***‘If it ain't broke, don't fix it’?* EU requirements of administrative
oversight and judicial protection for public contracts**

By

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1. - Introduction

Interwoven[[1]](#footnote-1) with the expansion of substantive EU public procurement rules,[[2]](#footnote-2) EU law has developed an increasingly demanding body of legislation and case law oriented towards ensuring their effectiveness[[3]](#footnote-3). As stressed by the European Commission, “*it would not be possible to realise their objectives* *if economic operators would be unable to effectively ensure that the rights given them by the EU-rules were observed everywhere in the EU*”[[4]](#footnote-4). The development of this system of administrative and judicial review of public procurement decisions has built upon legislative interventions spanning the last three decades[[5]](#footnote-5). The basic structure of the system was first laid down with the adoption of Directives 89/665/EC[[6]](#footnote-6) and 92/13/EEC[[7]](#footnote-7), which crystallised the first wave of oversight and judicial protection requirements[[8]](#footnote-8). Later, with their revision by means of Directive 2007/66/EC[[9]](#footnote-9), the system consolidated a second wave of requirements that led to the creation of the important new remedies of standstill and ineffectiveness[[10]](#footnote-10). The CJEU has consistently amplified the force of the Remedies Directive[[11]](#footnote-11) by insisting in its explicit transposition by Member States so as to ensure that it “*does indeed guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before national courts*”[[12]](#footnote-12).

To a great extent, the development and refinement of this *acquis communautaire* regarding the mechanisms of administrative oversight and judicial protection that Member States need to set up in relation to their public contracts has taken place through the case law of the Court of Justice of the European Union (CJEU)[[13]](#footnote-13), which has emerged in the amorphous space located in the tension between the general principles of effectiveness of EU law and national procedural autonomy[[14]](#footnote-14). While general monitoring and oversight infrastructures have remained significantly underdeveloped despite the European Commission’s repeated efforts to impose EU-wide standards (of monitoring, data collection, statistical treatment, etc),[[15]](#footnote-15) and in line with the general development of the requirements for effective judicial protection of EU rights at national level[[16]](#footnote-16), the CJEU’s case law has consolidated a system of rules imposing effective administrative and judicial review of procurement decisions[[17]](#footnote-17), as well as the protection of a growing body of individual rights of the undertakings interested in gaining public contracts[[18]](#footnote-18).

Member States can channel challenges to procurement decisions either through a system of administrative review, or directly in proceedings in front of a judicial body. Thus, the architecture for the administrative oversight and judicial protection for public contracts has resulted in significant variation across Member States[[19]](#footnote-19), but the European Commission has been satisfied that compliance with EU law is the norm[[20]](#footnote-20). Currently, first-instance independent reviews are carried out by judicial bodies in 14 Member States and by an administrative body in the other 14 other Member States[[21]](#footnote-21), and it is worth stressing that the European Commission has expressed the view that both avenues of protection of the integrity of the process and the individual rights of the undertakings involved are clearly equivalent and the “*actual difference between the type of review body chosen is less acute than the terms ‘administrative’ or ‘judicial’ would suggest*”[[22]](#footnote-22).

The Remedies Directive has been found to contribute both directly (through specific enforcement) and indirectly (through deterrence) to the effectiveness of EU public procurement law[[23]](#footnote-23). Moreover, these statutory remedies have been coupled with developments regarding damages claims[[24]](#footnote-24), as well as the enforcement of general EU law remedies for contracts not covered by the EU public procurement rules[[25]](#footnote-25), all of which point towards additional (direct and indirect) effectiveness of EU’s primary and secondary substantive rules[[26]](#footnote-26). However, the actual effectiveness of these rules remains difficult to verify in objective terms. Any attempt to assess the actual effectiveness of the EU public procurement rules, and the Remedies Directive in particular, is affected by significant difficulties ranging from the availability of data itself, to the wild variation in magnitudes regarding the volume of litigation in different Member States[[27]](#footnote-27). Some jurisdictions have thousands of procurement cases a year, while others have the equivalent of a handful if put in relation to their volume of expenditure[[28]](#footnote-28). There may be very many different reasons for this, and litigation culture or litigation costs[[29]](#footnote-29) are usually discussed as the elephant in the room. However, the CJEU has recently dismissed the opportunity of starting to address this issue[[30]](#footnote-30), and—everything else being equal, including an assumption of similar degrees of compliance/non-compliance in all Member States—the likelihood of procurement challenges in different Member States will likely remain very different in the near future. This makes it difficult to identify relevant metrics to establish compliance or effectiveness with these rules in an objective or quantitative manner, and any analysis of effectiveness based on such metrics needs to be taken with a grain of salt. Given these difficulties, in order to critically assess this area of EU economic law, it seems preferable to approach the system from a qualitative perspective and try to determine whether the Remedies Directive is fit for purpose and whether it continues to allow ‘*economic operators to effectively ensure that the rights given them by the EU-rules are observed everywhere in the EU*’, while at the same time not imposing a disproportionate burden of litigation on contracting authorities so as to make the system unadministrable[[31]](#footnote-31), particularly at a time when contracting authorities are expected to exercise more discretion[[32]](#footnote-32).

The purpose of this chapter is not to revisit the requirements that EU law imposes on Member States concerning administrative oversight and judicial protection for public contracts[[33]](#footnote-33). My goal is rather to reflect on the need for further developments of this part of the *acquis communautaire*, so as to ensure that substantive EU public procurement law is effectively and efficiently enforced at Member State level *going forward*. In my view, beyond the issues currently regulated in the Remedies Directive, there is a third wave of additional requirements for the effectiveness of public procurement rules that deserves critical analysis. At the highest level of constitutional issues, some uncertainties result from the increased relevance of the *Charter of Fundamental Rights of the European Union* (CFR)[[34]](#footnote-34) in the enforcement of (secondary) EU law at domestic level[[35]](#footnote-35). Some other issues result from recent case law on the interplay between general EU law (such as the principle of proportionality), substantive EU public procurement rules, the Remedies Directive, and domestic administrative law provisions[[36]](#footnote-36).

The need to clarify and eventually consolidate these issues into the Remedies Directive is compounded by the glaring regulatory asynchrony derived from the expansion of the scope of EU public procurement rules to the field of defence and security procurement[[37]](#footnote-37) and extended coverage of concession contracts[[38]](#footnote-38), as well as the substantive reforms brought about by the 2014 Public Procurement Package[[39]](#footnote-39), which have raised a number of practical and normative issues surrounding the remedies that need to be made available for completely new EU substantive requirements (such as the enforcement of the rules on contract modification or termination[[40]](#footnote-40), or for contracts for social services covered by the new “light-touch regime”[[41]](#footnote-41)), as well as the need to set a proper balance between *procedural administrability* and individual rights in areas where contracting authorities are expected to exercise increased levels of discretion[[42]](#footnote-42) (such as in the procedures leading to the exclusion of economic operators). Additional issues may derive from the need to introduce mechanisms to alleviate the burden of review bodies, such as the possibility to create alternative dispute resolution mechanisms (for all or for some of the grounds for a challenge under substantive EU rules)[[43]](#footnote-43).

These developments and additional functional needs have not yet resulted in a second revision of the Remedies Directive. Despite having launched a public consultation in 2015[[44]](#footnote-44), the European Commission seems to have lost interest in the review of the Remedies Directive[[45]](#footnote-45). This chapter submits that the review of the Remedies Directive remains necessary and that the Commission should reinstate this project as a matter of high priority. In order to substantiate this claim, the chapter will address the implications derived from the interplay between EU public procurement rules and the CFR (§2), as well as between general EU law, EU public procurement rules and general administrative law of the Member States (§3). It will then assess the difficulties of applying the Remedies Directive “as is” to some of the new rules of the 2014 Public Procurement Package, which creates uncertainty as to its scope of application (§4), and gives rise to particular challenges for the review of exclusion decisions involving the exercise of administrative discretion (§5). The chapter will then raise some issues concerning the difficulties derived from the lack of coordination of different remedies—focusing in particular on the coordination between procedure-specific remedies and damages claims (§6)—and will briefly consider the need to take the development of ADR mechanisms into account in any future revision of the Remedies Directive (§7). The chapter will close with some conclusions stressing the need for a second review of the Remedies Directive in the near future (§8).

1. - Need to clarify the interplay with the CFR

The Remedies Directive is a piece of secondary EU legislation which implementation can raise relevant issues of a constitutional nature that can often be overlooked. One of the important issues that requires clarification is the extent to which exercising individual rights to challenge public procurement decisions at national level engages the application of the CFR and, if so, which are those rights and what is their extent. This issue deserves careful attention, particularly because the Remedies Directive was adopted and revised before the entry into force of the Treaty of Lisbon, which changed the nature of the CFR[[46]](#footnote-46). Thus, even if the revision of the Remedies Directive mentioned that some of its changes were “*fully in line with the objective of Article 47 of the Charter of Fundamental Rights of the European Union*”[[47]](#footnote-47), no exhaustive effort to ensure compliance with the CFR was attempted. Equally, the CJEU has not been very clear in identifying the relationship between the Remedies Directive and the CFR. There are (at least) two dimensions to this interplay. First, as a matter of EU law, whether the Remedies Directive complies with the standards of the CFR. Second, as a broader issue, whether the application of the Remedies Directive at the national level engages the concurrent application of the CFR by domestic courts and review bodies and, if so, to what extent this has an effect on the need to ensure specific procedural guarantees currently not foreseen in the Remedies Directive (as discussed below §4 and §5).

The first dimension of interplay seems uncontroversial. In clear terms, the CJEU confirmed in *Orizzonte Salute* that the Remedies Directive “*must be interpreted in the light of the fundamental rights set out in the Charter, in particular the right to an effective remedy before a court or tribunal, laid down in Article 47 thereof*”[[48]](#footnote-48). In *Fastweb*[[49]](#footnote-49)*,* the CJEU also touched upon the first dimension and assessed whether specific aspects of the Remedies Directive complied with the right to an effective remedy under Article 47 CFR, and generally considered that “*the provisions of [Remedies Directive], which is intended to protect tenderers against arbitrary behaviour on the part of the contracting authority, are designed to reinforce existing arrangements for ensuring the effective application of the EU rules on the award of public contracts, in particular where infringements can still be rectified. Such protection cannot be effective if the interested party is unable to rely on those rules vis-à-vis the contracting authority*”[[50]](#footnote-50). However, no analysis of the second dimension was attempted in these cases and, to the best of my knowledge, in any other case decided to date. The CJEU has assessed whether domestic procurement remedies systems complied with equivalent general principles of EU law, such as the principle of effective judicial protection[[51]](#footnote-51), but the extent to which these considerations would justify the full application of the CFR could be doubted. This leaves important issues on the extent of the interplay between the Remedies Directive and the CFR, as well as its implications, still unanswered[[52]](#footnote-52). In particular there could be doubts as to whether the application of the Remedies Directive *engages the application of the CFR* at domestic level and, if so, what are the implications of that engagement. This will be particularly relevant in relation with the right to good administration guaranteed by Article 41 CFR. Let’s focus on each of these issues in turn.

2.1. - *Applicability of the CFR*

The applicability of the CFR to procurement review procedures at domestic level crucially depends on the interpretation of Article 51(1) CFR, according to which “*The provisions of this Charter are addressed to (…) the Member States only when they are implementing Union law*”[[53]](#footnote-53). After some initial controversy of the meaning and limits of the expression “implementing EU law”, it is now established by the CJEU that, in order to assess whether the CFR is engaged by the application of domestic legislation of the Member States, it is necessary to determine “*whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it*”[[54]](#footnote-54). In the case of public procurement review, it seems clear to me that the CFR is engaged *structurally* because the domestic rules that transpose the Remedies Directive and set up a procurement review system (be it administrative or judicial) aim to give effectiveness to the EU and domestic substantive public procurement rules—which, for the same reasons, engage the application of the CFR themselves—and cannot be reasonably constructed as having any other objective than ensuring the integrity and probity of the procurement process and strengthening the rights of tenderers to participate in fair an undistorted competition for public contracts.

However, it could be argued that there is a difficulty in extending the protection of the CFR to *all* procurement challenges because at least some of them are bound to constitute purely internal situations—*ie* cases where the disappointed tenderer (and possibly every tenderer having actually participated) is a national of / established in the Member State to which the contracting authority or entity belongs—which raises a tricky issue of compatibility of a blanket-cover approach with another strand of case law of the CJEU concerning the CFR. That argument would rely on case law such as *Romeo*[[55]](#footnote-55)*,* where the CJEU analysed a situation directly relevant to public procurement litigation because it involved the duty to provide reasons for administrative decisions regulated in Article 41(2)(c) CFR. In *Romeo*, the CJEU controversially ruled the CFR inapplicable because “*it does not appear that the Italian legislature intended, as regards the obligation to state reasons, purely internal situations to be subject to (…) Article 41(2)(c) of the Charter rather than the specific rules of Italian law relating to the obligation to state reasons and the consequences of a breach of that obligation*”[[56]](#footnote-56). This could be seen as an obstacle for the view advanced here that the CFR is structurally engaged in the review of public procurement decisions at domestic level. However, the counter-argument is that the case law of the CJEU concerning “purely internal situations” also foresees that:

“while national legislation (…) – which applies indiscriminately to Italian nationals and to nationals of other Member States – is, generally, capable of falling within the scope of the provisions relating to the fundamental freedoms established by the Treaty only to the extent that it applies to situations connected with trade between the Member States, it is far from inconceivable that nationals established in Member States other than the Italian Republic have been or are interested in [carrying out an economic activity] in that latter Member State”[[57]](#footnote-57).

Therefore, in the same line of case law, the CJEU has dismissed the “purely internal situation” exception where there is at least a potential cross-border interest in the type of activity covered by the domestic rules under scrutiny. This strongly links with the case law on the existence of a cross-border interest in the tender of public contracts, where the CJEU has been consistent in finding that the potential interest of non-domestic tenderers suffices to engage primary EU law, even if that implies going beyond the scope of application of the substantive EU public procurement rules[[58]](#footnote-58). It is also important to stress in this setting the relevance of the principle of non-discrimination and equal treatment enacted in Article 18 of Directive 2014/24/EU, which the CJEU case law has extended to procurement not covered by that Directive where there is a cross-border interest[[59]](#footnote-59), and which requires contracting authorities to treat all tenderers equally—and, by implication, excludes situations of *reverse discrimination* because that would distort the competition for the public contract, which would in turn breach the principle of competition in that same Article 18 of Directive 2014/24/EU[[60]](#footnote-60). Beyond that, it is also worth stressing that, from the strict perspective of procedural equality of treatment, Article 1(2) of the Remedies Directive requires that Member States ensure that there is no discrimination between undertakings claiming harm in the context of a procedure for the award of a contract as a result of the distinction made in that Directive between national rules implementing Union law and other national rules, which requires equivalence of remedies[[61]](#footnote-61). In short, it seems at least conceptually impossible to conceive a situation covered by the substantive EU public procurement rules—either those of the 2014 Public Procurement Package, or those derived from Treaty requirements—where the existence of “purely domestic situations” could actually be justified in a manner that excluded the applicability of the CFR to domestic procurement review procedures.

The only possibility to exclude such engagement of the CFR would remain for public contracts where there was clearly no cross-border interest whatsoever (such as minor contracts, but even then this is not a water-tight category from the perspective of potential cross-border interest), which would also not engage the Remedies Directive itself. Nonetheless, from a normative point of view and in order to increase legal certainty, it would seem preferable to afford full CFR protection in all public procurement challenges, so as to avoid the risk of cross-border interest being declared during litigation, as well as reducing the burden of running public procurement procedures subjected to diverging standards[[62]](#footnote-62). Once the applicability of the CFR to domestic public procurement review procedures is clarified (and proposed to extend it to all procedures, for the reasons given), it is necessary to turn to the analysis of the implications of such blanket-coverage of administrative and judicial review of public procurement decisions, which will also extent to pre-contentious phases of the procurement cycle where this is warranted by the right to good administration under Article 41 CFR. Thus, the implications of the applicability of the CFR in the area of public procurement exceed the remit of the Remedies Directive *stricto sensu*.

2.2. - *Implications of the applicability of the CFR*

In my view, the two main implications of the blanket applicability of the CFR to public procurement review procedures derives from the engagement of the right to good administration (Art 41) and the right to an effective remedy and to a fair trial (Art 47)[[63]](#footnote-63). Suffice it to stress here that the general right to good administration encompasses a set of more specific rights, which include the right to have affairs handled impartially, fairly and within a reasonable time [Art 41(1)], the right to be heard before any individual measure which would have an adverse effect is taken [Art 41(2)(a)], the right to access the file, subject to legitimate interests of confidentiality and of professional and business secrecy [Art 41(2)(b)], and the right to be given reasons for the decisions adopted by the public administration [Art 41(2)(c)][[64]](#footnote-64).

Some of these specific rights derived from the requirements of good administration are readily in line with general principles of EU public procurement law, and would not seem to create particular difficulties. The *right to impartiality, fairness and timeliness* seems fundamentally in line with the general principles of procurement, which require contracting authorities to treat economic operators equally and without discrimination, and to act in a transparent and proportionate manner, making sure that competition is not artificially narrowed, in particular by unduly favouring or disadvantaging certain economic operators [Art 18(1) Dir 2014/24/EU]. The wording of the right under Article 41(1) CFR and the general principles of Article 18(1) of Directive 2014/24/EU is certainly different, but I would not foresee much difficulty to reconcile them—with the specific point of timeliness being supported by the numerous time limits set in the remainder of Directive 2014/24/EU. Other specific rights, such as the *right to be heard and to access the file* require some more detailed analysis, particularly in the context of the potential exclusion of economic operators from tender procedures (on which see below §5), but it also seems possible to ensure compliance without having to adjust the rules in the 2014 Public Procurement Package or the Remedies Directive in a significant way (below §3.1). These guarantees are, for instance, somewhat already available in the special procedural requirements for the treatment of apparently abnormally low tenders[[65]](#footnote-65), which create a partial blueprint for extension to similar situations (see below §5).

At this point, the analysis should focus on the specific obligation to state reasons under Article 42(1)(c) CFR and the right to an effective remedy under Article 47 CFR, which are the two more directly relevant to an analysis of the Remedies Directive. In that regard, it is important to stress here that the case-law of the General Court (GC) has started to establish a strong link between both provisions. Indeed, the GC has stressed that:

“(…) the right to good administration under Article 41 of the Charter of Fundamental Rights of the European Union (…) sets an obligation on the administration to justify its decisions and that this motivation is not only in general, the expression of the transparency of administrative action, but it must also allow the individual to decide, with full knowledge of the facts, if it is useful to apply to the competent jurisdictional body. There is therefore a close relationship between the obligation to state reasons and the fundamental right to effective judicial protection and the right to an effective remedy under Article 47 of the Charter of Fundamental Rights”*[[66]](#footnote-66)*.

I submit that this comes to significantly reduce the implications of the general applicability of the CFR to public procurement challenges to the two main issues of: (a) the need to ensure the availability of judicial review in order to ensure the right to a fair trial, which needs not be at first instance of procurement challenge[[67]](#footnote-67), and (b) the need to ensure that the way in which the contracting authority provides reasons for its decisions throughout the procurement process meets the standards of Article 41(2) (c) CFR. Putting this in connection with the Remedies Directive itself, it seems clear that the implications of the applicability of the CFR in this area should be rather limited. Not because it does not impose robust substantive standards, which it does, but because the same standards are already required by the Remedies Directive itself.

Concerning the *availability of judicial review* (Art 47 CFR), Article 2(9) of the Remedies Directive determines that, where bodies responsible for first-instance review procedures are not judicial in character, Member States must 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 267 TFEU and independent of both the contracting authority and the review body[[68]](#footnote-68). Therefore, the requirement that would align the system with Article 47 CFR is explicitly imposed by the Remedies Directive and the interpretation of that requirement would have to be made in light of Article 47 CFR *in any case,* as the CJEU has already clearly indicated[[69]](#footnote-69).

An open question in that regard concerns the *intensity of the judicial review* to which public procurement decisions need to be subjected, which has been an unresolved query in EU public procurement law for a long time[[70]](#footnote-70). A case raising this issue is pending before the CJEU[[71]](#footnote-71), which may result in some clarity in this area[[72]](#footnote-72). In that regard, it is worth stressing that the relevant standard of the European Convention on Human Rights (Art 6), with which Article 47 CFR needs to be coordinated[[73]](#footnote-73), what is required is, simply put, that decisions adopted in the application of EU public procurement law are open to sufficient judicial review by a judicial body that has jurisdiction to quash the decision in case it identifies material errors in fact or law[[74]](#footnote-74). It is worth stressing that the European Court of Human Rights has found that, where: i) the administrative body adopting the initial decision follows a procedure that sufficiently complies with Article 6 ECHR[[75]](#footnote-75), and ii) the decision involves a *“classic exercise of administrative discretion*” or, in other words “*the issues to be determined* [require] *a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims*”[[76]](#footnote-76); then, (mere) judicial review of the legality of the decision suffices, and a (full) right of appeal on the merits is not necessary[[77]](#footnote-77)— always provided that the reviewing tribunal can effectively grant a remedy to the appellant if successful[[78]](#footnote-78), which includes the possibility of quashing the decision and remitting the case for a new decision[[79]](#footnote-79). Bearing this in mind, the recent proposal by Advocate General Campos in the ongoing *Connexxion Taxi Services* case may aim to set too high a standard of review. In his Opinion,

“the judicial review imposed by Directive 89/665 requires something more [than a mere 'marginal' review, or solely assessing whether or not the contested decision was arbitrary] to deserve that name. The assessment by the court cannot end with a mere assessment of the ‘reasonableness’ of the contested decisions, especially as those decisions must comply with detailed rules covering formal and substantive matters. A court hearing an application in this field will have to assess whether the disputed award observed the rules of the invitation to tender and whether the successful tenderer’s application can withstand the critical analysis which its competitors present in the action. That assessment will require, in many cases, verification of the decisive facts (which the administration may have determined incorrectly), as well as evidence concerning the relative merits of the various applications. It will also involve gauging whether the administrative action is duly reasoned and whether it is in line or at variance with the objectives which underlie it (in other words, whether there is evidence of misuse of powers) and the other legal provisions which govern it. Examination of all that evidence goes beyond… a mere assessment of the ‘reasonableness’ of the contested measure and involves matters of fact and law of a more ‘technical’ and usually more complex nature, which every court having jurisdiction to review administrative acts usually carries out”[[80]](#footnote-80).

The test seems roughly in line with the requirements under Article 6 ECHR / Article 47 CFR, but the question is whether all the specific details of the full review advanced by AG Campos are necessary in order to allow the review body or court to assess compatibility of procurement decisions with EU law and domestic transposing measures. As I read his Opinion, he advocates for three main components: (1) a review of the decisive facts, (2) a review of the relative merits of the offers, (3) a review of the reasons given by the contracting authority for its choices and the soundness of those reasons (or, in his own words, to check that there has been no misuse of powers). In my view, elements (1) and (3) are relatively uncontroversial. However, element (2) is very likely to create difficulties if the review body or court is expected (or empowered) to second guess the technical evaluation carried out by the contracting authority. I think that the risk of allowing review courts and bodies to substitute the contracting authority’s discretion for their own would be going a step too far. Thus, while the minimum requirements of the review procedures mandated by the Remedies Directive clearly seem to indicate the need to go beyond a mere assessment of arbitrariness and engage in a full review of legality, it also seems clear to me that the review cannot go as far as to allow for a second-guessing of the contracting authority’s discretion. Admittedly, though, this is an area where establishing bright lines is very difficult, and “*the substantial justification for the [award] decision shades into the adequacy of the reasons, even if sufficiency of reasons is usually treated as a separate ground of judicial review*”[[81]](#footnote-81). The final decision of the CJEU will indicate where the balance between administrative discretion and judicial review lies for these purposes.

Concerning the closely-linked *duty to provide reasons* [Art 41(2)(c) CFR], it is worth stressing that Article 2(9) of the Remedies Directive also requires that where bodies responsible for review procedures are not judicial in character, written reasons for their decisions are always given. Taking this requirement to the pre-contentious phase (*ie* to the debriefing stage), it is also clear that the substantive rules in the 2014 Public Procurement Package impose equivalent requirements[[82]](#footnote-82). Notably, Article 55 of Directive 2014/24/EU contains very detailed rules on the duty to inform candidates and tenderers[[83]](#footnote-83). The relevance of these requirements at debriefing stage is accentuated by Article 2a of the Remedies Directive, which links the provision on standstill to the effective discharge of those debriefing obligations[[84]](#footnote-84). These are thus requirements clearly in line with Article 41(2)(c) CFR, so a self-standing obligation to provide reasons needs not be derived from this latter provision. Moreover, the interpretation of the requirements to provide reasons under Article 2(9) of the Remedies Directive and Article 55 of Directive 2014/24/EU, being enacted in rules of secondary EU law, need to be interpreted in accordance with the substantive standard of Article 42(1)(c) CFR anyway because EU law must be interpreted in accordance with the CFR—or, as aptly put, “*just as general principles of EU law, the Charter also serves as an aid to interpretation, since both EU secondary law and national law falling within the scope of EU law must be interpreted in light of the Charter*”[[85]](#footnote-85).

Overall, then, it seems that a clear determination that the CFR applies fully and squarely to the procedures for the review of public procurement decisions at domestic level (above §2.1) does not really expand the requirements imposed by the Remedies Directive and the substantive EU public procurement rules themselves as regards the basic guarantees oriented towards *ensuring good administration subject to judicial review*, and that the only areas that require further analysis concern the rights to be heard before any individual measure which would have an adverse effect is taken [Art 41(2)(a) CFR] and the right to access the file, subject to legitimate interests of confidentiality and of professional and business secrecy [Art 41(2)(b) CFR], both of which are discussed at different points of the remainder of this chapter. This is not to say that the applicability of the CFR in the context of domestic public procurement review procedures is irrelevant—given that it will serve to set the right substantive standards for these rights—but simply to dispel any claims that engaging the CFR would require a major reform of the existing public procurement remedies system in the Member States. Somehow, it seems fair to say that the Remedies Directive and the substantive EU public procurement rules have already undertaken the bulk of the mission of ensuring *good administration subject to judicial review* in this area. If anything, the parts of the tendering procedure that would require reform would concern the pre-contentious administrative phase, and only in the specific circumstances that would warrant access to the file or the right to be heard (below §3 to §5).

Ultimately, then, from the perspective of the coordination of the Remedies Directive and the CFR, it would be desirable to include an explicit acknowledgement that the application of the Remedies Directive and the domestic rules for its transposition engage the applicability of the CFR to domestic procurement review procedures, so as to avoid any further litigation in that front.

1. - Need to clarify the interplay with general administrative law

The second general area where there is a need for further coordination of the EU requirements for administrative oversight and judicial protection in public contracts concerns the interplay between EU general law, EU substantive public procurement rules, the Remedies Directive and general administrative law of the Member States. The difficulty arises from the perspective of the substantive standards applicable to the review of public procurement decisions where the contracting authority does not rely exclusively on domestic procurement rules that directly implement EU rules, but rather on other domestic public procurement rules or, even more clearly, on general domestic administrative law, including administrative precedent or practice and the applicable interpreting case-law. Interestingly, the reliance on these additional sources of (domestic) law will generally derive from the fact that public procurement rules are not applied in the vacuum, but rather within the broader context of public or administrative law, and the activity of the contracting authority is itself constrained by the *duty to act legally*, which mandates compliance with those other domestic public procurement rules or general domestic administrative law provisions. Indeed, the right to good administration in Article 41 CFR contains an implied requirement for the public administration to *act legally*—or, more clearly, to “act *under* and *within* the law”[[86]](#footnote-86). These situations arise in settings where the general principles of supremacy, direct effect and consistent interpretation do not necessarily solve the relevant issues because they derive from a juxtaposition rather than a conflict between EU rules and domestic general administrative law[[87]](#footnote-87). This may well require an adaptation of the procedural rules applicable in this context, so as to accommodate the requirements of all concurrently applicable substantive rules without jeopardising the effectiveness of the guarantees derived from the right to good administration under Article 41 CFR. The problems derived from this difficult coordination of all these layers of public law[[88]](#footnote-88) has been raised in two recent cases before the CJEU, both of them concerned with decisions of exclusion of economic operators from tender procedures (on which more below §5): one concerning administrative rules contrary to the interests of the affected tenderer (§3.1), and another one concerning favourable administrative rules (§3.2). It is worth discussing them separately, to then extract some common preliminary conclusions (§3.3).

* 1. *. - Unfavourable administrative rules*

In *Pizzo*[[89]](#footnote-89)*,* the contracting authority excluded a tenderer on the basis of lack of compliance with general anti-mafia legislation applicable in the tendering of public contracts in Italy—and, in particular, due to the lack of payment of certain fees. To complicate the matter further, the obligation to pay the relevant fees in the circumstances of the excluded tenderer was not explicitly foreseen in the anti-mafia rules themselves, but derived from the administrative practice for their application and relevant domestic case law interpreting those rules. The tenderer challenged its exclusion on the basis that the obligation to pay the fee was not explicitly set in the tender documentation, and that this prevented the contracting authority from insisting on its compliance on the basis of the generally applicable interpretation of the anti-mafia rules. The legal point for the CJEU to determine was whether the contracting authority had exceeded the limits imposed by EU public procurement law by requesting compliance with a general requirement that did “*not expressly arise from the documents relating to that procedure or out of the national law in force, but from an interpretation of that law and from the incorporation of provisions into those documents by the national authorities or administrative courts*”[[90]](#footnote-90). The CJEU, despite acknowledging that the contracting authority was not obliged to indicate the obligation to pay the relevant fees in the tender documentation, determined that the exclusion of the tenderer was contrary to EU law. Following the argument of the Advocate General, the CJEU determined that:

“a condition governing the right to participate in a public procurement procedure which arises out of the interpretation of national law and the practice of an authority … would be particularly disadvantageous for tenderers established in other Member States, inasmuch as their level of knowledge of national law and the interpretation thereof and of the practice of the national authorities cannot be compared to that of national tenderers”[[91]](#footnote-91).

This seems to indicate that the CJEU took the position that, in order to ensure a level playing field for economic operators established in other Member States, public procurement procedures and their review can only rely on EU law, and in domestic rules only if contracting authorities have taken positive steps to bridge the information gap or information asymmetry between national tenderers and those established in other Member States. This seems to go well beyond the traditional doctrine of consistent interpretation[[92]](#footnote-92) requiring domestic courts and administrative authorities to interpret national law in a manner consistent with EU law and to only set domestic rules aside where it is not possible to ensure consistency between EU and domestic rules[[93]](#footnote-93), and to push the argument of legal harmonisation as a pre-condition for the effectiveness of the internal market beyond what would seem a sensible interpretation of Article 114 TFEU[[94]](#footnote-94), *inter alia*. Taken to the extreme, the CJEU reasoning in *Pizzo* would lead to the absurd requirement for tender documents to reproduce *all* relevant domestic legislation, case law and administrative practice or precedent that the contracting authority considered (potentially) relevant, which would increase tender preparation costs disproportionately and raise significant issue concerning the validity and bindingness of those documents in cases of omissions or errors.

However, a closer look at the case shows that the CJEU’s worry was actually that the tenderer had been excluded without being afforded the opportunity to remedy the shortcoming of not having paid the fee and that, indeed, “*there is no possibility of rectifying non-compliance with that condition that a fee must be paid*”.[[95]](#footnote-95) Ultimately, then, the CJEU ruled that:

“the principle of equal treatment and the obligation of transparency must be interpreted as precluding an economic operator from being excluded from a procedure for the award of a public contract as a result of that economic operator’s non-compliance with an obligation which does not expressly arise from the documents relating to that procedure or out of the national law in force, but from an interpretation of that law and those documents and from the incorporation of provisions into those documents by the national authorities or administrative courts. Accordingly, the principles of equal treatment and of proportionality must be interpreted as not precluding an economic operator from being allowed to regularise its position and comply with that obligation within a period of time set by the contracting authority”[[96]](#footnote-96).

This left two issues relatively unclear. The first one is about the actual compatibility with EU law of excluding economic operators on the basis of requirements that derive from the national law in force *itself* without allowing them the possibility to remedy that situation. The Judgment in *Pizzo* does not prevent this situation explicitly, but it would seem that the reasoning concerning the legal burden on non-national tenderers could apply as well—which in turn raises difficult issues from a functional perspective and bearing in mind the principle of subsidiarity (Art 69 TFEU and the corresponding Protocol on the application of the principles of subsidiarity and proportionality). The second unclear issue concerns the apparent *optionality* of the possibility to regularise the situation where the exclusion results from an interpretation of domestic administrative law, which the CJEU simply indicated as not being precluded by EU law.

In my view, both issues could be resolved by a proper application of the right to good administration in Article 41 CFR (above §2.2). Firstly, where a contracting authority aims to exclude a tenderer on the basis of national law requirements (be it direct legal requirements, or “constructed” legal requirements), given that exclusion is a decision that constitutes an individual measure which would adversely affect its position in the tender, the undertaking is entitled to be heard [Art 41(2)(a) CFR]—or, in other words, to an *inter partes* procedure[[97]](#footnote-97). Secondly, given that allowing the undertaking to remedy that type of formal non-compliance does not afford it a competitive advantage and falls within the limits of impartial, fair and timely treatment [Art 41(1) CFR]—and of non-discriminatory and proportionate treatment [Art 18(1) Dir 2014/24/EU][[98]](#footnote-98)—the contracting authority should *always* afford the possibility to remedy that type of shortcoming. Indeed, rather than focusing solely on the principle of equal treatment and non-discrimination, it is worth stressing the relevance of the principle of good administration as well. From that perspective, if the contracting authority identifies a participation requirement that was not obvious from the tender documentation, its eventual decision to exclude any non-compliant tenderers should be subjected to a mandatory vis-à-vis, short administrative phase whereby it allows tenderers to remedy the situation[[99]](#footnote-99). Given that these issues are mainly procedural and result from the need to coordinate EU public procurement law with the general administrative (procedural) law of the Member States—which may require a restriction of their national procedural autonomy so as to ensure the effectiveness of EU (public procurement) law (see above §1)—these issues should be regulated at EU level and a revision of the Remedies Directive could effectively do so by creating a special procedure concerned with decisions on exclusion of tenderers (or rejection of tenders, as further discussed below §5).

3.2. - *Favourable administrative rules*

The opposite situation of interaction between EU public procurement law and general domestic administrative law is under consideration by the CJEU at the time of writing regarding the *Connexxion Taxi Services* case[[100]](#footnote-100). In this situation, a tenderer was not excluded from a public procurement process due to the favourable application of general administrative law rules and, in particular, of the principle of proportionality—as a specific requirement of domestic law. The case derives from the fact that the contracting authority had set very stringent exclusion rules in the tender documentation by indicating that “[a] *tender to which a ground for exclusion applies shall be set aside and shall not be eligible for further (substantive) assessment*”[[101]](#footnote-101). However, when applying this condition to participating undertakings, the contracting authority decided to rely on a more general Dutch public procurement administrative rule whereby “*the assessment of whether a tenderer must actually be excluded … must always be proportional and be carried out in a non-discriminatory manner*”[[102]](#footnote-102). It thus concluded that, although the winning tenderer “*had been guilty of ‘grave professional misconduct’, its exclusion would be disproportionate*”[[103]](#footnote-103), which prompted a challenge by the second-ranked tenderer.

The difficulty in this case is that the application of the (more) general administrative law provision that benefits the undertaking concerned also generates spill-over negative effects for the rest of the undertakings participating in the tender, which are particularly relevant for the second-ranked entity. In his Opinion in *Connexxion Taxi Services*, AG Campos proposed to find that reliance on the (more) general administrative law provision did not infringe the general principles of EU public procurement law. More specifically, he indicated that:

“The fact that, in order to assess one of those grounds for exclusion expressly included in [the descriptive] document [the contracting authority] applied the criterion of proportionality, which was not expressly referred to in the descriptive document but is required by the general (...) rules on public procurement (as well as by the case-law of the Court), is, in my view, consistent with the principle of equal treatment and its corollary, the obligation to act transparently[[104]](#footnote-104).

This solution could seem formally contrary to the one adopted in *Pizzo* (above §3.1), at least partially, because it allows the contracting authority to rely on general administrative law (and case-law) without requiring any specific procedural adaptation and, in particular, without allowing tenderers potentially affected by that decision to challenge this approach. Thus, this solution allows for “indirect” negative effects derived from reliance on (more) general administrative law provisions, which are bound to be suffered by the competitors of the tenderer to which the favourable administrative provision is applied. This is similar to the issue of spill-over effects deriving from the direct effect of Directives, which are also tolerated[[105]](#footnote-105). Ultimately, this seems the right solution and it is to be hoped that the CJEU will follow the AG in this case. More generally, in my view, it must be right that contracting authorities are always under a general obligation to act in a proportionate manner and, consequently, each decision they adopt needs to be proportionate under the circumstances and pro-competitive because, ultimately, a contracting authority must retain the power to assess, on a case-by-case basis, the gravity of the circumstances that would lead to exclusion of the tenderer and also balance them against the effects that such exclusion would have on competition[[106]](#footnote-106).

* 1. *- Preliminary conclusion regarding the interplay with general administrative rules*

From a functional perspective, it seems that the emerging case law of the CJEU may point towards the general criterion that reliance on general administrative rules is allowed where they are favourable to the economic operator concerned, provided the contracting authority still acts in a manner that complies with the general principles of public procurement law [Art 18(1) Dir 2014/24/EU] and, implicitly, with the requirements of impartial, fair and timely treatment of economic operators that derive from the right to good administration [Art 41(1) CFR]. It also seems clear that third parties, even those in competition with the economic operator concerned, do not have a claim to bar reliance on the general administrative law provision, which would only arise if that implied a breach of the higher order principles (*ie* in case there was discriminatory or unequal treatment). More clearly, economic operators have the right for the exclusion rules to be applied in the manner that better protects the integrity and the probity of the procurement process—which can include their insistence on the exclusion of a competing tenderer affected by an exclusion ground—but this right is not absolute and it certainly does not entail a justification for the restriction of the individual rights of any of them, even if the combination of the exclusion rules and more general administrative law provisions would seem to be indirectly detrimental if they avoid the exclusion of a tenderer that would otherwise have taken place. Conversely, where reliance on general administrative rules may negatively affect the individual rights of a given economic operator, then these same principles require the contracting authority that intends to rely on such general rules to create an opportunity to remedy this situation, provided that this does not infringe those same general principles of EU public procurement law—that is, provided that this does not result in discriminatory or unequal treatment, or allows the economic operator to gain an undue competitive advantage. The difficulty here is that these general criteria, which overall seem appropriate, still trigger the need to strike a balance between ensuring procedural rights [including the right to be heard and access to the file; Art 41(2)(a) and (b) CFR] and the administrability of the public procurement procedure. This will be discussed in further detail (below §5), but suffice it to stress here that this clarification should be included in a revision of the Remedies Directive.

1. — Shortcomings of the Remedies Directive in view of the 2014 Public Procurement Package: Uncertain Scope of Application

Moving beyond the general issues discussed in previous sections, we should now focus on the critical assessment of the shortcomings created by the regulatory asynchrony resulting from the lack of revision of the Remedies Directive in light of the substantive reforms included in the 2014 Public Procurement Package, which create some difficulties for the application of the Remedies Directive “as is” to some of the situations created by the new rules[[107]](#footnote-107). The difficulties discussed here mainly derive from the fact that the scope of application of the Remedies Directive is designed to capture “decisions” taken by contracting authorities concerning “contracts” covered by the substantive EU rules, which are defined to “*public contracts, framework agreements, works and services concessions and dynamic purchasing systems*” [Art 1(1)][[108]](#footnote-108). The drafting of this provision is not adjusted to most of the changes brought about by the 2014 Public Procurement Package, which has both introduced for the first time the concept of “procurement”— which may be altering the concept of “contract” for these purposes—as well as expanded the type of decisions covered by the EU rules — which now extend to contractual modification and termination. I submit that this triggers the need to revise the scope of the Remedies Directive as defined in its Article 1(1), in order to avoid the uncertainties discussed here.

The *concept of “decision”* has been interpreted broadly in order to encompass all those subject to the relevant substantive rules of Union law[[109]](#footnote-109) — which not only covers the rules in the substantive Directives, but also the general principles of EU law — and it thus extends not only to decisions to enter into a contract, but also to withdraw an invitation to tender[[110]](#footnote-110), and more generally the decisions that trigger an obligation to inform candidates and tenderers under the applicable substantive rules, such as decisions to exclude them or their offers (Art 55 Dir 2014/24/EU, see above §2.2 and below §5). From this perspective, then, any clarification of the scope of application of the Remedies Directive should tend to ensure its maximum application.

Similarly, the *concept of “contract”* has traditionally been interpreted teleologically and with a generally expansive approach by the CJEU. Given that the existence of a contract is a pre-condition for the application of the EU public procurement rules, the CJEU has “expressly stated that non-applicability of the directives in question remains the exception” and that any interpretation of the concept of “contract” aimed at reducing the scope of application of the EU public procurement rules - and, consequently, of the Remedies Directive - has to be construed narrowly[[111]](#footnote-111).

However, the extent to which this expansive approach in the interpretation of the concept of contract remains the position of the CJEU can be doubted in light of the Judgment in the recent *Falk Pharma* case[[112]](#footnote-112). In this case, the CJEU was presented with an issue concerning the interpretation of the concept of public contract and decided to resort to the new concept of “procurement” introduced by Article 1(2) of Directive 2014/24/EU in search for interpretative guidance. In that provision, procurement is defined as “*the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose*”. The CJEU focused on the element of *choice of contractor* and extrapolated that “*the choice of a tender and, thus, of a successful tenderer, is intrinsically linked to the regulation of public contracts by that directive and, consequently, to the concept of ‘public contract’ within the meaning of Article 1(2) of that directive*”[[113]](#footnote-113); and, further, that procurement is an activity necessarily requiring the choice of a successful tenderer because “*that principle is expressly set out in the definition of the concept of ‘procurement’, now set out in Article 1(2) of Directive 2014/24, in respect of which one aspect is the choice by the contracting authority of the economic operator from whom it will acquire by means of a public contract the works, supplies or services which are the subject matter of that contract*”[[114]](#footnote-114). This led the CJEU to consider that an open system of licenses for the supply of generic pharmaceutical products was not covered by Directive 2014/24, despite the fact that “*such a scheme leads to the conclusion of contracts for a pecuniary interest between a public entity* (…) *and economic operators whose objective is to supply goods, which corresponds to the definition of ‘public contracts’*”[[115]](#footnote-115).

Apparently, then, the traditionally expansive interpretation of the concept of “contract” is now limited by the introduction of an additional requirement of “choice of supplier”, which restricts the scope of the substantive EU public procurement rules by leaving public contracts outside of their material scope of application[[116]](#footnote-116). Unfortunately, but reasonably from the perspective of systemic coherence, this limitation is likely to carry forward to the scope of the Remedies Directive, thus contributing to the uncertainty about its scope of application. If the teleological arguments raised by the CJEU in *Falk Pharma* are taken into account, the potential limitation of the scope of application of the Remedies Directive becomes more apparent. It is worth stressing that the CJEU established that:

“where a public entity seeks to conclude supply contracts with all the economic operators wishing to supply the goods concerned in accordance with the conditions specified by that entity, the fact that the contracting authority does not designate an economic operator to whom contractual exclusivity is to be awarded means that there is no need to control, through the detailed rules of [the substantive Directive], the action of that contracting authority so as to prevent it from awarding a contract in favour of national operators”[[117]](#footnote-117).

This can be criticised because it seems to take a reductionist approach to the goal of EU public procurement law as solely aiming to prevent discrimination of economic undertakings on the basis of their nationality or country of establishment—which would reopen a never ending discussion about the goals of EU public procurement law and take us beyond the scope of our discussion[[118]](#footnote-118). More importantly, this can be criticised because it fails to acknowledge that the substantive rules and the Remedies Directive explicitly apply to the setting up of dynamic purchasing systems, which are mechanisms whereby the contracting authority does not initially chose the economic operator that will end up supplying goods or providing services (see Art 34 Dir 2014/24/EU), as well as to multi-supplier framework contracts, where the contracting authority does not award contractual exclusivity either (or at least not in absolute terms) (see Art 33 Dir 2014/24/EU). Thus, the *Falk Pharma* case actually creates a risk of internal inconsistency in the scope of application of the substantive EU public procurement rules and the Remedies Directive that aims to ensure their effectiveness. This legal uncertainty needs to be resolved, particularly concerning issues such as the application of the Remedies Directive to call-offs within framework agreements[[119]](#footnote-119), the modification of contracts during their term (Art 72 Dir 2014/24/EU), or decisions to terminate contracts (Art 73 Dir 2014/24/EU). All of these decisions raise difficult issues for different reasons, which are worth considering.

The applicability of the Remedies Directive to the setting up of *framework agreements* has so far seemed uncontroversial due to the explicit reference in Art 1(1) thereof, while the applicability of these remedies to review decisions calling-off for specific contracts within the framework agreement has been uncharted territory. Given that Article 33 of Directive 2014/24/EU now establishes specific (minimum) rules on how the call-offs have to be carried out, it would seem that these intra-framework agreement decisions can be subsumed within the general concept of “decision” and thus subjected to review. However, this could create issues of duplicity in the control of framework agreements, as well as significantly diminish their practical desirability from the perspective of their administrability. Further, in view of the *Falk Pharma* case, it would now seem to be teleologically possible to exclude the reviewability of the decision to set up the framework agreement (or at least multi-supplier frameworks) and defer it to the specific call-offs (where choice is actually exercised), which would not make functional sense and would fail to address issues concerning economic operators not included in the framework agreement. Consequently, the applicability of the Remedies Directive to the setting up of framework agreements and to intra-framework call-offs deserves further analysis and review.

Similarly, the applicability of the Remedies Directive to *contract modification* decisions raises complex issues. Traditionally, contract modifications were not regulated at EU level and had been considered equivalent to illegal direct awards where the modification substantially altered the subject matter of the contract[[120]](#footnote-120). The decision to modify the contract was thus subjected to review under the Remedies Directive as if it took the form of the illegal direct award of a partial contract. From this perspective, it would seem natural to extend the Remedies Directive to contractual modifications taking place under the new rules of Article 72 of Directive 2014/24/EU. However, the argument that the substantive modification of the contract is equivalent to an illegal direct award is no longer necessary and the question can now be posed to what extent this is a decision that requires control under the *Falk Pharma* logic. Indeed, the decision to award the initial contract should have already been exposed to review under the Remedies Directive and the modification of the contract does not materialise a *different choice* of economic operator by the contracting authority, which would seem to be excluded from the functional approach developed by the CJEU in that case. This could allow for a severance of the review of the potential breach of Article 72 of Directive 2014/24/EU, which could be redirected to different courts (civil/contract courts rather than administrative courts or review bodies) as well as subjected to different procedural requirements (of standing, to mention the most obvious). Such a development would depart from previous CJEU case-law and, in my view, be likely to negatively affect the effectiveness of EU public procurement rules. Thus, the general teleological approach previously held by the CJEU should be preferred and a revision of the Remedies Directive to explicitly cover contract modification decisions seems justified.

I submit that analogous arguments justify the explicit inclusion of *termination decisions*, at least those based on the grounds foreseen in Article 73 of Directive 2014/24/EU, within the scope of the Remedies Directive. Given that this provision requires Member States to allow for the possibility of contractual termination in two circumstances covered (or that should be covered) by the Remedies Directive — that is, illegal modification of contracts (as just discussed), or where the contractor should have been excluded from the procurement procedure (as discussed below §5) — it seems consistent to subject the review of the termination decision itself to the same remedies. The difficulty with this approach — which also applies to some extent to the issue of contract modification — is that the adjudication of these issues has both administrative and contractual/civil effects, which can create significant difficulties in some countries, depending on their internal judicial organisation. Moreover, the extent to which this would be compatible, or susceptible of being made compatible, with alternative dispute resolution mechanisms is unclear (see below §7).

Even if the analysis in this section is by no means exhaustive, I think that it suffices to demonstrate that the reforms brought about by the 2014 Public Procurement Package have created the need to revise and clarify the scope of application of the Remedies Directive, and that such clarification should also tackle further uncertainties created by the incipient case-law on the interpretation of the concept of “procurement” by the CJEU. Such need for reform will now be discussed in relation with one particularly problematic area of reform of the substantive rules, which concerns the rules applicable to the exclusion of economic operators[[121]](#footnote-121).

1. — Specific issues involving the exercise of administrative discretion:
exclusion of tenderers

As mentioned above, another of the difficult areas where the development of substantive EU public procurement rules is putting pressure on the reform of the Remedies Directive concerns the rules on the exclusion of economic operators from tender procedures[[122]](#footnote-122). Article 57 of Directive 2014/24/EU requires the exclusion of economic operators affected by certain mandatory grounds (linked to criminal activity), and it also allows contracting authorities to exclude economic operators affected by certain discretionary grounds (such as, e.g. irresolvable conflicts of interest or grave professional misconduct that renders its integrity questionable). The provision also allows for the assessment of remedial measures or self-cleaning undertaken by the economic operators in order to avoid exclusion[[123]](#footnote-123). Article 57(7) foresees that Member States shall specify the implementing conditions for this mechanism by law, regulation or administrative provision and having regard to Union law. Thus, from a procedural perspective, the discretionary exclusion of economic operators and the assessment of self-cleaning measures aimed at avoiding it are left to domestic regulation by the Member States, but this does not exclude such decisions from the scope of application of the Remedies Directive, which covers challenges to exclusion decisions[[124]](#footnote-124). At this stage, the main difficulties for the application of the Remedies Directive to exclusion decisions under the revised rules of Directive 2014/24/EU are difficult to establish because they are largely dependent on transposition measures to be adopted by the Member States—most of which have not yet transposed the 2014 Public Procurement Package at the time of writing—and the ensuing administrative practice that will follow. However, it is possible to identify areas of uncertainty, which could be resolved through a revision of the Remedies Directive.

First, it is difficult to determine the *nature of an exclusion from a public tender* and, in particular, to establish whether it constitutes a sanction. The exclusion mechanism is oriented towards ensuring the integrity and probity of the procurement process, but exclusion from public procurement opportunities can also be used as a sanction against undertakings engaging in illegal activities[[125]](#footnote-125). This dual function of exclusion mechanisms is very clear in the list of discretionary exclusion grounds included in Article 57(4) of Directive 2014/24/EU, which is far from homogeneous. This is relevant because the standards of procedural guarantees and judicial protection that needs to be afforded to the economic operators that the contracting authority intends to exclude are higher in the case of imposition of (administrative) sanctions than in cases deciding other types of administrative matters. However, it does not seem possible to clarify this issue in the abstract and for all cases. For example, the one-off exclusion from a specific public procurement procedure seems to be closer to a decision on administrability of the process, whereas the debarment of an economic operator from all public tenders for a specified period of time seems closer to the imposition of a sanction. Moreover, even in the first case, the grounds for the one-off exclusion of the economic operator can also make a difference in its assessment. For example, an exclusion based on the impossibility to avoid a conflict of interest by less intrusive means, or due to the bankruptcy proceedings to which the economic operator is subjected do not seem to necessarily merit the same legal treatment than an exclusion based on the existence of “sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition”, or where the “economic operator has been guilty of serious misrepresentation in supplying” information to the contracting authority—not least because the two latter cases have a clear connection with the infringement of other sets of rules (competition law, criminal law).

Along these lines, the admissibility of claims based on legitimate expectations will also vary depending on the underlying cause for the exclusion. While economic operators engaged in illegal or prohibited activities cannot harbour legitimate expectations to be allowed to participate in the tender despite the existence of the exclusion ground, it is not clear whether economic operators can have the legitimate expectation that a potential conflict of interest will be resolved in a way that does not imply their exclusion, or to what extent they are under a duty to foresee that possibility and accept the risk of exclusion by the simple fact of participating in the tender. Thus, even at this level of generality, it seems clear that different instances of exclusion may (in abstract terms) merit different levels of administrative oversight and judicial protection. Importantly, the legal answer to some of these issues requires the weighting of competing public policy interests, which makes these issues more clearly adapted to legislative intervention than to judicial adjudication. Not least because, even if this was considered a matter of interpretation of the existing EU legislation, leaving these issues to be resolved via preliminary references to the CJEU results in significant legal uncertainty in the intervening period. Additionally, it is worth stressing that the design of too granular a system of administrative or judicial review of exclusion decisions that tried to differentiate between the diverse grounds and their implications may also create significant difficulties for its administration. From this perspective, it would seem desirable to reflect in further detail on this issue and to provide Member States with more specific indications of the minimum standards to be upheld in this area via a revision of the Remedies Directive.

From a systematic perspective, and taking for a moment the position that, in some instances, the exercise of administrative discretion to exclude an economic operator can be considered close or equivalent to the imposition of a sanction, at least functionally, it seems appropriate to return to some of the analysis concerning the application of unfavourable administrative rules discussed above (§3.1). As mentioned there, it seems clear that the requirements derived from the duty of good administration require that contracting authorities provide the affected economic operators with the opportunity to challenge the reasons for the intended exclusion [Art 41(2)(c) CFR], including granting them sufficient access to the administrative file [Art 41(2)(b) CFR] and, even more, that this situation can engage the right to be heard [Art 41(2)(a) CFR]. As also mentioned, this is not too different from the inter-partes procedure that contracting authorities need to carry out when they intend to reject a tender on the basis that it is apparently abnormally low [Art 69 Dir 2014/24/EU]. Indeed, contracting authorities shall require economic operators to explain the price or costs proposed in the tender where it appears to be abnormally low [Art 69(1)], and this requires the contracting authority to seek specific types of information [Art 69(2)] and to assess it “by consulting the tenderer” [Art 69(3)]. The contracting authority can only reject the tender “where the evidence supplied does not satisfactorily account for the low level of price or costs proposed”. This seems to clearly meet part of the requirements of Article 41 CFR, as well as the specific requirement for an opportunity to rebut the initial assessment that the tender is abnormally low. However, the special procedure potentially leading to the rejection of the tender regulated in Article 69 of Directive 2014/24/EU does not explicitly address the issues of access to the file or granting the possibility of being heard—which are, however not excluded. Taken together, the lack of regulation of the procedure that contracting authorities need to follow prior to the (discretionary) exclusion of a tenderer, as well as the partial regulation of the inter-partes procedure that needs to be followed prior to the rejection of the tender (due to its apparent abnormality, but not due to other causes) seem to trigger the need to regulate this type of interim procedural phase in the Remedies Directive. That would allow for the imposition of clear-cut time limits for the challenge of the contracting authorities’ decisions, as well as rules on whether the contracting procedure can carry on or needs to be suspended, whether the rest of the economic operators have any possibility to intervene or be consulted by the contacting authority (see above §3.3), to what extent the contracting authority can seek assistance from other authorities (such as the competition authority, or tax or social security agencies), etc[[126]](#footnote-126).

A further issue that deserves some additional analysis and a potential reform of the Remedies Directive concerns the *availability of damages claims in case of quashing of exclusion decisions*, and more generally in this setting. This could in theory arise either from the improper exclusion of an economic operator, or from the view that no-fault exclusions (*ie* those that are ultimately based on the need to ensure the integrity and probity of the procedure, but which do not necessarily derive from any fault or wrongdoing by the economic operator) should trigger compensation to the affected economic operator. The difficulty in this area is that, while the availability of damages claims could serve as a financial incentive for economic operators to litigate and therefore impose checks and constraints on the activity of the contracting authorities, a system where contracting authorities feared significant financial consequences from the exercise of their discretion could result in the ineffectiveness of the exclusion rules in Directive 2014/24/EU. In any case, it could well be that the scope of the discretion to be exercised by the contracting authority could exclude liability in damages under general EU law[[127]](#footnote-127), but this does not seem clear enough. In that regard, it seems necessary to establish a clear rule to control this issue, and potentially to establish certain limits on the damages that can ensue from exclusion decisions so as to avoid neutralising the new rules introduced by the 2014 Public Procurement Package, which could e.g. be limited to the reimbursement of direct participation costs, but not damages due to claims of loss of opportunity[[128]](#footnote-128). Setting the desirable level of maximum damages compensation exceeds the possibilities of this chapter, but it seems clear that domestic rules on the recoverability of damages for exclusion decisions can vary substantially and that this can in turn have an impact on the effectiveness of the rules on exclusion of Directive 2014/24/EU. Thus, this is another area where the Remedies Directive could usefully be revised.

1. — Coordination of procedure-specific remedies and damages

Still on the topic of damages claims due to breaches of EU public procurement rules, another issue that deserves analysis is the functional coordination of procedure-specific remedies and claims for damages derived from breaches of EU public procurement law. In that regard, it is important to stress that the interaction between these different types of remedies —which has never been particularly clear[[129]](#footnote-129)— may be changing. Generally, Article 2(1) of the Remedies Directive foresees that, amongst other things (such as granting interim relief), domestic (administrative or judicial) review bodies need to be empowered to set aside procurement decisions taken unlawfully (which in some cases can trigger the ineffectiveness of the contract, under Art 2d), and to award damages to persons harmed by an infringement of EU public procurement law. However, in general terms, the Remedies Directive does not clarify whether there is a hierarchy of remedies or not, and what is the interaction between procedure-specific remedies (such as the setting aside of a given decision and the retroaction of the procurement process to the relevant phase) and claims for damages. The Remedies Directive leaves it to the Member State to create such a (temporal) hierarchy of remedies by establishing that they “*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*” [Art 1(6)]. This could be seen as setting a preference for procedure-specific remedies over damages, but it is not necessarily the only interpretation of this provision, which could also aim to address issues of administrative pre-emption of judicial claims for damages, depending on the internal organisation of the Member State. The only area where the relationship between damages and other remedies is addressed concerns the ineffectiveness of illegally awarded contracts in the situations foreseen in Article 2d(1) of the Remedies Directive. In that regard, Article 2e foresees the possibility of imposing alternative penalties rather than declaring the ineffectiveness of the contract, and it expressly indicates that the award of damages does not constitute an appropriate penalty for these purposes [Art 2e(2) *in fine*]. However, this seems to have limited interpretive value in terms of the interaction between procedure-specific remedies and claims for damages. All in all, I would argue that damages are conceptualised as an ancillary remedy under the Remedies Directive[[130]](#footnote-130). In my view, this is particularly clear after the 2007 reform of the Remedies Directive, which aimed at ensuring the effectiveness of the public procurement rules through stronger requirements of ineffectiveness of contracts concluded in their breach[[131]](#footnote-131).

Different views can support either a preference for procedure-specific remedies or for damages claims. There are good reasons for both options, which need not be rehearsed here[[132]](#footnote-132). However, recent developments in the case law of the CJEU may be developing an option that would favour the *sequential (and possibly cumulative*) availability of both types of remedies. Whereas the actions seeking the review of procurement decisions not leading to the ineffectiveness of the contract are subjected to time limits to be determined by the Member States [Art 2f(2)][[133]](#footnote-133), any challenges that could result in the ineffectiveness of the contract are subjected to a 6-month guillotine with effect from the day following the date of the conclusion of the contract [Art 2f(1)(b)]. This is generally understood to be justifiable in view of the severe disruption that derives from contractual ineffectiveness, as well as creating some legal certainty by requiring that challenges seeking a remedy *in natura* are timely. In contrast, the same strict time restrictions do not apply to actions for damages, even if they rely on the same infringements that could have led to ineffectiveness. In *Uniplex (UK)*[[134]](#footnote-134)*,* the CJEU made it clear that the period for bringing proceedings to obtain damages should start to run from the date on which the claimant knew, or ought to have known, of that alleged infringement. Furthermore, in *MedEval*[[135]](#footnote-135)*,* the CJEU explicitly excluded the possibility of applying the 6-month guillotine to damages claims on the basis that

“(…) the degree of necessity for legal certainty concerning the conditions for the admissibility of actions is not identical for actions for damages and actions seeking to have a contract declared ineffective. Rendering a contract concluded following a public procurement procedure ineffective puts an end to the existence and possibly the performance of that contract, which constitutes a significant intervention by the administrative or judicial authority in the contractual relations between individuals and State bodies. Such a decision can thus cause considerable upset and financial losses not only to the successful tenderer for the public contract in question, but also to the awarding authority and, consequently, to the public (...) the EU legislature placed greater importance on the requirement for legal certainty as regards actions for a declaration that a contract is ineffective than as regards actions for damages”[[136]](#footnote-136).

This may be seen as expressing a preference for damages as a remedy that minimises distortion of the operational needs implicit in all public procurement processes. Even without taking such an extreme reading, this seems to indicate that the CJEU is willing to promote the use of damages actions as a tool to provide effectiveness to EU law[[137]](#footnote-137), even if this comes at the cost of legal certainty for the contracting authority or can have a significant financial impact on the public purse. Depending on the domestic rules on recoverable damages, the impact of a compensatory award may not be of second order and, ultimately, payments of damages to disappointed tenderers reduce the funds available for the carrying out of public missions. The overall desirability of damages compensation in this area is controversial, and a more detailed analysis would be necessary, particularly to assess the desirability of establishing limits on the recoverable damages (along the lines briefly discussed above §5) or imposing additional restrictions on time limits and coordination with procedure-specific remedies, as well as the potential expansion of the use of alternative penalties in cases other than infringements leading to ineffectiveness. Regardless of the eventual need to adopt any of these possible reforms, once more, it seems clear that the Remedies Directive currently creates legal uncertainty as to the interaction between different types of remedies and that the solution to these issues carries important normative considerations, which may be more amenable to legislative solutions than judicial adjudication.

1. — Brief consideration to the possibility of ADR

A final point worth considering refers to the possibility of introducing provisions concerning alternative dispute resolution (ADR) mechanisms in a revision of the Remedies Directive[[138]](#footnote-138). Different types of ADR mechanisms are already in place in some Member States[[139]](#footnote-139), while other Member States clearly exclude them in the area of public procurement law[[140]](#footnote-140). International investment arbitration may also create the situation that Member States accept ADR mechanisms where foreign investors are involved, but not when national economic operators are chosen as contractors[[141]](#footnote-141), or only for complex public contracts, mainly limited to private-public partnerships[[142]](#footnote-142). The diverging approach towards the use of ADR in public procurement can be based on different assessments of the balance between the public and private interests involved in procurement litigation, particularly at the execution phase, as well as on the existence or not of a separate body of public contracts law that differs from general contract law[[143]](#footnote-143). However, it can also depend on different approaches to general administrative law and administrative procedure, or more simply on different stages of modernisation of the public administration in different Member States. In any case, given that some of the issues now covered by the substantive EU public procurement rules are of a contractual nature and/or require addressing issues that would be amenable to settlement through ADR (in particular, those concerned with contractual modifications or contractual termination, see above §4), this seems to be an area where there could be a push for a more intense use of ADR mechanisms, at least in some jurisdictions — which will require a solution in practice sooner rather than later. Once more, this is an issue that could best be resolved through a revision of the Remedies Directive, rather than through judicial adjudication.

1. — Conclusions

This chapter has demonstrated that there is a large number of enforcement issues in the area of EU public procurement law that require specific solutions by means of a revision of the Remedies Directive. It has shown how the CFR provides a blanket cover for domestic administrative oversight and judicial protection for public contracts (§2). Even if this does not require a major overhaul of the remedies system due to the inroads already made by the Remedies Directive and the EU substantive public procurement rules towards *ensuring good administration subject to judicial review*, it does result in the need to strengthen procedural rights such as the right to access the file and to be heard before a negative decision is adopted in several areas of EU public procurement activity, mainly at a pre-contentious stage. This ultimately raises the procedural requirements applicable to the review of decisions involving administrative discretion, particularly in the case of application of unfavourable general administrative rules (§3.1), or concerning decisions of exclusion of economic operators or the rejection of their tenders (§5).

The chapter has also demonstrated how the substantive reforms brought by the 2014 Public Procurement Package have triggered the need to clarify the scope of application of the Remedies Directive (§4). This is particularly clear in view of the incipient case law of the CJEU on the interpretation of the novel concept of procurement and the implications it can have in terms of coverage of the substantive EU public procurement Directives, which in turn impacts on the scope of coverage of the Remedies Directive. There is thus a need to revise the coordination in the scope of application of both sets of rules, which may be diverging rather than converging. The need for an *aggiornamento* of the Remedies Directive is also particularly clear concerning contractual matters now included in the scope of the substantive EU public procurement Directives, such as contract modification and contract termination (§4), which can in turn also justify the consideration of the introduction of rules concerning ADR mechanisms and their interaction with the remedies currently foreseen in the Remedies Directive (§7). The chapter has also stressed the need to establish clearer rules for the coordination of the remedies already available under the Remedies Directive (§6), in particular to determine if damages are to be considered as a residual remedy in preference for procedure-specific measures. It has also suggested that there is a potential need for the introduction of restrictions concerning claims for damages, e.g. in order to ensure the effectiveness of novel rules that aim to increase the level of integrity and probity of public procurement procedures in the EU (§5).

Overall, I submit that, even if only in a non-exhaustive manner, the chapter shows that there are important areas where the Remedies Directive requires a revision. Most of these areas either derive from the need to establish a clear position where several options are available—thus avoiding the uncertainty of unclear or contradictory case law of the CJEU—or imply important and complex normative assessments that are better suited for legislative action rather than judicial adjudication. Thus, *de lege ferenda*, my view is that the European Commission should relaunch the process for the review of the Remedies Directive as a matter of high priority. Given that only a year has elapsed since it launched the public consultation on the revision of the Remedies Directive, and that the REFIT revision is still ongoing, this still seems timely and the process could probably be simply reinvigorated. For one, I would very much welcome such an initiative.

1. All views are personal and do not represent any of the institutions to which I am affiliated. Comments welcome: a.sanchez-graells@bristol.ac.uk. [↑](#footnote-ref-1)
2. For a critical account, see C. Harlow & R. Rawlings, *Process and Procedure in EU Administration*, Oxford, Hart Publishing, 2014, p. 142. See also S. Arrowsmith, *The Law of Public and Utilities Procurement. Regulation in the EU and the UK*, 3rd edn, vol. 1, London, Sweet & Maxwell, 2014, p. 178, p. 195. [↑](#footnote-ref-2)
3. For an overview and critical assessment, see e.g. S. Treumer, “Enforcement of the EU Public Procurement Rules: The State of Law and Current Issues”, in S. Treumer & F. Lichère (eds), *Enforcement of the EU Public Procurement Rules*, vol. 3 European Procurement Law Series, Copenhagen, DJØF Publishing, 2011, p. 17; R. Caranta, “Many Different Paths, but Are They All Leading to Effectiveness”, in ibid, p. 53; C. H. Bovis, “Access to Justice and Remedies in Public Procurement”, *European Procurement & Public Private Partnership Law Review*, 2012, 7, p. 195; E. Matei, “The Remedies Directive in Public Procurement” in C. Bovis (ed), *Research Handbook on EU Public Procurement Law*, Cheltenham, Edward Elgar, 2016, p. 352; S. Díez Sastre, “Organisational Forms and Structures of the Public Procurement Administration in the European Internal Market”, in F. Velasco Caballero & F. Pastor-Merchante (eds), *The Public Administration of the Internal Market*, Groningen, Europa Law, 2015, p. 168. [↑](#footnote-ref-3)
4. Commission Staff Working Paper, *Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation*,

Part 1, SEC (2011) 853 final, p. 26, available at <http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/er853_1_en.pdf> (last accessed 8 August 2016). [↑](#footnote-ref-4)
5. F. Wilman, *Private Enforcement of EU Law before National Courts*, Cheltenham, Edward Elgar, 2015, p. 63. [↑](#footnote-ref-5)
6. 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 [1989] OJ L 395/33. [↑](#footnote-ref-6)
7. Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1992] OJ L 76/14. [↑](#footnote-ref-7)
8. For discussion, see A. Brown, “Effectiveness of remedies at national level in the field of public procurement”, *Public Procurement Law Review*, 1998, 4, p. 89. [↑](#footnote-ref-8)
9. 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 [2007] OJ L 335/31. [↑](#footnote-ref-9)
10. J. Golding & P. Henty, “The new Remedies Directive of the EC: standstill and ineffectiveness”, *Public Procurement Law Review*, 2008, 3, p. 146. [↑](#footnote-ref-10)
11. For simplicity, on occasion, the expression ‘Remedies Directive’ is used as shorthand for the ensemble of statutory requirements derived from Directives 89/665/EEC, 92/13/EEC and 2007/66/EC. However, most of the time, it refers to Directive 89/665/EEC as amended by Directive 2007/66/EC. [↑](#footnote-ref-11)
12. Judgment in *Commission v Germany*, C-433/93, EU:C:1995:263. See J. M. Fernández Martín, *The E.C. Public Procurement Rules, A Critical Analysis*, Oxford, Oxford University Press, 1996, p. 281. [↑](#footnote-ref-12)
13. See C. H. Bovis, “Judicial activism and public procurement”, in ibid (ed), *Research Handbook on EU Public Procurement Law*, Cheltenham, Edward Elgar, 2016, p. 325. For a general overview of the relevant case law, particularly of the initial stages, see C. De Koninck & P. Flamey (eds), *European Public Procurement Law-Part II Remedies: The European Public Procurement Remedies Directives*, Alphen aan den Rijn, Kluwer Law International, 2009. [↑](#footnote-ref-13)
14. D. Pachnou, “Enforcement of the EC procurement rules: the standards required of national review systems under EC law in the context of the principle of effectiveness”, *Public Procurement Law Review*, 2000, 2, p. 55. Generally, on the developments concerning these two principles and the shifting approach of the CJEU in this area, see M. Dougan, *National Remedies before the Court of Justice. Issues of Harmonisation and Differentiation*, Oxford, Hart Publishing, 2004. For interesting critical remarks, see A. Wallerman, “Towards an EU law doctrine on the exercise of discretion in national courts? The Member States’ self-imposed limits on national procedural autonomy”, *Common Market Law Review*, 2016, 53, 2, p. 339; and M. Bobek, “Why There is no Principle of 'Procedural Autonomy' of the Member States”, in B. de Witte & H. Micklitz (eds), *The European Court of Justice and Autonomy of The Member States*, Antwerp, Intersentia, 2011, p. 305. With specific reference to procurement and the erosion of domestic procedural autonomy, see also C. Harlow, “At Risk: National Administrative Procedure within the European Union”, *Italian Journal of Public Law*, 2015, 7, 1, p. 60. [↑](#footnote-ref-14)
15. For discussion, see P. Cerqueira Gomes, “A Lost Proposal in the 2014 Public Procurement Package: Is there any Life for the Proposed Public Procurement Oversight Bodies?”, in G. S. Ølykke & A. Sanchez-Graells (eds), Reformation or Deformation of the EU Public Procurement Rules, Cheltenham, Edward Elgar, 2016 (forthc.). [↑](#footnote-ref-15)
16. Generally, see A. Arnull, “The Principle of Effective Judicial Protection in EU law: An Unruly Horse?”, *European Law Review*, 2011, 36, 1, p. 51. [↑](#footnote-ref-16)
17. Judgment in *HI*, C-92/00, EU:C:2002:379. However, the intensity of such judicial review remains unclear (see below §2.2). [↑](#footnote-ref-17)
18. Judgment in *Dorsch Consult Ingenieursgesellschaft v Bundesbaugesellschaft Berlin*, C-54/96, EU:C:1997:413, paragraph 40. [↑](#footnote-ref-18)
19. See e.g. the contributions to this book by Craven (UK), Dragos & Sparios (Romania), Marchetti (Italy), Noguellou (France), Stelkens (Germany), Valcárcel Fernández (Spain), or van Ommeren, Huisman & Jansen (Netherlands). See also the national chapters in Treumer & Lichère (eds), *Enforcement of the EU Public Procurement Rules* (n 2) and in U. Neergaard, C. Jacqueson & G. S. Ølykke (eds), *Public Procurement Law: Limitations, Opportunities and Paradoxes*, XXVI FIDE Congress, vol. 3, Copenhagen, DJØF Publishing, 2014. See also OECD, “Public Procurement Review and Remedies Systems in the European Union”, SIGMA Papers, No. 41, 2007, available at <http://dx.doi.org/10.1787/5kml60q9vklt-en> (last accessed 8 August 2016). For interesting critical remarks regarding the situation in the UK, see also E. Aspey, “The Search for the True Public Law Element: Judicial Review of Procurement Decisions”, *Public Law*, 2016, 1, p. 35. [↑](#footnote-ref-19)
20. Commission Staff Working Document, *Annual Public Procurement Implementation Review 2012*, SWD(2012) 342 final, available at <http://ec.europa.eu/internal_market/publicprocurement/docs/implementation/20121011-staff-working-document_en.pdf> (last accessed 8 August 2016). [↑](#footnote-ref-20)
21. Commission Staff Working Document, *Annual Public Procurement Implementation Review 2013*, SWD(2014) 262 final, p. 19, available at <http://ec.europa.eu/internal_market/publicprocurement/docs/implementation/20140820-staff-working-document_en.pdf> (last accessed 8 August 2016). [↑](#footnote-ref-21)
22. *Annual Public Procurement Implementation Review 2012* (n 19) p. 21 [↑](#footnote-ref-22)
23. Europe Economics and Milieu, *Economic efficiency and legal effectiveness of review and remedies procedures for public contracts. Final Study Report for the European Commission*, April 2015, available at <http://ec.europa.eu/DocsRoom/documents/10087/attachments/1/translations/en/renditions/native> (last accessed 8 August 2016). See also R. Williams QC, “The European Commission’s recent report, ‘Economic efficiency and legal effectiveness of review and remedies procedures for public contracts’”, *Public Procurement Law Review*, 2016, 2, p. NA29. [↑](#footnote-ref-23)
24. H. Schebesta, *Damages in EU Public Procurement Law*, vol. 6 Studies in European Economic Law and Regulation, Heidelberg, Springer, 2016; D. Fairgrieve & F. Lichère (eds), *Public Procurement Law. Damages as an Effective Remedy*, Oxford, Hart Publishing, 2011. See also H. Leffler, “Damages liability for breach of EC procurement law: governing principles and practical solutions”, *Public Procurement Law Review*, 2003, 4, p. 151; and A. Reich & O. Shabat, “The remedy of damages in public procurement in Israel and the EU: a proposal for reform”, *Public Procurement Law Review*, 2014, 2, p. 50. [↑](#footnote-ref-24)
25. A. Brown, “EU primary law requirements in practice: advertising, procedures and remedies for public contracts outside the procurement directives”, *Public Procurement Law Review*, 2010, 5, p. 169; Treumer (n 2) p. 44. [↑](#footnote-ref-25)
26. For a comparative view of how the system fares compared to the US benchmark, see C. D. Swan, “Lessons from Across the Pond: Comparable Approaches to Balancing Contractual Efficiency and Accountability in the U.S. Bid Protest and European Procurement Review Systems”, *Public Contract Law Journal*, 2013, 1, p. 29. [↑](#footnote-ref-26)
27. For an attempt at benchmarking several aspects of public procurement regulation, including remedies, see World Bank, *Benchmarking Public Procurement 2016. Assessing Public Procurement Systems in 77 Economies*, available at <http://bpp.worldbank.org/~/media/WBG/BPP/Documents/Reports/Benchmarking-Public-Procurement-2016.pdf> (last accessed 8 August 2016). [↑](#footnote-ref-27)
28. *Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation* (n 3) pp. 71-73. [↑](#footnote-ref-28)
29. Caranta (n 2) p. 81. [↑](#footnote-ref-29)
30. Indeed, the CJEU has not applied a strict assessment to the imposition of administrative or court fees as a requirement to access procurement review procedures, thus affording significant leeway to Member States on the basis of the principle of national procedural autonomy. See Judgment in *Orizzonte Salute*, C-61/14, EU:C:2015:655; and *Tita and Others*, C-495/14, EU:C:2016:230. [↑](#footnote-ref-30)
31. In this regard, it is interesting to note that Member States generally resolve procurement cases quicker than cases in other areas of EU economic law, such as competition law or consumer law. See European Commission, *The 2015 EU Justice Scoreboard*, COM(2015) 116 final Part 1/2, available at <http://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-116-EN-F1-1.PDF> (last accessed 11 August 2016). This has led the Commission to conclude that “Effective judicial review ensures that tenderers can benefit from the full scope of remedies under EU law on remedies in public procurement and that society at large is not affected by delayed performance of public contracts”; see European Commission, *The 2016 EU Justice Scoreboard*, COM(2016) 199 final, available at <http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2016_en.pdf> (last accessed 11 August 2016). [↑](#footnote-ref-31)
32. This discussion seems to replicate in good part that had in the US two decades ago, mainly between Kelman and Schooner. See S. Kelman, *Procurement and Public Management. The Fear of Discretion and the Quality of Government Performance*, Washington, AEI Press, 1990, and S. L. Schooner, “Fear of Oversight: The Fundamental Failure of Businesslike Government”, *American University Law Review*, 2001, 50, 3, p. 627. [↑](#footnote-ref-32)
33. This has been aptly done by many others. See above, mainly Treumer and Caranta n 2, n 18. [↑](#footnote-ref-33)
34. Charter of Fundamental Rights of the European Union [2012] OJ C 326/391. [↑](#footnote-ref-34)
35. For discussion concerning the European Convention on Human Rights, see A. Georgopoulos, “The EU Accession to the ECHR: An Attempt to Explore Possible Implications in the Area of Public Procurement”, in V. Kosta, N. Skoutaris & V. Tzevelekos (eds), *The EU Accession to the ECHR*, Oxford, Hart Publishing, 2014, p. 271. [↑](#footnote-ref-35)
36. Judgment in *Pizzo*, C-27/15, EU:C:2016:404, as well as the pending decision in *Connexxion Taxi Services*, C-171/15, on which only the AG Opinion of 30 June 2016 is available (EU:C:2016:506). [↑](#footnote-ref-36)
37. See M. Trybus, “The hidden Remedies Directive: review and remedies under the EU Defence and Security Procurement Directive”, *Public Procurement Law Review*, 2013, 4, p. 135. [↑](#footnote-ref-37)
38. Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L 94/1. [↑](#footnote-ref-38)
39. Together with the Concessions Directive, it includes 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 [2014] OJ L 94/65, and 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 [2014] OJ L 94/243. [↑](#footnote-ref-39)
40. M. A. Simovart, “Old remedies for new violations? The deficit of remedies for enforcing public contract modification rules”, *Upphandlingsrättslig Tidskrift (Procurement Law Journal)*, 2015, 1, p. 33. [↑](#footnote-ref-40)
41. A. Semple & M. Andrecka, “Classification, Conflicts of Interest and Change of Contractor: A Critical Look at the Public Sector Procurement Directive”, *European Procurement & Public Private Partnership Law Review*, 2012, 10, p. 171. [↑](#footnote-ref-41)
42. Not least, due to the renewed protectionist risks that arise from the flexibility of the new rules and the implicit administrative discretion for their interpretation and enforcement. Along the same lines, see M. Meulenbelt, “Protectionism on the rise? Modernization of EU public procurement rules during the economic crisis”, in H. Kalimo & M. S. Jansson (eds), *EU Economic Law in a Time of Crisis*, Cheltenham, Edward Elgar, 2016, p. 57. [↑](#footnote-ref-42)
43. Generally, although from the perspective of international (investment) arbitration, see M. Audit (ed), *Contrats publics et arbitrage international*, Brussels, Bruylant, 2011. [↑](#footnote-ref-43)
44. European Commission, Consultation on Remedies in Public Procurement, April-July 2015, available at <http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8244> (last accessed 8 August 2016). At the time of writing (August 2016), there has been no follow-up on the public consultation. [↑](#footnote-ref-44)
45. Informally, Commission officials have expressed this view repeatedly. Formally, the assessment of whether any revision is necessary seems to not have been concluded yet. See European Commission, *REFIT evaluation of the modifications introduced by Directive 2007/66/EC to Directives 89/665/EEC and 92/13/EEC concerning the European legal framework for remedies in the area of public procurement*, Dec 2015, available at <http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_grow_048_remedies_evaluation_en.pdf> (last accessed 11 August 2016). [↑](#footnote-ref-45)
46. The literature on this topic is really extensive. For general discussion, see S. Prechal, “The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?”, in C. Paulussen, T. Takács, V. Lazić & B. Van Rompuy (eds), *Fundamental Rights in International and European Law. Public and Private Law Perspectives*, Berlin, Springer, 2015, p. 143; G. De Búrca, “After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?”, *Maastricht Journal of European and Comparative Law*, 2013, 20, 2, p. 168; S. Douglas-Scott, “The European Union and Human Rights after the Treaty of Lisbon” *Human Rights Law Review*, 2011, 11, 4, p. 645. [↑](#footnote-ref-46)
47. Proposal for a Directive 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, COM(2006) 195 final/2, available at <http://ec.europa.eu/internal_market/publicprocurement/docs/remedies/com-2006-195_en.pdf> (last accessed 11 August 2016). [↑](#footnote-ref-47)
48. Judgment in *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 49. The CJEU referred specifically to Article 1(1) of the Remedies Directive, but there seems to be no reason not to consider this extensive to the entirety of the Remedies Directive. [↑](#footnote-ref-48)
49. Judgment in *Fastweb*, C-19/13, EU:C:2014:2194. [↑](#footnote-ref-49)
50. *Fastweb*, EU:C:2014:2194, paragraph 59. [↑](#footnote-ref-50)
51. *Club Hotel Loutraki and Others*, C-145/08, EU:C:2010:247. For discussion of this case in relation to Article 47 CFR, see M. Dougan, “Who Exactly Benefits from the Treaties? The Murky Interaction between Union and National Competence over the Capacity to Enforce EU Law”, *Cambridge Yearbook of European Legal Studies*, 2010, 12, 101. [↑](#footnote-ref-51)
52. Along the same lines, raising the issue of the growing importance of CFR-based arguments in public procurement litigation, see Schebesta (n 23) p. 58. [↑](#footnote-ref-52)
53. See E. Hancox, “The meaning of ‘implementing’ EU law under Article 51(1) of the Charter: Åkerberg Fransson”, *Common Market Law Review*, 2013, 50, 5, p. 1411. See also E. Muir, “The fundamental rights implications of EU legislation: Some constitutional challenges”, *Common Market Law Review*, 2014, 51, 1, p. 219. [↑](#footnote-ref-53)
54. Judgment in *Siragusa*, C-206/13, EU:C:2014:126, paragraph 25; *Julian Hernández and Others*, C-198/13, EU:C:2014:2055, paragraph 37. On the implications this can have for the harmonisation of standards of administrative protection, see R. Widdershoven, “Developing Administrative Law in Europe: Natural Convergence or imposed Uniformity?”, *Review of European Administrative Law*, 2014, 7, 2, p. 5. More generally, see M. Dougan, “Judicial review of Member State action under the general principles and the Charter: Defining the ‘scope of Union law’”, *Common Market Law Review*, 2015, 52, 5, p. 1201; J. Kokott & C. Sobotta, “Protection of Fundamental Rights in the European Union: On the Relationship between EU Fundamental Rights, the European Convention and National Standards of Protection”, *Yearbook of European Law*, 2015, 34, 1, p. 60; J. Snell, “Fundamental Rights Review of National Measures: Nothing New under the Charter?”, *European Public Law*, 2015, 21, 2, p. 285; T. Tridimas, “Fundamental Rights, General Principles of EU Law, and the Charter*”, Cambridge Yearbook of European Legal Studies*, 2014, 16, p. 361; F. Fontanelli, “National Measures and the Application of the EU Charter of Fundamental Rights – Does curia.eu Know iura.eu?”, *Human Rights Law Review*, 2014, 14, 2, p. 231; and ibid, “The Implementation of European Union Law by Member States under Article 51(1) of the Charter of Fundamental Rights”, *Columbia Journal of European Law*, 20, 3, p. 193. [↑](#footnote-ref-54)
55. Judgment in *Romeo*, C-313/12, EU:C:2013:718. [↑](#footnote-ref-55)
56. Ibid, paragraph 35. [↑](#footnote-ref-56)
57. Judgment in *Venturini*, joined cases C-159/12 to C-161/12, EU:C:2013:791, paragraph 25 and case-law cited. [↑](#footnote-ref-57)
58. Clearly, in the recent Judgment in *Comune di Ancona*, C-388/12, EU:C:2013:734. For discussion and a review of the case law, see C. Risvig Hamer, *Contracts not Covered or not Fully Covered by the Public Sector Directive*, Copenhagen, DJØF Publishing, 2012, p. 121. [↑](#footnote-ref-58)
59. As recently stressed in *Impresa Edilux and SICEF*, C-425/14, EU:C:2015:721, paragraph 21; see also *Enterprise Focused Solutions*, C‑278/14, EU:C:2015:228, paragraph 16 and case-law cited [↑](#footnote-ref-59)
60. *Cf* R. Nielsen, “Discrimination and equality in public procurement”, *EU & Arbetsrätt*, 2005, available at <http://arbetsratt.juridicum.su.se/Filer/PDF/klaw46/discrimination.procurement.pdf> (last accessed 9 August 2016), who entertains the idea that “*It may be argued that contracting in the framework of a European Union wide procurement procedure is never purely internal to a Member State and that workers, etc are therefore protected by [Union] law against their own nation-state when their employers take part in public procurement tendering. The law, as it stands at present, does not seem to be clear*”, p. 32. The same problem of *reverse discrimination* arises in connection with other public procurement rules, such as exclusion requirements; see A. Sanchez-Graells, L. R. A. Butler & P. Telles, ‘Exclusion and Qualitative Selection of Economic Operators under Public Procurement Procedures: A Comparative View on Selected Jurisdictions’, in M. Burgi, S. Treumer & M. Trybus (eds), *Qualification, Exclusion and Selection in EU Procurements*, vol. 7 European Procurement Law Series, Copenhagen, DJØF Publishing, 2016 (forthc.). For background discussion, see A. Tryfonidou, *Reverse Discrimination in EC Law*, The Hague, Kluwer Law International, 2009, ch 5, discussing reverse discrimination as an incongruity in a genuine internal market. See also D. Hanf, ‘Reverse Discrimination in EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice’, *Maastricht Journal of European and Comparative Law*, 2011, 18, 1, p. 29; and P. Van Elsuwege, ‘The Phenomenon of Reverse Discrimination: An Anomaly in the European Constitutional Order?’, in L. S Rossi & F. Casolari (eds), *The EU after Lisbon. Amending or Coping with the Existing Treaties?*, Berlin, Springer, 2014, p. 161. [↑](#footnote-ref-60)
61. *Cf* Opinion of Advocate General Stix-Hackl delivered on 11 July 2002 in *Makedoniko Metro and Michaniki*, C-57/01, EU:C:2002:450,paragraph 67. [↑](#footnote-ref-61)
62. Which, in any case, should be aligned with the requirements of effective judicial protection under the European Convention on Human Rights. However, differences could arise regarding the implications of the right to good administration, given that this is not regulated in the ECHR. For discussion, see Georgopoulos (n 34). [↑](#footnote-ref-62)
63. More indirect implications, such as any consequences that could potentially be drawn from the freedom to conduct a business (Art 16 CFR), do not seem sufficiently specific as to assess them here. [↑](#footnote-ref-63)
64. For detailed commentary, see P. Craig, “Article 41 – Right to Good Administration”, in S. Peers, T. Hervey, J. Kenner & A. Ward (eds), *The EU Charter of Fundamental Rights: A Commentary*, Oxford, Hart Publishing, 2014, p. 1069. See also H. C. H. Hofmann, “General Principles of EU Law and EU Administrative Law”, in C. Barnard & S. Peers (eds), *European Union Law*, Oxford, Oxford University Press, 2014, p. 198; and H. C. H. Hofmann & C. Mihaescu, “The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case”, *European Constitutional Law Review*, 2013, 9, 1, p. 73. [↑](#footnote-ref-64)
65. For discussion, see A. Sanchez-Graells, “Enforcement of State Aid Rules for Services of General Economic Interest before Public Procurement Review Bodies and Courts”, *Competition Law Review*, 2014, 10, 1, p. 3. [↑](#footnote-ref-65)
66. Judgment of 10 October 2012, *Sviluppo Globale v Commission*, T-183/10, EU:T:2012:534, paragraph 40, own translation from French. [↑](#footnote-ref-66)
67. Under the relevant substantive standards [*ie* that of the European Convention on Human Rights, for reasons that do not need to be clarified here; see Art 52(3) CFR and below (n 72)] the possibility of a first instance administrative decision coupled with a second instance judicial review is considered sufficient to uphold the right to a fair trial, even where fines are imposed; see *A. Menarini Diagnostics S.r.l. c. Italie*,App no 43509/08 (ECtHR, 27 September 2011), paragraph 59. The same applies here by analogy. [↑](#footnote-ref-67)
68. See Recital 36 of Directive 2007/66/EC, which explicitly states that the Remedies Directive “*respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union ... In particular, this Directive seeks to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second subparagraphs of Article 47 of the Charter*”. [↑](#footnote-ref-68)
69. Judgment in *Fastweb*, C-19/13, EU:C:2014:2194, *in totum*. The issue was also raised in *Orizzonte Salute*, C-61/14, EU:C:2015:655, and the CJEU stressed the applicability of Article 47 CFR to procurement review procedures covered by the Remedies Directive. [↑](#footnote-ref-69)
70. Caranta (n 2) p. 84. See also R. Caranta, “Remedies in EU Public Contract Law: The Proceduralisation of EU Public Procurement Legislation”, *Review of European Administrative Law*, 2015, 8, 1, p. 75. [↑](#footnote-ref-70)
71. *Connexxion Taxi Services*, C-171/15. Application [2015] OJ C 213/16. [↑](#footnote-ref-71)
72. See the already available Opinion of Advocate General Campos Sánchez-Bordona delivered on 30 June 2016 in *Connexxion Taxi Services*, C-171/15, EU:C:2016:506. [↑](#footnote-ref-72)
73. Although in relation with EU competition law, see A. Sanchez-Graells, “The EU’s Accession to the ECHR and Due Process Rights in EU Competition Law Matters: Nothing New under the Sun?”, in V. Kosta, N. Skoutaris & V. Tzevelekos (eds), *The EU Accession to the ECHR*, Oxford, Hart Publishing, 2014, p. 255. [↑](#footnote-ref-73)
74. Similarly Harris, O’Boyle & Warbrick, *Law of the European Convention on Human Rights*, 2nd edn, Oxford, Oxford University Press, 2009, p. 228. [↑](#footnote-ref-74)
75. *Bryan v UK* Series A no 335 (1995); 21 EHRR 342, paragraph 47. [↑](#footnote-ref-75)
76. *Tsfayo v UK* App no 60860/00 (ECtHR, 14 November 2006)) paragraph 46. See W. P. J. Wils, “The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights”, *World Competition*, 2010, 33, 1, p. 23; and A. E. Beumer, “The Interplay between Article 6 ECHR & Article 47 Charter and the EU Competition Enforcement System—Is There a Need of ‘Reviewing’ the Standard of Review?”, Working Paper presented at the Workshop ‘A Europe of Rights: the EU and the ECHR’, University of Surrey (8-9 June 2012), p. 13-14 and 24-25. [↑](#footnote-ref-76)
77. *Zumtobel v Austria* Series A no 268 (1993); 17 EHRR 116, paragraph 32. [↑](#footnote-ref-77)
78. *Kingsley v UK* 2002-IV GC; 33 EHRR 13. [↑](#footnote-ref-78)
79. For further details on these issues and the balance between full rights of appeal and limited judicial review in the analysis of Article 6 guarantees in the area of challenges against administrative decisions, see Harris, O’Boyle and Warbrick(n 73) p. 229-32. [↑](#footnote-ref-79)
80. AG Campos Sánchez-Bordona in *Connexxion Taxi Services*, EU:C:2016:506, paragraph 73. [↑](#footnote-ref-80)
81. N. Fennelly, “Remedies for Breach of EU Law Revisited. Effective Judicial Protection before National Courts: Lessons from Ireland”, 2010, available at <http://ukael.org/past-events/past_events_24_3629873531.pdf> (last accessed 11 August 2016). [↑](#footnote-ref-81)
82. K. M. Halonen, “Disclosure Rules in EU Public Procurement: Balancing between Competition and Transparency”, *Journal of Public Procurement*, 2016, 16, 4, p. 528. See also A. Sanchez-Graells, “The Difficult Balance between Transparency and Competition in Public Procurement: Some Recent Trends in the Case Law of the European Courts and a Look at the New Directives”, *University of Leicester School of Law Research Paper,* No. 13-11, 2013, available at [http://ssrn.com/abstract=2353005](http://ssrn.com/abstract%3D2353005) (last accessed 10 August 2016). [↑](#footnote-ref-82)
83. Arrowsmith (n 1) p. 1344. [↑](#footnote-ref-83)
84. See Recital 82 of Directive 2014/24/EU, and S. Arrowsmith (n 1) p. 1134. [↑](#footnote-ref-84)
85. K. Lenaerts, “Exploring the Limits of the EU Charter of Fundamental Rights”, *European Constitutional Law Review*, 2012, 8, p, 375, at 376. [↑](#footnote-ref-85)
86. *By* analogy, Hofmann (n 63) p. 206. For broader discussion, see also A. Sanchez-Graells, “Assessing the Public Administration’s Intention in EU Economic Law: Chasing Ghosts or Dressing Windows?”, in K. A. Armstrong (ed), *Cambridge Yearbook of European Legal Studies*, 2017 (forthc.). [↑](#footnote-ref-86)
87. For broader discussion of the tensions derived from the competing ideas of supranational rules and national sovereignty, see E. G. Heidbreder, “European Union Governance in the Shadow of Contradicting Ideas: The Decoupling of Policy Ideas and Policy Instruments”, *European Political Science Review*, 2013, 5, 1, p. 133. [↑](#footnote-ref-87)
88. For general discussion of this problem in the UK context, see N. Bamforth, “Courts in a Multi-Layered Constitution”, in N. Bamforth & P. Leyland (eds), *Public Law in a Multi-Layered Constitution*, Oxford, Hart Publishing, 2003. [↑](#footnote-ref-88)
89. *Pizzo*, C-27/15, EU:C:2016:404. [↑](#footnote-ref-89)
90. *Pizzo*, EU:C:2016:404, paragraph 35. [↑](#footnote-ref-90)
91. *Pizzo*, EU:C:2016:404, paragraph 46. [↑](#footnote-ref-91)
92. Judgment in *Von Colson and Kamann v Land Nordrhein-Westfalen*, C-14/83, EU:C:1984:153. [↑](#footnote-ref-92)
93. On the extension of these duties not only to national courts, but also and notably to national authorities, see J. Temple Lang, “The Duty of National Courts under Community Constitutional Law”, *European Law Review*, 1997, 22, p. 3; and ibid, “The Duty of National Authorities under European Constitutional Law”, *European Law Review*, 1998, 23, p. 109. [↑](#footnote-ref-93)
94. For critical discussion, see S. Weatherill, “The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court’s Case Law has Become a Drafting Guide”, *German Law Journal*, 2011, 2, p. 827. [↑](#footnote-ref-94)
95. *Pizzo*, EU:C:2016:404, paragraph 48. [↑](#footnote-ref-95)
96. *Pizzo*, EU:C:2016:404, paragraph 51. [↑](#footnote-ref-96)
97. For discussion of this principle of administrative law common to the EU and national systems, see C. Harlow, “Global Administrative Law: The Quest for Principles and Values”, *European Journal of International Law*, 2006, 17, 1, p. 187. [↑](#footnote-ref-97)
98. To that effect, see the Judgment in *Manova*, C-336/12, EU:C:2013:647, and in *Cartiera dell'Adda and Cartiera di Cologno*, C-42/13, EU:C:2014:2345. For discussion, see for discussion, see A. Sanchez-Graells, “Rejection of Abnormally Low and Non-Compliant Tenders in EU Public Procurement: A Comparative View on Selected Jurisdictions”, in M. Comba & S. Treumer (eds), *Award of Contracts in EU Procurement*, vol. 5 European Procurement Law Series, Copenhagen, DJØF, 2013, p. 289. [↑](#footnote-ref-98)
99. The same would go for the interpretation of Article 56(3) of Directive 2014/24/EU in terms of the possibility (in my view, non-discretionary) to seek clarifications from tenderers and to “take all appropriate steps to avoid the rejection of candidates on the basis of shortcomings in the available documentation that could be overcome if the contracting authority were to exercise the appropriate level of diligence”; see A. Sanchez-Graells, *Public procurement and the EU competition rules*, 2nd edn, Oxford, Hart Publishing, 2015, p. 321. [↑](#footnote-ref-99)
100. *Connexxion Taxi Services*, C-171/15. Application [2015] OJ C 213/16. [↑](#footnote-ref-100)
101. Opinion of Advocate General Campos Sánchez-Bordona delivered on 30 June 2016 in *Connexxion Taxi Services*, C-171/15, EU:C:2016:506, paragraph 12. [↑](#footnote-ref-101)
102. AG Campos Sánchez-Bordona in *Connexxion Taxi Services*, EU:C:2016:506, paragraph 10. [↑](#footnote-ref-102)
103. AG Campos Sánchez-Bordona in *Connexxion Taxi Services*, EU:C:2016:506, paragraph 19. [↑](#footnote-ref-103)
104. AG Campos Sánchez-Bordona in *Connexxion Taxi Services*, EU:C:2016:506, paragraph 58. [↑](#footnote-ref-104)
105. In particular, on the issue of the admissibility of the ‘horizontal’ direct effect (or a disguised indirect horizontal effect) in so-called ‘triangular relationships’—such as those generally present in public procurement, see Wells, C-201/02, EU:C:2004:12 and the extension of its findings by J. H. Jans et al, *Europeanisation of Public Law*, Groningen, Europa Law Publishing, 2007, p. 100. See also K. Lackhoff & H. Nyssens, “Direct Effect of Directives in Triangular Situations”, *European Law Review*, 1998, 23, p. 407, and 412; D. Colgan, “Triangular Situations: The Coup de Grâce for the Denial of Horizontal Direct Effect of Community Directives”, European Public Law, 2002, 8, p. 545; D. Edward, “Direct Effect: Myth, Mess or Mystery?”, *Diritto dell’Unione Europea*, 2003, 7, p. 215; S. Prechal, *Directives in European Community Law. A Study of Directives and Their Enforcement in National Courts*,2nd completely revised edn, Oxford, Clarendon Press, 2005, p. 261; and T. Tridimas, “Black, White and Shades of Grey: Horizontality of Directives Revisited”, *Yearbook of European Law*, 2002, 21, p. 353. [↑](#footnote-ref-105)
106. Sanchez-Graells (n 98) 293. [↑](#footnote-ref-106)
107. Interestingly, though, the 2015 public consultation on the review of the Remedies Directive did not include any questions in that regard, but solely focused on the effectiveness of the instrument as a whole and of the reforms introduced by Directive 2007/66/EC more specifically. See the Law Society's response to the Commission consultation on Remedies in Public Procurement, 20 July 2015, available at <http://communities.lawsociety.org.uk/download?ac=13653> (last accessed 11 August 2016). [↑](#footnote-ref-107)
108. Drafting amended by the Concessions Directive (n 37). [↑](#footnote-ref-108)
109. Judgment in *HI*, C-92/00, EU: C:2002:379. [↑](#footnote-ref-109)
110. As recently reminded in the Judgment in *Croce Amica One Italia*, C-440/13, EU:C:2014:2435, paragraph 39. [↑](#footnote-ref-110)
111. To this effect, see Opinion of Advocate General Stix-Hackl delivered on 23 September 2004 in *Stadt Halle and RPL Lochau*, C-26/03, EU:C:2004:553,paragraphs 50 and ff. [↑](#footnote-ref-111)
112. Judgment in *Falk Pharma*, C-410/14, EU:C:2016:399. [↑](#footnote-ref-112)
113. *Falk Pharma*, EU:C:2016:399, paragraph 38. [↑](#footnote-ref-113)
114. *Falk Pharma*, EU:C:2016:399, paragraph 40. [↑](#footnote-ref-114)
115. *Falk Pharma*, EU:C:2016:399, paragraph 33. [↑](#footnote-ref-115)
116. I have criticised this elsewhere, see “ECJ Gets First Principles of EU Public Procurement Law Wrong, as Demonstrated by the Regulation of Dynamic Purchasing Systems (C-410/14)”, *howtocrackanut*, 6 June 2016, available at <http://www.howtocrackanut.com/blog/2016/6/3/6dmoau4vg7cuvwdswixj9zdclyk19h>, (last accessed 10 August 2016). [↑](#footnote-ref-116)
117. *Falk Pharma*, EU:C:2016:399, paragraph 37, emphasis added. [↑](#footnote-ref-117)
118. See Sanchez-Graells (n 98) ch 3. *Contra*, S. Arrowsmith, “The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies”, *Cambridge Yearbook of European Legal Studies*, 2012, 14, p. 1; and P. Kunzlik, “Neoliberalism and the European Public Procurement Regime”, *Cambridge yearbook of European Legal Studies*, 2013, 15, p. 283. [↑](#footnote-ref-118)
119. Generally, see M. Andrecka, “Dealing with Legal Loopholes and Uncertainties within EU Public Procurement Law regarding Framework Agreements”, *Journal of Public Procurement*, 2016, 16, 4, p. 505. [↑](#footnote-ref-119)
120. Judgment in *Commission v CAS Succhi di Frutta*, C-496/99 P, EU:C:2004:236; *pressetext Nachrichtenagentur*, C-454/06, EU:C:2008:351. [↑](#footnote-ref-120)
121. For a critical assessment, see S. De Mars, “Exclusion and self-cleaning in Article 57: discretion at the expense of clarity and trade?”, in G. S. Ølykke & A. Sanchez-Graells (eds), Reformation or Deformation of the EU Public Procurement Rules, Cheltenham, Edward Elgar, 2016 (forthc.). [↑](#footnote-ref-121)
122. For discussion of the reform, see A. Sanchez-Graells, “Exclusion, Qualitative Selection and Short-listing”, in F Lichère, R Caranta & S Treumer (eds), *Modernising Public Procurement. The New Directive*, vol. 6 European Procurement Law Series, Copenhagen, DJØF Publishing, 2014, p. 97. [↑](#footnote-ref-122)
123. See H. J. Prieβ, “The rules on exclusion and self-cleaning under the 2014 Public Procurement Directive”, *Public Procurement Law Review*, 2014, 23, p. 112. [↑](#footnote-ref-123)
124. Judgment in *Hackermüller*, C-249/01, EU:C:2003:359. [↑](#footnote-ref-124)
125. Interestingly, the trade-off or tensions derived from this dual function of decisions to exclude economic operators from procurement procedures is explicitly reflected in the rules applicable to federal government procurement in the US. In that regard, it is worth noting that US FAR 9.402(b) explicitly establishes that “*The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government’s protection and not for purposes of punishment. Agencies shall impose debarment or suspension to protect the Government’s interest and only for the causes and in accordance with the procedures set forth in this subpart*”. This can gain relevance in the future, given that exclusion seems to form part of the negotiations of the procurement chapter of TTIP. On these issues, see A. Sanchez-Graells, “Is TTIP Likely to Result in a Single Transatlantic Procurement Debarment System?” presented at the Symposium on Opening Transatlantic Procurement Markets, King’s College London & George Washington University Law School, London, 19 September 2016 (forthc.). [↑](#footnote-ref-125)
126. Some of these issues could usefully be modelled in view of the experience with Regulation 1/2003 in the area of competition law. See Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102] of the Treaty [2003] L1/1. [↑](#footnote-ref-126)
127. Ultimately, “[l]*iability ensues only if the breach is serious, which in turn involves an enquiry revolving around discretion, good faith, reasonableness, and the behaviour of related actors …*”; see T. Tridimas, “Liability for Breach of Community Law: Growing up and Mellowing Down?”, *Common Market Law Review*, 2001, 38, p. 301. [↑](#footnote-ref-127)
128. *Cfr.* Schebesta (n 23), who argues in terms of deterrence and advocates for more generous damages rules based on a proportional approach to the seriousness of the chance of having gotten the contract. [↑](#footnote-ref-128)
129. Caranta (n 2) p. 87; Treumer (n 2) p. 38. [↑](#footnote-ref-129)
130. For discussion see S. Treumer, “Damages for breach of the EC public procurement rules – changes in European regulation and practice”, Public Procurement Law Review, 2006, 17, 4, p. 159. [↑](#footnote-ref-130)
131. Similarly, Arrowsmith (n 1) p. 194; see also R. Caranta, “The Comparatist’s Lens on Remedies in Public Procurement”, Istituto Universitario di Studi Europei, WP 2011-1, p. 7, available at <http://workingpapers.iuse.it/wp-content/uploads/2011/08/2011-02-ECLI.pdf> (last accessed 11 August 2016). [↑](#footnote-ref-131)
132. Caranta (n 2) p. 88. For discussion of the risk of allowing disappointed tenderers to choose between remedies, see A. Sanchez-Graells, “Should Damages in Public Procurement Hinge on Disappointed Bidders’ Commercial Interests? A Comment on Energy Solutions EU Ltd v Nuclear Decommissioning Authority”, *EUtopia law*, 12 February 2015, available at <https://eutopialaw.com/2015/02/12/damages-in-public-procurement-should-not-hinge-on-disappointed-bidders-commercial-interests/> (last accessed 11 August 2016). [↑](#footnote-ref-132)
133. See Judgment in *Lämmerzahl*, C-241/06, EU:C:2007:597; and in *Commission v Ireland*, C-456/08, EU:C:2010:46. [↑](#footnote-ref-133)
134. Judgment in *Uniplex (UK)*, C-406/08, EU:C:2010:45. [↑](#footnote-ref-134)
135. Judgment in *MedEval*, C-166/14, EU:C:2015:779. [↑](#footnote-ref-135)
136. *MedEval*, EU:C:2015:779, paragraphs 39 and 40. [↑](#footnote-ref-136)
137. This is by no means an exclusive phenomenon in the area of public procurement. For discussion in the area of competition law, see O. Odudu & A. Sanchez-Graells, “The interface of EU and national tort law: Competition law”, in P. Giliker (ed), *Research Handbook on EU Tort Law*, Cheltenham, Edward Elgar, 2017 (forthc.). [↑](#footnote-ref-137)
138. Generally, see D. Dragoş, “Alternative Dispute Resolution Mechanisms in the Field of Public Procurement: Between Effectiveness and Constitutionality”, *Transylvanian Review of Administrative Sciences*, 2011, 34, p. 98; and D. Dragoş & B. Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law*, Berlin, Springer, 2014. [↑](#footnote-ref-138)
139. E.g. Romania, or the UK. ADR used to be relevant in Denmark, although this seemed to phase out. See the contributions to Treumer & Lichère (eds), *Enforcement of the EU Public Procurement Rules* (n 2). [↑](#footnote-ref-139)
140. E.g. France. See Treumer & Lichère (eds), *Enforcement of the EU Public Procurement Rules* (n 2). [↑](#footnote-ref-140)
141. See the contributions to Audit (ed), *Contrats publics et arbitrage international* (n 42). [↑](#footnote-ref-141)
142. See C. Donnelly, “Public-Private Partnerships: Award, Performance, and Remedies”, in S. W. Schill (ed), *International Investment Law and Comparative Public Law*, Oxford, Oxford University Press, 2010, p. 475. [↑](#footnote-ref-142)
143. More generally, Caranta (n 2) p. 55. [↑](#footnote-ref-143)