenmaekers, Wouter Devroe and Niels Philipsen eds, Intersentia 2014)

Steiner E, *French Law a Comparative Approach* (2nd edn, Oxford University Press 2018)

Thai KV, *International Handbook of Public Procurement* (Khi V Thai and others eds CRC Press Taylor & Francis Group 2009)

Torrente A and Schlesinger P, *Manuale Di Diritto Privato* (20th edn, A Giuffrè 2011)

Trepte P, *Public Procurement in the EU: A Practitioner's Guide* (2nd edn, Oxford University Press 2007)

Treumer S and Comba M (eds), *Modernising Public Procurement: The Approach of EU Member States* (Edward Elgar Publishing Limited 2018)

Treumer S and Lichère François, *Enforcement of the EU Public Procurement Rules* (1st edn, DJØF Publishing Copenhagen 2011)

Wilman F, *Private Enforcement of EU Law Before National Courts: The EU Legislative Framework* (Edward Elgar Publishing 2015)

Xuereb PG, *Malta and the EU: Together in Change?: EDRC Conference 2001* (European Documentation and Research Centre, University of Malta 2001)

Chapters Published in Books:

Caranta R, "Many Different Paths, but Are They All Leading to Effectiveness?" in Steen Treumer and Lichère François (eds), *Enforcement of the EU Public Procurement Rules* (1st edn, DJØF Publishing 2011)

Comba M, "Enforcement of EU Procurement Rules. The Italian System" in Steen Treumer and Lichère François (eds), *Enforcement for the EU Public Procurement Rules* (1st edn, DJØF Publishing 2011)

Gabayet N, "Damages for Breach of Public Procurement Law: A French Perspective" in Fairgrieve D and Lichère F (eds), *Public Procurement Law: Damages as an Effective Remedy* (Bloomsbury Publishing 2011)

Gormley LM, "Some Procurement Issues Worth Recalling" in HD van Romburgh (ed), *Jaarboek van de Nederlandse Vereniging voor Aanbestedingsrecht 2000* (Samsom 2001)

Gormley LW, "Public Procurement" in Dennis Campbell and Charles Flint (eds), *The European Market- myth or reality?* (Kluwer Law International 1994)

Gormley, LW, "An Overview of Procurement Issues and Future Directions" in Xuereb, PG (ed.), *Malta and the EU: Together in Change?: EDRC Conference 2001* (European Documentation and Research Centre, University of Malta 2001)

Helby JM and Wilman FG, "Damages for Breach of Public Procurement Law. The Dutch Situation" in Duncan Fairgrieve and Lichère François (eds), *Public procurement law damages as an effective remedy* (Hart Publishing 2011)

Leczykiewicz D, "Loss and Its Compensation in the Proposed New French Regime of Extra-Contractual Liability" in Borghetti Jean-Sébastien and Simon Whittaker (eds), *French civil liability in comparative perspective* (Bloomsbury Publishing, an imprint of Hart Publishing, 2019)

Lichère F and Gabayet N, "Enforcement of the EU Public Procurement Rules in France" in Steen Treumer and Lichère François (eds), *Enforcement for the EU Public Procurement Rules* (1st edn, DJØF Publishing 2011)

Lichère F, "Transposition of the Public Procurement Directive in France: between Overimplementation and Questionable Implementation" in Mario Comba and Steen Treumer (eds), *Modernising Public Procurement* (Edward Elgar Publishing 2018)

Ponzio S, “State Liability in Public Procurement – The Case of Italy” in Duncan Fairgrieve and Lichère François (eds), *Public procurement law damages as an effective remedy* (Hart Publishing 2011)

Wissink MH and van Boom WH, “The Netherlands. Damages under Dutch Law” in FD Busnelli and U Magnus (eds), *Unification of Tort Law: Damages* (Kluwer Law International 1996)

Journal Articles:

“Recent Judgments or Orders Rendered by the Court of Justice of the European Union” (2016) 11 European Procurement & Public Private Partnership Law Review.

“Recent Judgments or Orders Rendered by the General Court of the European Union” (2016) 11 European Procurement & Public Private Partnership Law Review.

“Recent Judgments Rendered by the Court of Justice of the European Union, Case Summary 2016-2017” [2017] European Procurement & Public Private Partnership Law Review.

“Recent Judgments Rendered by the General Court of the European Union, Case Summary 2016-2017,” (2017) 12 European Procurement & Public Private Partnership Law Review.

“Special Issue on the Legal Remedies and Implications from the Fosen-Linjen Case · Damages in EU Public Procurement Law: Fosen-Linjen Can Hardly Be the Last Chapter” (2019) 14 European Procurement & Public Private Partnership Law Review 214.

Aschieri A, “Italian Requests for Preliminary Rulings: A Difficult Dialogue between National Courts and the CJEU” (2015) 10 European Procurement & Public Private Partnership Law Review 149.

Berends W-J, “Judicial Protection in the Field of Public Procurement: The Transposition into Dutch Law of Directive 2007/66/EC Amending the Remedies Directives” (2010) 26 Utrecht Journal of International and European Law 17.

Bernal Blay MÁ, “The Spanish Remedies System in Public Procurement: Strengths and Opportunities for Improvement” (2013) 8 European Procurement & Public Private Partnership Law Review 118.

Beumers T and Boom W.V *Tortious and Contractual Liability from a Dutch Perspective,* in Ernst Karner (ed*), Tortious and Contractual Liability – Chinese and European Perspective* (Vienna: Jan Sramek Verlag 2021), 223 - 245.

Bovis CH and Clarke CM, "Private Enforcement of EU Competition Law" (2015) Liverpool Law Review 49.

Bovis CH, "Access to Justice and Remedies in Public Procurement" (2012) 7 European Procurement & Public Private Partnership Law Review 195.

Calleja J, "Public Procurement Remedies within the Realms of the Laws of Malta" (2016) 11 European Procurement & Public Private Partnership Law Review 119.

Caranta R, "Damages in EU Public Procurement Law: Fosen-Linjen Can Hardly Be the Last Chapter" (2019) 14 European Procurement & Public Private Partnership Law Review 214.

Caranta R, "The Liability of EU Institutions for Breach of Procurement Rules" (2013) 8 European Procurement & Public Private Partnership Law Review 238.

Carvalho R, "The Remedy of Ineffectiveness: Reform Perspectives" (2017) 12 European Procurement & Public Private Partnership Law Review 374.

Ceruti M, "The Italian Mechanism of Paid Assistance in Compiling Procurement Documentation" (2018) 13 European Procurement & Public Private Partnership Law Review 234.

De Koninck C, "Country Report – Belgium – Pre- and Post Contractual Remedies" (2014) 9 European Procurement & Public Private Partnership Law Review 77.

Dougan M, "Addressing Issues of Protective Scope within the Francovich Right to Reparation" (2017) 13 European Constitutional Law Review 124.

Dunne N, "Antitrust and the Making of European Tort Law" (2015) 36 Oxford Journal of Legal Studies 366.

Flavier H and Froger C, "Administrative Justice in France: Between Singularity and Classicism" (2016) 3 BRICS Law Journal 80.

Fuentes M, "The Spanish Approach to the Remedy of Damages in the Field of European Public Procurement" (2016) 11 European Procurement & Public Private Partnership Law Review 49.

Ginter C and Väljaots T, “Excluded Tenderer’s Access to a Review in a Public Procurement Procedure” (2018) 13 European Procurement & Public Private Partnership Law Review 301.

Gormley L, “The New System or Remedies in Procurement by the Utilities” (1992) Public Procurement Law Review 259.

Gormley LW, “The Single Market Rules and the Enforcement Regime after 1992. By Andrew Cox. - A Guide to the Procurement Cases of the Court of Justice. By Sue Arrowsmith. (1995) 44 International & Comparative Law Quarterly 971.

Halonen K-M, “Finland - Is the Remedy of Contractual Ineffectiveness Truly Effective in Finland?” (2015) 10 European Procurement & Public Private Partnership Law Review 310.

Korogiannakis N, “Recent Case Law of the Gjeu on Interim Measures and Award of Damages in EU Public Procurement Law” (2017) 18 ERA Forum 95.

Lang G, “From Slow and Simple to Rapid but Complex Remarks on the Evolution of the Polish Remedies System” (2013) 8 European Procurement & Public Private Partnership Law Review 132.

Mimoso MJ and do Rosário Anjos M, “Administrative Arbitration in Public Procurement: a Look at Portuguese Law” (2019) 9 Juridical Tribune.

Monteverde GB, “Public Tenders and Public Contracts in Italy. The Issues That Large Groups Have to Face When Bidding/Contracting with Italian Awarding Bodies” (2008) 2 International In-house Counsel Journal 740.

Pardi L, “Italy - The Latest Reforms of the Italian Public Procurement Law – 1st Semester 2012” (2012) 7 European Procurement & Public Private Partnership Law Review 141.

Pardi L, “Italy · The New Italian Public Procurement and Concessions Code” (2017) 12 European Procurement & Public Private Partnership Law Review 57.

Raczkiewicz Z, “Compensation for Damages Incurred in Irregular Public Procurement Procedure” (2018) 13 European Procurement & Public Private Partnership Law Review 344.

Sanchez-Graells A, “The EFTA Court’s Fosen-Linjen Saga: Liability Threshold for Damages in Public Procurement: a there and back again walk” (2019) 14 European Procurement & Public Private Partnership Law Review 248.

Sanchez-Graells A, “You Can’t Be Serious Critical Reflections on the Liability Threshold for Damages Claims for Breach of EU Public Procurement Law After the EFTA Court’s Fosen-Linjen Opinion” (2018) 1 Nordic Journal of European Law 1.

Schebesta H, “Community Law Requirements for Remedies in the Field of Public Procurement: Damages” (2010) 5 European Procurement & Public Private Partnership Law 15.

Shapiro M, “Appeal” (1980) 14 Law & Society Review 629.

Struckmann K and Hodal P, “Private Enforcement of Contract Ineffectiveness: A Practitioner’s Point of View” (2014) 9 European Procurement & Public Private Partnership Law Review 27.

Swan CD, “Lessons from Across the Pond: Comparable Approaches to Balancing Contractual Efficiency and Accountability in the US Bid Protest and European Procurement Review Systems” (2013) 43 Public Contract Law Journal.

Treumer S, “Damages for Breach of the EC Public Procurement Rules from a Danish Perspective” (2004) 5 European Business Organization Law Review 563.

Trybus M, Blomberg P and Gorecki PN, “Public Procurement Review and Remedies Systems in the European Union” [2007] SIGMA Papers 41.

van Gerven W, “Bringing (Private) Laws Closer to Each Other at the European Level” (1993) The Institutional Framework of European Private Law 36 <https://www.casebooks.eu/documents/2005-01-18_WvG_Impact_courts_on_private_law.pdf> accessed 2 April 2020.

van Heeswijck, A, “The Dutch system of legal protection in public procurement procedures” (2015) 6 Public Procurement Law Review.

Vornicu R, “Special Issue on the Legal Remedies and Implications from the Fosen-Linjen Case Procurement Damages in the UK and France – Why so Different?” (2019) 14 European Procurement & Public Private Partnership Law Review 222.

Yukins CR, “The United Nations Convention against Corruption and The Uncitral Model Procurement Law” (2007) 36 Public Contract Law Journal 307.

Reports, Publications and Conferences:

“Competition Policy in OECD Countries 1996-1997” <https://www.oecd.org/daf/competition/prosecutionandlawenforcement/2089960.pdf> accessed September 2, 2021.

“Country Reports and Information on EU Countries - Malta Country Report to the European Commission under Directive 2014/23/EU on the Award of Concession Contracts, Directive 2014/24/EU on Public Procurement and Directive 2014/25/EU on Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sectors” (*Internal Market, Industry, Entrepreneurship and SMEs*) <https://single-market-economy.ec.europa.eu/single-market/public-procurement/country-reports-and-information-eu-countries_en> accessed November 22, 2021.

“European Commission, Regular Report on Malta’s Progress towards Accession, 2002” (October 9, 2002) <https://aei.pitt.edu/44585/1/malta_2002.pdf> accessed March 8, 2023.

“Report Updating the Commission Opinion on Malta's Application for Membership. COM (99) 69 Final, 17 February 1999” (*Archive of European Integration* January 1, 1999) <https://aei.pitt.edu/43459/> accessed March 8, 2023.

“Study to Explore Data Availability at the National Level in Order to Develop Indicators for Evaluating the Performance of the ‘Remedies Directives’ Annex 2: Country Fiches” (February 14, 2019) <https://ec.europa.eu/docsroom/documents/33982> accessed March 8, 2023.

Arrowsmith S and others, “EU Public Procurement: An Introduction” (Sue Arrowsmith ed) <https://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf> accessed March 7, 2023.

Association of the Councils of State and Supreme Administrative Jurisdictions, “Recent Case-Law of the Court of Justice of the European Union and of the (Supreme) Administrative Courts in Public Procurement Litigation” (*Seminar in Helsinki from 22 to 23 October 2015*) <https://www.aca-europe.eu/index.php/en/seminars/475-seminar-in-helsinki-from-22-to-23-october-2015> accessed December 18, 2021.

Bundeskartellamt, “Information Leaflet on the Legal Protection Available in the Award of Public Contracts” (*Bundeskartellamt*) <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Bekanntmachungen/Bekanntmachung%20-%20Public%20Procurement%20Information%20leaflet.html?nn=3590560> accessed September 2, 2021.

Chao-Duivis M and Bruggeman E, “Procurement Law in the Netherlands A General Overview over the System and Two Peculiarities Considered in More Detail - Annual Conference of the European Society of Construction Law” European Society of Construction Law International Conference Faculty of Law, University of Bucharest Conference Proceedings 24 and 25 October 2018.

Council of Europe, “European Judicial Systems CEPEJ Evaluation Report 2020 Evaluation Cycle (2018 Data)” <https://rm.coe.int/evaluation-report-part-1-english/16809fc058> accessed November 22, 2021.

Directorate-General for Regional and Urban Policy (European Commission) and PWC, “Stock-Taking of Administrative Capacity, Systems and Practices across the EU to Ensure the Compliance and Quality of Public Procurement Involving European Structural and Investment (ESI) Funds : Final Report.” (April 13, 2016) <https://op.europa.eu/en/publication-detail/-/publication/d1082259-0202-11e6-b713-01aa75ed71a1/language-en> accessed March 8, 2023

European Commission, “Country Reports and Information on EU Countries” (*Internal Market, Industry, Entrepreneurship and SMEs*) <https://single-market-economy.ec.europa.eu/single-market/public-procurement/country-reports-and-information-eu-countries_en> accessed November 22, 2021.

European Union Agency for Fundamental Rights and Council of Europe, “Handbook on European Law Relating to Access to Justice” <https://www.echr.coe.int/Documents/Handbook_access_justice_ENG.pdf> accessed March 8, 2023.

Ministère de l’Economie, des Finances et de la Relance “Fiche Technique - L'abandon De Procédure” (*economie.gouv.fr - Retour à l'accueil*) <https://www.economie.gouv.fr/files/files/directions_services/daj/marches_publics/conseil_acheteurs/fiches-techniques/mise-en-oeuvre

procedure/FT33%20_Abandon_de_proc%C3%A9dure_01042019.pdf> accessed November 18, 2021.

Ministry of Economic Affairs and Climate Policy, "Procurement Monitoring Report of the Netherlands 2018 - European Commission" <https://ec.europa.eu/docsroom/documents/34752/attachments/1/translations/en/renditions/native> accessed March 8, 2023

Neergaard U and Jacqueson C (eds), *Proceedings: Speeches from the XXVI FIDE Congress. The XXVI FIDE Congress in Copenhagen 2014. Congress Publication.*, vol 4 (Congress Publications 2014) <https://jura.ku.dk/english/fide2014/pdf/Volume4_Speeches_from_the_XXVI_FIDE_Congress.pdf> accessed March 8, 2023.

Public Procurement Review and Remedies Systems in the European Union (OECD Publishing 2007) <https://www.oecd-ilibrary.org/docserver/5kml60q9vklt-en.pdf?expires=1678268995&id=id&accname=guest&checksum=A18F7896B4881CD9F646A205E59A8C7E> accessed March 8, 2023.

Report Updating the Commission Opinion on Malta's Application for Membership of the European Union 2001.

Vogel L, "Macroeconomic Effects of Cost Savings in Public Procurement" <https://ec.europa.eu/economy_finance/publications/pages/publication16261_en.pdf> accessed March 8, 2023.

Thesis:

Bonello J, "Public Procurement in Malta – A Critical Analysis" (Faculty of Laws: University of Malta, LL.D. Thesis, 2005)

De Mars S, "The Influence of Recent Developments in EU Procurement Law on the Procurement Regulation of Member States: A Case Study of the UK, the Netherlands and France" (Thesis submitted to the University of Nottingham for the degree of Doctor of Philosophy, 2010) <http://eprints.nottingham.ac.uk/12208/1/536559.pdf> accessed 18 December 2021

Grima D, “An appraisal of Review processes under Maltese public procurement legislation” (Faculty of Laws: University of Malta, LL.D. Thesis, 2016)

Pachnou D, “The Effectiveness of Bidder Remedies for Enforcing the EC Public Procurement Rules: A Case Study of the Public Works Sector in the United Kingdom and Greece” (Thesis submitted to the University of Nottingham for the degree of Doctor of Philosophy, March 2003)

Refalo M, “Public procurement – A comparative perspective” (Faculty of Laws: University of Malta, LL.D. Thesis, 2003)

Sammut M, “Procurement by Tender – A Comparative analysis between the situation in Malta and in the European Union” (Faculty of Laws: University of Malta, LL.D. Thesis, 2003)

Sappiano G, “The EU Public Procurement Regime and its transposition in Maltese Law: A critical analysis in the light of current developments” (Faculty of Laws: University of Malta, LL.D. Thesis, 2013)

Vella CL, “The changing legal landscape for concession contracts in light of Directive 2014/23/EU” (Faculty of Laws: University of Malta, LL.D. Thesis, 2016)

Websites:

“Legislação Consolidada” (*Diario Da Republica Eletronico*) <https://dre.pt/web/guest/legislacao-consolidada//lc/168155479/202108311250/exportPdf/normal/1/cacheLevelPage?_LegislacaoConsolidada_WAR_drefrontofficeportlet_rp=indice%3E> accessed August 31, 2021.

“Public Procurement in the European Union - Practical Guide on Remedies” <http://www.sigmaweb.org/publicationsdocuments/35027835.pdf &gt> Accessed on October 10, 2020.

“Public Procurement: Commission Welcomes Adoption of Directive Improving Rights of Rejected Bidders” (*Commissione Europea,* November 15, 2007) <https://ec.europa.eu/commission/presscorner/detail/it/IP_07_1700> accessed March 8, 2023.

“Tendering Rules” (*business.gov.nl*) <https://business.gov.nl/regulation/tendering-rules/> accessed August 31, 2021

Allen & Overy, ‘The New Italian Public Procurement Code: A (Missed) Revolution?’ (*Allen & Overy*, 5 April 2023)

<https://www.allenovery.com/en-gb/global/news-and-insights/publications/the-new-italian-public-procurement-code-a-missed-revolution> accessed 1 August 2023.

Bianchi T and Guidi V (eds), "EU: The Comparative Survey on Public Procurement Systems across the PPN" (*Joinup*) <https://joinup.ec.europa.eu/collection/eprocurement/document/eu-comparative-survey-public-procurement-systems-across-ppn> accessed March 7, 2023.

Broerse D, Peelen JJ and Vis B, 'Public Procurement in the Netherlands: Overview' (*Thomson Reuters: Practical Law*, 1 June 2023) <https://uk.practicallaw.thomsonreuters.com/3-522-7902?transitionType=Default&contextData=%28sc.Default%29&firstPage=true> accessed 10 August 2023.

Chambers and Partners, 'The Reform of the Italian Public Procurement Code: Article: Chambers and Partners' (*Chambers and Partners*, 12 May 2023) <https://chambers.com/articles/the-reform-of-the-italian-public-procurement-code-6> accessed 3 August 2023.

European Commission "Country Reports and Information on EU Countries" (*Internal Market, Industry, Entrepreneurship and SMEs*) <https://ec.europa.eu/growth/single-market/public-procurement/country-reports_en> accessed August 31, 2021.

Fieldfisher (ed), 'Cassazione: Criteri Di Quantificazione Ed Onere Della Prova Del Risarcimento Del Danno Da Perdita Di Chance' (*Lavorosi Associazione Per Lo Sviluppo Del Lavoro*, 9 March 2020) <http://www.lavorosi.it/rapporti-di-lavoro/inquadramento-mansioni-mobilita-professionale/cassazione-criteri-di-quantificazione-ed-onere-della-prova-del-risarcimento-del-danno-da-perdita-di/> accessed 26 July 2023.

Houlden J and Jackson C, "Public Procurement in UK (England and Wales): Overview" <https://uk.practicallaw.thomsonreuters.com/8-525-0631?transitionType=Default&contextData=(sc.Default)&firstPage=true&gt> accessed September 13, 2020.

Iscaru A, 'The New Italian Public Contract Code: Setbacks, Innovation, and New SPP Requirements' (*SAPIENS Network*, 6 April 2023) <https://sapiensnetwork.eu/new-italian-public-contract-code-setbacks-innovation-spp/> accessed 1 August 2023.

Izzo L, 'Danno Emergente e Lucro Cessante: Cosa Sono e Quali Sono Le Differenze' (*Studio Cataldi*, 25 June 2015) <https://www.studiocataldi.it/articoli/18691-il-danno-emergente-e-il-lucro-cessante-cosa-sono-e-quali-sono-le-differenze.asp> accessed 11 August 2023.

Keraudren V and Schreiber T, 'Trucks Cartel: District Court of Amsterdam Confirms the Possibility for Entities to Bundle Multiple Damage Claims in One Action and Applies Uniformly Dutch Law to Those Claims' (*Lexology*, 4 November 2022) <https://www.lexology.com/library/detail.aspx?g=d48170dc-e884-4210-b482-4f9b8b85b466> accessed 11 August 2023.

Ministry for Economic Affairs & Climate Policy, "Public Procurement Monitoring Report of the Netherlands" (*Rapport | Rijksoverheid.nl,* April 30, 2021) < https://ec.europa.eu/docsroom/documents/47780/attachments/1/translations/en/renditions/native > accessed December 18, 2021.

Merlo I, 'Danno Da Perdita Di Chance e Grado Di Probabilità (Di Aggiudicazione)' (*Scuderi & Motta Avocati*, 20 September 2021) <https://scuderimottaeavvocati.it/danno-da-perdita-di-chance-e-grado-di-probabilita-di-aggiudicazione/> accessed 26 July 2023.

Pacciani F and Esposito A, "Public Procurement Laws and Regulations 2020" (January 31, 2020) <lt;https://iclg.com/practice-areas/public-procurement-laws-and-regulations/italy&gt> accessed September 13, 2020.

Puliti B, 'The Timeline of the New Italian Public Procurement Code' (*Aiternalex*, 10 May 2023) <https://aiternalex.com/en/public-procurement-en/the-timeline-of-the-new-italian-public-procurement-code/> accessed 10 May 2023.

Roosjen R, 'Limitation Period for Claims for Damages in the Netherlands' (*MAAK*, 11 May 2022) <https://www.maak-law.com/limitation-period-for-claims-for-damages-in-the-netherlands/> accessed 11 August 2023.

Satta F and Romano A, "Public Procurement in Italy" (*Lexology,* June 11, 2019) <https://www.lexology.com/library/detail.aspx?g=c1105ab2-0705-492a-8a30-11155a87b034> accessed March 8, 2023.

Studio Legale Vianello, 'Risarcimento Danno Perdita Della Capacità Di Lavoro' (*Avvocato Umberto Vianello*, 17 April 2018) <https://www.studiolexvianello.it/2016/11/28/nella-recente-

sentenza-n-20630-del-13-ottobre-2016-la-cassazione-esamina-criteri-calcolare-danno-perdita-della-capacita-lavoro-ed-danno-perdita-chan/> accessed 27 July 2023

The Malta Chamber of Commerce, "Report on Public Procurement Reform 2021" (*DG (contracts) and the Chamber of Commerce Recommendations*) <https://contracts.gov.mt/en/NewsAndInfo/Pages/DG(Contracts)-And-ChamberOfCommerceRecommendations.aspx> accessed September 9, 2021.

SAMENVATTING IN HET NEDERLANDS

Effectieve rechtsbescherming bij overheidsopdrachten: Het pleidooi voor meer harmonisatie

In dit proefschrift worden de (Rechtsbeschermings)richtlijnen betreffende beroepsprocedures bij overheidsopdrachten (Richtlijn 89/665/EEG en Richtlijn 92/13/EEG, zoals gewijzigd bij Richtlijn 2007/66/EG) onderzocht om na te gaan of er ruimte is voor een verdergaande harmonisatie bij de toekenning van schadevergoedingen door de nationale gerechten binnen de lidstaten. Daarnaast wordt er onderzocht of er ruimte is voor een verdere stroomlijning van de beroepsinstanties in de lidstaten die deze rechtsbescherming zouden moeten bieden.

Aangezien de huidige Rechtsbeschermingsrichtlijnen een minimumpakket aan eisen bevatten, geven zij de lidstaten - bij de implementatie daarvan - veel speelruimte. In combinatie met het beginsel van een onafhankelijke rechtspraak leidt dit tot verschillen tussen de lidstaten bij het bieden van doeltreffende rechtsbescherming aan benadeelde inschrijvers. De rechtsbeschermingsrichtlijnen hebben tot doel de rechtsbescherming in de lidstaten zoveel mogelijk te coördineren, met als uiteindelijk doel te komen tot een meer uniforme toepassing en doeltreffende rechtsbescherming binnen de lidstaten.

Op dit moment wordt de rechtsbescherming bij overheidsopdrachten en de daarvoor aangewezen beroepsinstanties hoofdzakelijk geregeld door de nationale wetgeving van de individuele lidstaten. Het Europees recht verplicht de lidstaten echter om ten minste een minimumniveau aan rechtsbescherming te bieden, terwijl de nationale systemen daarbinnen nog steeds vrij zijn om bepaalde keuzes te maken. Daarom stelt de auteur voor om de Rechtsbeschermingsrichtlijnen op een beperkte wijze aan te passen. Deze wijzigingen worden voorgesteld aan de hand van een rechtsvergelijkend onderzoek naar de rechtsbescherming in het aanbestedingsrecht in vier lidstaten.

Dit proefschrift stelt dat een verdergaande - geharmoniseerde - rechtsbescherming binnen de Europese interne markt noodzakelijk is. Daarmee kunnen alle benadeelde belanghebbenden gelijk worden behandeld, ongeacht de lidstaat waarbinnen zij de genomen beslissingen willen aanvechten.

Om de effectiviteit en gelijkwaardigheid in de geboden rechtsbescherming te bereiken, stelt de auteur dat het de voorkeur zou verdienen om de rechtsbescherming op het terrein van het aanbestedingsrecht op EU-niveau te borgen door middel van een Verordening in plaats van door middel van de huidige Rechtsbeschermingsrichtlijnen. Deze richtlijnen geven de lidstaten immers te veel zelfstandige beleidsruimte ten nadele van benadeelde partijen.

Hoofdstuk 1 van dit proefschrift geeft een beschrijving van de rechtsbeschermingsrichtlijnen.

Een beschrijving van het Maltese recht met betrekking tot overheidsopdrachten wordt in hoofdstuk 2 gegeven. Daarin wordt uitgebreid aandacht besteed aan het Maltese stelsel van schadevergoeding en de werking van de rechtsbescherming op het terrein van overheidsopdrachten.

In hoofdstuk 3 wordt het toekennen van schadevergoedingen door het Europese Hof van Justitie aan de hand van een aantal arresten van het Hof onderzocht. Vervolgens wordt in hoofdstuk 4 het toekennen van schadevergoedingen in drie lidstaten (Italië, Frankrijk en Nederland) nader geanalyseerd. In dit hoofdstuk vergelijkt en onderzoekt de auteur de verschillen in die lidstaten ten aanzien van het toekennen van schadevergoedingen. De in dit hoofdstuk gedane observaties dienen als de basis om te komen tot voorstellen voor een aanpassing van de rechtsbeschermingsrichtlijnen.

Hoofdstuk 5 richt zich op een voorstel tot aanpassing van de rechtsbeschermingsrichtlijnen door een harmonisatie van de beroepsinstanties op het terrein van aanbestedingsrecht door te voeren aan de hand van een rechtsvergelijkende analyse van de huidige beroepsinstanties in Malta, Frankrijk en Nederland.

Tot slot worden in hoofdstuk 6 concrete wijzigingen voorgesteld in de rechtsbeschermingsrichtlijnen op het gebied van de schadevergoedingen en de beroepsinstanties en hoe een verdere harmonisatie binnen de rechtsbescherming kan worden bereikt binnen de grenzen van het algemene beginsel van rechterlijke autonomie. De auteur houdt daarbij rekening met de in dit proefschrift vergeleken lidstaten gebruikelijke rechtspraktijk. Tevens zal worden nagegaan of de drie huidige rechtsbeschermingsrichtlijnen moeten worden geconsolideerd. Daardoor kunnen de schadevergoedingsbedragen en de vorming van beroepsinstanties voor zowel de overheid, de speciale sectoren als op het terrein van concessieovereenkomsten worden gestroomlijnd. Dit alles met het oog op de algemene uitgangspunten voor uniformiteit, rechtszekerheid, doeltreffendheid en eenvormigheid.

De verschillen tussen de nationale wetgevingen van de lidstaten voorzien in onvoldoende middelen voor de rechtsbescherming van benadeelde inschrijvers. Dit heeft tot gevolg dat benadeelde inschrijvers er soms van zullen afzien om bij aanbestedende diensten verhaal te halen, omdat zij geen hoge verwachtingen hebben van de resultaten van een in te stellen beroep. Een effectief rechtsmiddel is onvoldoende gebleken. Daarom zal een verdere stroomlijning van de rechtsbeschermingswetgeving binnen de lidstaten bedrijven meer stimuleren om in te schrijven op overheidsopdrachten in de interne markt.

Door meer deel te nemen aan aanbestedingsprocedures zal er meer concurrentie, eerlijkheid, transparantie, non-discriminatie en waar voor je geld zijn, aangezien er meer rechtszekerheid en consistentie zal zijn bij de toepassing van de aanbestedingsregels. Het eindresultaat zijn leiden tot betere procedures. Dat zal leiden tot een tijdige en effectieve correctie van oneerlijke en onrechtvaardige gunningen.

Een verdere harmonisatie zal ondernemingen in de lidstaten de voorgestane stimulans geven om meer vertrouwen te kunnen hebben in toekomstige aanbestedingen. Dit zal leiden tot meer deelname van marktpartijen en dus meer concurrerende inschrijvingen.