

Remedies in EU public procurement: current issues

Mari Ann Simovart, Dr Iur



Research on remedies

- Ginter, Simovart in - M Steinicke, P. L. Vesterdorf, ed's. "Brussels Commentary on EU Public Procurement Law" (a working title), to be published by Nomos Publishers in Feb 2018
- Simovart. Enforcement of ineffectiveness ... *Juridica International*, 2016.
- Simovart. Old remedies for new violations? The deficit of remedies ... *UrT* 1, 2015.
- Ginter, Parrest, Simovart. Access to the content of public procurement contracts ... *PPLR* 2013 4.

CONCLUSIONS FROM CJEU CASE LAW

- Overall **success**:
 - Rapid and effective remedies
 - Dual protection of both abstract and personal interests
 - Wide scope of application - C-81/98 *Alcatel*, C-26/03 *Stadt Halle*

- **Problematic** issues:
 - Remedies under “**old**” **directives**:
 - Essentially unharmonized damages
 - Essentially unharmonized disclosure duties
 - Difficulties with applying rules on *locus standi* (compare e.g. C-131/16 – C-355/15), standstill outside directives, deadlines.
 - Remedies in **interaction with 2014 directives**

- **No vision** for the e-future!

Example: lack of uniformity: damages

- Member States' competence in regulating award of **damages** unclear (compare C-568/08, Spijker p 90 - C-314/09 *Strabag* p 34 – 35 – C-166/14 *MedEval* p 32, 35-38, 46)
- Major differences in national laws cause unequal playing-grounds *vis a vis*
 - *Locus standi*
 - Any violation vs serious violation as grounds for damages
 - Culpability?
 - Scope of compensation (unreceived profit?)

Example: interplay with 2014 directives: unlawful modification

- *Locus standi*?
 - *Pressetext C-454/06*: restrictions of access must “not affect the practical effectiveness of the directive”.
 - Rejection only if lack of standing plainly obvious? (Compare also to C-131/16!)
- **Disclosure** obligation?
- **Other remedies** besides ineffectiveness?

Example: interaction with 2014 directives: termination

- Remedies **for terminating or for not terminating** under Art 73? **If** these decisions are subject to review, then ...
 - **Locus standi** if challenging a failure to terminate?
 - **Deadline** for terminating ?
 - **Deadline** for challenging termination/ failure to terminate ?
 - **NB!** Compare with ineffectiveness!

... ineffectiveness vs termination

- The **result** of both: contractual rights and duties cease to be enforced and performed. (Directive 2007/66/EC Recitals 21)
- Differences in application:
 - Limitation period: **6 mo** for ineffectiveness (Directives 1989/665, 1992/13, Art 2f) – **none** for termination
 - Legitimate expectations: **voluntary notice** avoids ineffectiveness (Art 2d (4)) – **nothing** can eliminate threat of termination
 - Application: ineffectiveness subject to review body's decision, general interests exception (Art 2d (1),(3)) – no rules on termination.

Example: (no) vision for the e-future

- Review of remedies in light of **e-procurement**, e.g.:
 - Calculation of **limitation periods**
 - Standards for **verification** within a procedure?
 - Availability of remedies due to **e-discrimination** (no **e-documents**, no **e-tenders**)?
 - Duty to accept **e-claims** ?
 - Effect on burden of **proof**?
- **Transfer to** (partial) **e-review**?
 - Access of review body to e-procedure?

Case of Estonia: limitation period for review of contract documents

- Options:
 - A. ... starts from publishing documents?
 - B. ... starts from accessing / downloading / registering ?
 - C. ... is tied to end of tender submission deadline A new solution / compromise?
 - “Claim of review must be submitted 2 / 5 work days before tender submission deadline.” (Act on Public Procurement § 189 lg 2)

Case of Estonia: towards e-review

□ Partial **e-review**:

- Submission of e-claim grants Review Body with access to the concerned e-procurement procedure (Statutes of Public Procurement Register § 21 lg 1 p 9, lg 3, addendum 1)
- Often, **no documents** accompany the claim. Exceptions apply: claims of damages, cases of abnormally low tenders etc.
 - **E-verification substitutes burden of proof**
- Review decision published in the public procurement e-Register (Statutes, § 15)

(Judges, attorneys still human, **no robots** in foreseeable future.)

REPORT: EFFECTIVENESS OF REMEDIES DIRECTIVES

- **REPORT** ON THE EFFECTIVENESS OF DIRECTIVE 89/665/EEC AND DIRECTIVE 92/13/EEC - COM(2017) 28 final 24.1.2017
- COMMISSION STAFF WORKING DOCUMENT - **EVALUATION** OF THE MODIFICATIONS INTRODUCED BY DIRECTIVE 2007/66/EC TO DIRECTIVES 89/665/EEC AND 92/13/EEC - SWD(2017) 13 final

Findings of the 2017 Report

- Overall satisfaction with effectiveness of remedies
- Overall proper (minimum) harmonization
- Some problematic issues, e.g.:
 - Interplay with 2014 directives
 - Lifting of automatic suspension
 - No structured data collection on national level

Conclusions of the Report

- “No major or urgent need” to amend Remedies Directives
- “Guidance”
 - Guidance vs directives:
 - Binding in court?
 - Mandatory for Member States?
 - Legal competence? E.g.
 - Damages – competence of Member States
 - Incl. / excl. Art 72 – 73 ?

My conclusions

- **Strong case for review of Remedies Directives.**
 - Harmonization in more detail
 - Remedies fit for new rules introduced in 2014
 - Attn to e-procurement!

- **Create a vision of e-review!**

Thank you for your attention!