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COMMISSION STAFF WORKING DOCUMENT

EVALUATION OF THE MODIFICATIONS INTRODUCED BY DIRECTIVE 2007/66/EC TO DIRECTIVES 89/665/EEC AND 92/13/EEC CONCERNING THE EUROPEAN FRAMEWORK FOR REMEDIES IN THE AREA OF PUBLIC PROCUREMENT/ REFIT EVALUATION

Accompanying the document

REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

ON THE EFFECTIVENESS OF DIRECTIVE 89/665/EEC AND DIRECTIVE 92/13/EEC, AS MODIFIED BY DIRECTIVE 2007/66/EC, CONCERNING REVIEW PROCEDURES IN THE AREA OF PUBLIC PROCUREMENT

{COM(2017) 28 final}

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1. EXECUTIVE SUMMARY

Background

The EU Public Procurement Directives[1] (the 'Procurement Directives') regulate award procedures and limited aspects of the execution of public contracts and concession contracts (the 'contracts') above certain thresholds. Experience in implementing the Procurement Directives has shown that their objectives could not be entirely achieved if economic operators were unable to ensure that their rights were observed across the EU through access to clear, rapid and effective procedures. Directives 89/665/EEC and 92/13/EEC[2] were adopted to this end.

Directives 89/665/EEC and 92/13/EEC were thoroughly amended by Directive 2007/66/EC to improve the effectiveness of review procedures concerning the award of public contracts and to ensure better compliance with EU law, especially at a time when breaches can still be corrected. In particular, the Directive introduced a mandatory standstill period between the decision to award a contract and the conclusion of the contract in question. To help address problems encountered by unsuccessful tenderers in relation to the access of relevant information specifying reasons why their offers were rejected, the Directive introduced an automatic debrief to tenderers at the time of the contract award decision. The Directive also provided for the sanction of contract ineffectiveness to address illegal direct awards which are considered as the most serious breach of Union law in the field of public procurement.

Directives 89/665/EEC and 92/13/EEC as amended by Directive 2007/66/EC require the Commission to review their implementation and to report to the European Parliament and to the Council on its effectiveness, and in particular on the effectiveness of the alternative penalties and time limits.

In December 2012, the Commission launched a regulatory fitness and performance programme (REFIT)[3] and as a result the Commission identified[4] Directive 2007/66/EC as

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[1] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sector and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. Both Directives were replaced by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, 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, 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.
For the sake of simplification, in the text of this Staff Working Document reference is made only to Directive 2004/17/EC and Directive 2004/18/EC since those Directives were applicable during the period on which this evaluation focuses.

[2] 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 which covers the public sector and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors which covers the utilities sector.

[3] Communication 'EU Regulatory Fitness', COM(2012) 746.

[4] 'Communication from the Commission — Regulatory Fitness and Performance Programme (REFIT): results and next steps', COM(2013)685.

legislation that should be evaluated in order to determine whether it contains any unnecessary or disproportionate regulatory burden which could be removed and, more generally, whether it delivers on its objectives and remains fit-for-purpose, considering the major changes that took place for the EU Public Procurement Directives.

For the sake of simplification, any reference in this document to the Remedies Directives is understood as referring to Directives 89/665/EEC and 92/13/EEC as amended by Directive 2007/66/EC unless indicated otherwise[5].

Findings

This evaluation assesses the functioning of the Remedies Directives, i.e. whether following their amendments by Directive 2007/66/EC, the Remedies Directives have achieved their objectives and whether they are still fit-for-purpose today. The five evaluation criteria are:
1) effectiveness;
2) efficiency;
3) relevance;
4) coherence with other policies and
5) EU added value.

There is currently no EU-wide monitoring and evaluation system of remedies action in Member States in place. Data for remedies on public contracts above thresholds brought in each Member State are not collected in a structured, coherent and systemic manner that would allow analysing the results obtained in an automated and easily comparable way. For this reason, the proper measurement or estimation of the effects of the Remedies Directives is difficult and requires additional actions (e.g. one-off data collection and manual analysis, as it was the case in the current evaluation).

Various sources of information were used to collect evidence on the functioning and added value[6] of the Directives', with the following conclusions:

(i) In terms of **effectiveness**, the Remedies Directives have generally met their objectives of: increasing the guarantees of transparency and non-discrimination; allowing effective and rapid action to be taken when there is an alleged breach of the Procurement Directives; and providing economic operators with the assurance that all tender applications will be treated equally. The available data on the actual usage of the provisions added further evidence on the effectiveness of the Directive. In general, the remedies provided in the Remedies Directives were frequently used in most of Member States. There were around 50 000 first instance decisions across Member States during 2009-2012. The most frequently type of remedy sought is set aside decision, followed at distance by interim measures and the removal of discriminatory specifications. As far as the opinions of the stakeholders were concerned, a clear majority of respondents to the public consultation carried out by the Commission departments considered that the Remedies Directives have

[5] Directive 2014/23/EU introduced further amendments to Directives 89/665/EEC and 92/13/EEC, mainly to extend their scope of application ith regard to concessions. Since its deadline for transposition elapsed on 18 april 2016, its impact is not addressed in this evaluation.

[6] These mainly included: public stakeholders consultations, exchanges within the Commission's experts group, exchanges among national authorities in charge of public procurement policy, supportive Study carried out by an external contractor, consultations with first instance administrative review bodies and judges of supreme administrative courts dealing with public procurement, overview of relevant case-law, data from the Official Journal of the European Union ('OJEU/TED', and more specifically the online version of its supplement dedicated to public procurement, Tenders Electronic Daily or TED – http://ted.europa.eu/), information provided by representative associations and academic literature review.

had a positive effect on the public procurement process. It is considered to be more transparent (80.59%), fairer (79.42%), more open and accessible (77.65%) and it provides greater incentive to comply with substantive public procurement rules (81.77%). As confirmed by virtual consensus among all the interested parties, Directive 2007/66/EC substantially increased the effectiveness of pre-contractual remedies by introducing a minimum standstill period between the notification of an award decision and the signing of the contract.

Some national systems require that legal protection in public procurement procedures is provided at first instance by administrative review bodies rather than ordinary courts. As a general trend, these tend to be more effective. This is confirmed by a large majority of respondents to the public consultation (74.7%) who considered that procedures before ordinary courts take generally longer and result in lower standards of adjudication than the procedures before specialised administrative review bodies.

In most cases, the costs of review procedures, albeit very divergent across Member States, do not seem to have decisive dissuasive effect on the access to remedies. Moreover, the Remedies Directives are also well balanced in addressing the interest of all parties concerned. In particular, 57.06% of respondents to the public consultation considered that the Directives evenly balance the interest of economic operators in ensuring the effectiveness of public procurement law and the interest of contracting authorities in limiting frivolous litigation. As a final point, the Remedies Directives are also effective as a deterrent to non-compliant behaviour in the area of public procurement.

The Remedies Directives require the Commission in its report to the European Parliament and to the Council to pay particular attention to the effectiveness of alternative penalties and time limits. The evaluation has revealed that alternative penalties are sporadically used in Member States and were considered by respondents to the online public consultation (carried out by the Commission departments) and by some Member States to be the least relevant remedy. Nonetheless, views were expressed that all remedies provided for in the Remedies Directives contribute to their deterrent effect and provide for a comprehensive and effective system for sanctioning irregularities in public procurement. Concerning time limits, no specific evidence was gathered in the context of the evaluation that would demonstrate that time limits that follow the structure of the Remedies Directives are either too long and cause undue delays in the public procurement process or too short and thereby do not allow economic operators to enforce their rights.

The evaluation revealed that certain aspects of the Remedies Directives could be made clearer. This is confirmed by the contributions received. This applies, for example, to matters such as the interplay between the Remedies Directives and the 2014 legislative package on public procurement, and the development of criteria to be applied to lift the automatic suspension of the conclusion of the contract following the lodging of a legal action.

The evaluation also made it possible to identify problems that persist at national level. In particular, various stakeholders confirmed in the context of the public consultation that problems identified are rooted either in national legislation beyond the Remedies Directives or in national practices, and not in the Remedies Directives.

Finally, the Commission also recognises that in most Member States the information on national remedies systems is not collected in a structured manner, making the analysis of

the performance of the Directives extremely difficult. In addition, it is rarely used for policymaking purposes (for example, identification of resources needed or abusive complaints; consistency of decisions based on effective searching tools; identification of contracting authorities/entities against which successful complaints are lodged most often; and identification of the aspects of procurement procedures that are appealed successfully).

(ii) In terms of **efficiency,** the Remedies Directives provide overall benefits in line with the intended impacts, both direct and indirect. There are clear indications that the benefits achieved through the Directives outweigh their costs. The costs to contracting authorities and suppliers of bringing forward or defending a review case (including direct and indirect costs) vary widely across the EU, typically accounting for 0.4%-0.6% of the contract value. It should be also noted that the costs would not reduce to zero if the Remedies Directives were repealed. On the contrary, they could be even higher because of national differences in the review and remedies rules and a lack of harmonisation at the level leading to a more cumbersome context for tenderers and others.

The benefits are important in terms of sound financial management, the best price/quality ratio and deterrence, especially when considering the value of invitations to tender published on Tenders Electronic Daily. The 2011 evaluation of EU public procurement legislation in general[7] estimated that savings of 5% realised for the 420 billion of public contracts that were published at EU level would translate into savings or higher public investment of over EUR 20 billion a year. The effective implementation of the Remedies Directives can therefore make such estimated savings from the Public Procurement Directives more likely to happen. Finally, the evaluation did not identify any administrative burden considered to be unnecessary for the operation of the Remedies Directives.

(iii) Concerning **relevance**, the objectives of the Remedies Directives are still relevant. The evaluation revealed that many provisions of the Directives are perceived as relevant across suppliers, contracting authorities and legal practitioners. Based on replies to the public consultation, the most relevant provision appears to be the standstill period (65% of respondents), followed by the suspension of the contract award procedure where review proceedings are initiated (62%) and the automatic debrief to tenderers (58%). Even if certain provisions are perceived to be of less practical value, they still contribute to the deterrent effect of the Remedies Directives. Another indicator of the relevance of the Remedies Directives is the actual use of the procedures they provide. In general, the remedies provided are frequently used in most Member States. There were around 50 000 first instance decisions across Member States during 2009-2012[8]. The most frequently type of remedy sought is set-aside decision, followed at some distance by interim measures and the removal of discriminatory specifications.

(iv) The Remedies Directives are **coherent with other EU policies**. As confirmed by the Court of Justice of the European Union, the right to an effective remedy is a general principle of EU law. In the light of this, the Remedies Directives are in line with the rights and general principles laid down in EU primary law concerning fundamental rights. The Remedies Directives lie at the core of public procurement legislation as they allow

[7] The Evaluation Report on Impact and Effectiveness of EU Public Procurement Legislation, SEC(2011) 853 final.

[8] This figure came from the Study "*Economic efficiency and legal effectiveness of review and remedies procedures for public contracts*", further explained in section 5 of this Staff Working Document.

bidders to enforce their substantive rights. They were found to be generally aligned with the 2014 legislative package on public procurement, in particular to cover the concessions subject to Directive 2014/23/EU. Nonetheless, as already mentioned above in section referring to effectiveness, the interplay between the Remedies Directives and the new legislative package on public procurement could be further clarified. Finally, by improving the effectiveness of national review procedures, especially those dealing with illegal direct awards of contracts, the Remedies Directives also play an important role in effectively tackling breaches of Procurement Directives that could also entail irregularities with criminal implications. The evaluation has not found any possible conflicts with other policy fields, but rather the contrary.

(v) In the Commission's view, the Remedies Directives present a clear **EU added value**. It was generally confirmed by all sources of information used for the purposes of the evaluation that it is of utmost importance to have EU law requirements for remedies in public procurement. Ordinary courts under ordinary procedural codes cannot guarantee rapid and effective review as required by EU case-law. For instance, before a mandatory standstill period was introduced by Directive 2007/66/EC, no interim measure before ordinary courts was rapid enough to suspend conclusion of the awarded contract.

Compared with other fields of EU law, public procurement rules have certain specificities. Firstly, as long as the contract is above the EU thresholds, the substantive public procurement rules are applicable, irrespective of the actual cross-border interest. Secondly, in each tendering procedure conducted by any contracting authority/entity there is a significant potential for numerous infringements (e.g. unlawful exclusion of tenderers, unlawful tender specifications, unlawful contract award criteria, use of the wrong procedures, accepting abnormally low tenders, conflict of interests, etc.) The role of the Commission, when dealing with individual complaints and potential infringements of EU law, is directed to ensuring future systematic respect for EU law, rather than obtaining remedies for individual parties to public tendering procedures particularly given the large volume of contracting authorities, tenderers and procedures in the EU and the technicalities involved in each individual process.

Suitable rights of direct recourse for bidders are therefore indispensable for the correct functioning of the substantive public procurement rules and for the proper operation of the single market in the public sector. As confirmed by numerous stakeholders, the minimum level of harmonisation ensured by Remedies Directives is absolutely essential in this respect.

Conclusions

Based on the evaluation, the Commission concludes that the Remedies Directives, in particular the amendments introduced by Directive 2007/66/EC, largely meet their objectives in an effective and efficient way although it has not been possible to quantify the concrete extent of their cost/benefits. Even if specific concerns are reported in some Member States, they usually stem from national measures and not from the Remedies Directives themselves. In general qualitative terms, the benefits of the Remedies Directives outweigh their costs. They remain relevant and continue to bring EU added value.

Despite the overall positive conclusion of the evaluation, certain shortcomings were identified, in particular as regards the clarity of some provisions and the availability of data. Data for remedies actions on public contracts above thresholds brought in each Member State are not collected in a structured, coherent and systemic manner that would allow comparing the results obtained. For this reason, the proper measurement or estimation of the effects of the Remedies Directives is more difficult.

Based on the information gathered in this evaluation, the report from the Commission to the European Parliament and the Council on the effectiveness of Directive 89/665/EEC and Directive 92/13/EEC, as modified by Directive 2007/66/EC, concerning review procedures in the area of public procurement to which this document accompanies, draws the necessary operational conclusions and proposes relevant paths of action.

2. INTRODUCTION

The Procurement Directives regulate award procedures of public contracts and concessions contracts ('contracts') above certain thresholds. The estimated value of tenders published in 'Tenders Electronic Daily'in 2014 amounted to EUR 421.31 billion, which is 3.32 % of EU GDP.[9] The Procurement Directives apply common principles of transparency, equal treatment, non-discrimination, open competition and sound procedural management to award procedures to the benefit of economic operators across the single market. Open and well regulated procurement markets also contribute to a more efficient use of public resources and to the improvement in the quality of public purchases.

The experience acquired with the Procurement Directives showed that to meet completely their objectives, economic operators had to be able to enforce the rights conferred by those Directives everywhere in the EU. Consequently, the 'Remedies Directives' (Directives 89/665/EEC and 92/13/EEC, as amended through Directive 2007/66/EC[10]) were adopted as flanking measures. These Directives ensured that, based on minimum EU review standards, economic operators across the EU would have access to rapid and effective procedures for seeking redress in cases where they considered that contracts had been awarded in breach of Procurement Directives. This was, and is, crucial to making sure that public contracts ultimately go to the company which has made the best offer, and therefore to building confidence among business and the public that public procurement procedures are fair. They are also an indispensable complement to Commission enforcement actions in the field of public procurement, leaving the Commission to focus on cases in which essential matters at EU level are at stake.

The Remedies Directives require the Commission to review their implementation and to report to the European Parliament and to the Council on its effectiveness, and in particular on the effectiveness of the alternative penalties and time limits.

In December 2012, the Commission launched a regulatory fitness and performance programme (REFIT).[11] The purpose of the REFIT programme was to:

- identify opportunities to reduce regulatory costs and cut red tape;
- simplify regulation in order to meet policy goals; and
- achieve the benefits of EU regulation at the lowest possible cost.

Fitness checks and evaluations of existing legislation are among the tools used by the REFIT programme to achieve these objectives. As the reform of the public procurement was

[9] European Commission, 2016, 2014 Public procurement indicators, http://ec.europa.eu/growth/single-market/public-procurement/studies-networks/index_en.htm

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

[11] COM(2012) 746 final of 12.12.2012.

followed up by the administrative burden programme and taken on board by REFIT, it was decided that the Remedies Directives should also be linked to REFIT, so that the regulatory fitness of the whole framework for public procurement would be assessed. Subsequently, the Commission Communication on "*REFIT – results and next steps*"[12] identified the amendments introduced in the Remedies Directives by Directive 2007/66/EC as legislation that should be evaluated in order to determine whether it delivers on its objectives at reasonable costs, is relevant, coherent and has EU added value. Opportunity was therefore taken to perform the overall evaluation of the performance of the Directives and examine whether they remain fit-for-purpose.

As far as the scope of this evaluation is concerned, it is important to note that Directive 2014/23/EU on the award of concession contracts introduced further amendments to Directive 89/665/EEC and Directive 92/13/EEC, mainly to extend their scope of application with regard to concessions. However, the deadline to turn Directive 2014/23/EU into national law elapsed on 18 April 2016, so its impact is not addressed in this evaluation, except for the aspect of coherence of the new legislative package on public procurement with the Remedies Directives.

[12] 'Communication from the Commission — Regulatory Fitness and Performance Programme (REFIT): results and next steps', COM(2013)685.

3. BACKGROUND - THE REMEDIES DIRECTIVES

The Remedies Directives require that decisions on contracts falling within the scope of the Procurement Directives taken by contracting authorities/entities may be reviewed effectively and as quickly as possible, on the grounds that such decisions have infringed the Procurement Directives.

Most of the provisions in the Remedies Directives are mandatory and must be turned into national law. Those mandatory provisions constitute '*minimum conditions to be satisfied by the review procedures established in the national legal systems*'[13]. Member States may introduce conditions that go beyond those laid down in the Remedies Directives, for instance by laying down similar or equivalent review procedures for public procurement under the EU thresholds, by granting to organisations that do not act as economic operators (e.g. trade associations) the right or capacity to bring an action or to appear before a court and by setting longer time limits for applying for review.

However, there are a few provisions in the Remedies Directives that are optional and therefore Member States may choose not to transpose them. Optional provisions are, for example, the imposition on plaintiffs of the obligation to seek review first with the contracting authority and the possibility for review bodies (if certain conditions are met) not to declare a contract ineffective and impose instead alternative penalties.

Directive 89/665/EEC, covering the public sector, and Directive 92/13/EEC, covering the utilities sector, are very similar in content. For the sake of simplification, any reference to Directive 89/665/EEC (and to contracting authorities) is understood to also refer to Directive 92/13/EEC (and contracting entities) unless indicated otherwise.

3.1. The founding Remedies Directives (Directives 89/665/EEC and 92/13/EEC)

The founding Remedies Directives did not intend to fully harmonise the remedies systems in the area of public procurement. They laid down only '*the minimum conditions to be satisfied by the review procedures established in domestic law to ensure compliance with the requirements of EU law concerning public procurement*'[14]. In fact, these Directives constituted (and still do today) a rare example of constraints placed on the principle of national procedural autonomy of Member States with a view to ensuring effective enforcement of EU rules at national level. The Remedies Directives are therefore an essential piece in the public procurement landscape and a unique example in EU law of giving full effect to EU rights at national level.

The remedies to be provided by Member States under the founding Remedies Directives included the powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures to correct the alleged infringement or prevent further damage to the interests concerned, including measures to suspend or to ensure the suspension of

[13] Judgment of 27 February 2003 in case C-327/00, *Santex*, paragraph 47.
[14] Judgment of the Court of Justice of 30 September 2010 in case C-314/09 *Strabag AG*, paragraph 33.

the procedure for the award of a public contract or the implementation of any procedural decision taken by contracting authorities;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure; and

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

Directive 92/13/EEC (for the utilities sector) also provided powers to take, at the earliest opportunity, if possible by way of interlocutory procedures and if necessary by a final procedure on the substance, measures other than those provided for in points (a) and (b) with the aim of correcting any identified infringement and preventing injury to the interests concerned i.e. making an order for the payment of a sum, in cases where the infringement had not been corrected or prevented.

As far as interim measures[15] were concerned, the founding Remedies Directives only specified that Member States could provide that the body responsible for review procedures could take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and could decide not to grant such measures when their negative consequences could exceed their benefits. In particular, the Court of Justice of the European Union ('the Court') made it clear that granting interim measures could not be made conditional on bringing an action for annulment of the contested act[16].

As far as annulment is concerned, there were no further provisions in the Remedies Directives on this issue except for the provision that specified that Member States could provide that where damages were claimed on the grounds that a decision was taken unlawfully, the contested decision had first to be set aside by a body having the necessary powers. How the remedy of setting aside of contracting authorities' decisions operated depended on national implementing measures.

The conditions for the award of damages also depended on national provisions. Directive 92/13/EEC only specified that '*where a claim is made for damages representing the costs of preparing a bid or of participating in an award procedure, the person making the claim shall be required only to prove an infringement of Community law in the field of procurement or national rules implementing that law and that he would have had a real chance of winning the contract and that, as a consequence of that infringement, that chance was adversely affected*'. The equivalent provision did not exist in Directive 89/665/EEC. Nonetheless, in its judgments in cases C-275/03 and C-70/06 *Commission v Portugal* and C-314/09 *Strabag,* the Court held that it was not possible for Member States to require proof of culpability as a precondition for an award of damages.

Under the founding Remedies Directives, Member States had also a wide discretion to decide which bodies would be responsible for hearing public procurement cases in first instance. Such bodies could be either judicial or not judicial in character. There were provisions in the founding Remedies Directives that guaranteed that when bodies responsible for review procedures were not judicial in character, written reasons for their decisions had to be given

[15] Interim measures provided for the suspension of an award procedure prior to the conclusion of the contract.
[16] Judgment of 19 September 1996 in case C-236/95 *Commission v. Greece*.

and there had to be the possibility of an appeal to a court (or to another independent body that is a court or tribunal within the meaning of Article 267 of the Treaty on the Functioning of the European Union –TFEU).

The founding Remedies Directives also guaranteed that review procedures were available, at least, to any person having or having had an interest in obtaining a public contract who has been or risks being harmed by an alleged infringement.

Furthermore, the founding Remedies Directives laid down a corrective mechanism that allowed the Commission to notify a Member State before the conclusion of a given contract when it considered that there had a been a clear and manifest infringement of EU public procurement law during the award procedure of that contract. The Commission had to state the reasons of the alleged breach and the Member State concerned had 21 calendar days to reply to the Commission. In any event, this corrective mechanism did not in practice oblige the Member State concerned to suspend, correct or cancel the award procedure. The Commission only exceptionally used the corrective mechanism. The case-law of the Court confirmed that such corrective mechanism was an option at the disposal of the Commission, which could even be used in paralel to an infringement procedure, but was not a pre-requisite for or a replacement of an infringement procedure.[17]

3.2. Directive 2007/66/EC

The Commission proposed the modernisation of the founding Remedies Directives following extensive consultations on their functioning with all major stakeholders, including Member States, contracting authorities, businesses, lawyers and professional associations. Both the consultations and the case-law of the Court revealed a certain number of weaknesses in the review mechanisms established by the founding Remedies Directives.[18]

As a result of these consultations[19], two key weaknesses were identified in the founding Remedies Directives:

1) the absence of a period allowing an effective review between a decision to award a contract and the conclusion of the contract in question. This resulted in 'the race to signature': contracting authorities who wished to make irreversible the consequences of the disputed contract award decision proceeded very quickly to the signature of the contract.

2) Second, it was impossible under the founding Remedies Directives to challenge illegal direct awards of public contracts, which are the most serious breaches of EU law in the area of public procurement.

The purpose of modernising the founding Remedies Directives was therefore to improve the effectiveness of review procedures concerning the award of contracts and to ensure better

[17] Judgment of 24 January 1995 in case C-359/93, *Commission v Netherlands*, paragraphs 8 and 11-13.
[18] A list of relevant case-law on remedies can be found in Annex 1.
[19] As described in Section 3 of the Impact Assessment, the consultations included seeking the opinion of two Advisory committees, direct consultation using the Commission's Interactive Policy Making tool (IPM), consultation of enterprises belonging to the European Business Test Panel (EBTP) and on-line questionnaires for awarding authorities.

compliance with EU law, especially at a time when the breaches can still be corrected. To a large extent, the concrete proposals codified the case-law of the Court in this area.

Directive 2007/66/EC aimed to increase guarantees of transparency and non-discrimination and to open up public procurement to EU-wide competition, in line with the overall objectives of the Procurement Directives (i.e. to achieve best value for money). As mentioned in its recital 36, Directive 2007/66/EC sought to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with Article 47 of the Charter of Fundamental Rights of the European Union. As the Court subsequently stated:'*Directive 89/665 gives specific expression to the general principle of EU law enshrining the right to an effective remedy in the particular field of public procurement*'[20].

While maintaining the guarantees introduced by Directives 89/665/EEC and 92/13/EEC explained above, Directive 2007/66/EC introduced the following key elements which are described in detail in the subsequent sections:

(a) an automatic debrief at the time of the contract award decision and a 'standstill period';

(b) time limits for pre-contractual remedies;

(c) an automatic suspension of the contract award procedure where legal proceedings are brought against contracting authorities' award decision;

(d) the sanction for 'ineffectiveness';

(e) time limits for 'ineffectiveness'; and

(f) alternative penalties.

Finally, Directive 2007/66/EC adjusted the corrective mechanism to clarify that the infringement of EU public procurement law does not need to be considered 'clear and manifest' but rather 'serious'. This refocus was the consequence of the strengthening of the effectiveness of national review procedures, in order to encourage those concerned to make greater use of the possibilities for review by way of interlocutory procedure before the conclusion of a contract.[21]

3.2.1. *Automatic debrief and 'standstill period'*

Before the adoption of Directive 2007/66/EC, contracting authorities were in a position to ensure that a disputed contract award decision was irreversible and that the only remedy available was damages. It sufficed to sign a contract at the moment of the award decision or right after without waiting for this decision to be challenged.

In its judgment of 28 October 1999 in case C-81/98, *Alcatel*, the Court ruled that '*Member states are required to ensure that the contracting authority's decision prior to the conclusion of the contract as to the bidder in a tender procedure with which it will conclude the contract*

[20] Order of 23 April 2015 of the Vice-President of the Court of Justice in case C-35/15 P(R), *Vanbreda*, paragraph 28. Furthermore, Article 47 of the Charter applies even to public contracts and concession contracts that are not covered by the Remedies Directives, provided that they have a certain cross-border interest.

[21] Recital 28 of Directive 2007/66/EC.

is in all cases open to review in a procedure whereby an applicant may have that decision set aside if the relevant conditions are met, notwithstanding the possibility, once the contract has been concluded, of obtaining an award of damages'.[22]

In its judgment of 24 June 2004 in case C-212/02, *Commission v Austria*, the Court decided that an effective remedy presupposes first, an obligation to inform tenderers of the award decision and second, that it was possible for the unsuccessful tenderer to examine in sufficient time the validity of the award decision. As the Court ruled, '*a reasonable period must elapse between the time when the award decision is communicated to unsuccessful tenderers and the conclusion of the contract in order, in particular, to allow an application to be made for interim measures prior to the conclusion of the contract*'[23].

The Court did not specify however any conditions for implementing these rules. These were clarified by Directive 2007/66/EC. Article 2a, paragraph 2, of Directive 89/665/EEC makes it clear that '*a contract may not be concluded following the decision to award a contract before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenders and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision*'.

This provision clarifies also that the communication of the award decision to each tenderer and candidate concerned must be accompanied by a summary of the relevant reasons and a precise statement of the exact standstill period applicable.

Based on the same provision, Member States may provide that the standstill period does not apply in cases where no publication of contract notice is required, there are no concerned candidates or in specific cases concerning contracts based on framework agreements or specific contracts based on a dynamic purchasing system ('DPS').

3.2.2. *Time limits for pre-contractual remedies*

Following the modifications introduced by Directive 2007/66/EC, Article 2c of Directive 89/665/EEC states that where a Member State provides that any application for review of a contracting authority's decision taken in the context of a contract award procedure falling within the scope of Directive 2004/18/EC must be made before the expiry of a specified period, time limits for applying for pre-contractual remedies shall be at least 10 calendar days (or 15 calendar days if means of communication other than fax or electronic means are used) with effect from the same triggering events as for the standstill period.

3.2.3. *An automatic suspension*

According to Article 2, paragraph 3, of Directive 89/665/EEC, as modified by Directive 2007/66/EC, '*when a body of first instance which is independent of the contracting authority, reviews a contract award decision, Member States shall ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application*

[22] See paragraph 43 of the judgment.
[23] See paragraph 23 of the judgment.

either for interim measures or for review. The suspension shall end no earlier than the expiry of the standstill period'. Member States have the choice as to whether the automatic suspension should continue at the stage of the second instance review. Furthermore, for reasons of *effet utile,* in some Member States the automatic suspension can be lifted by a body of first instance under the specific conditions established by Member States which, in particular, include the balancing of interests likely to be harmed and the public interest.

3.2.4. *Ineffectiveness*

The remedy of ineffectiveness was introduced in particular to tackle illegal direct awards which are considered by the Court '*the most serious breach of Community law in the field of procurement*'[24]. This remedy also codifies the case-law.[25]

Article 2d, paragraph 1, of Directive 89/665/EEC enumerates three situations in which ineffectiveness applies:

(i) illegal direct awards;

(ii) an infringement of the standstill period or the automatic suspension if this infringement has deprived the tenderer of the possibility to pursue pre-contractual remedies, where such an infringement is combined with an infringement of substantive public procurement rules and if that infringement has affected the chances of the tenderer to obtain the contract; and

(iii) in cases where Member States have invoked the derogation from the standstill period for contracts based on a framework agreement or a DPS, where there is an infringement of the second indent of the second subparagraph of Article 32(4)[26] or of Article 33(5) or (6)[27] of Directive 2004/18/EC.

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[24] Judgment of 11 January 2005 in case C-26/03, *Stadt Halle*, paragraph 37.

[25] Judgment of 10 April 2003 in joint cases C-20/01 and C-28/01, *Commission v Germany*, and judgment of 18 July 2007 in case C-503/04, *Commission v Germany*.

[26] According to the second indent of the second subparagraph of Article 32(4) of Directive 2004/18/EC, 'Contracts based on framework agreements concluded with several economic operators may be awarded (…) where not all the terms are laid down in the framework agreement, when the parties are again in competition on the basis of the same and, if necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement, in accordance with the following procedure: (a) for every contract to be awarded, contracting authorities shall consult in writing the economic operators capable of performing the contract; (b) contracting authorities shall fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders; (c) tenders shall be submitted in writing, and their content shall remain confidential until the stipulated time limit for reply has expired; (d) contracting authorities shall award each contract to the tenderer who has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement'.

[27] According to Article 33(5) of Directive 2004/18/EC, 'each specific contract must be the subject of an invitation to tender. Before issuing the invitation to tender, contracting authorities shall publish a simplified contract notice inviting all interested economic operators to submit an indicative tender, in accordance with paragraph 4, within a time limit that may not be less than 15 days from the date on which the simplified notice was sent. Contracting authorities may not proceed with tendering until they have completed evaluation of all the indicative tenders received by that deadline'. Under Article 33(6) of the Directive, 'contracting authorities shall invite all tenderers admitted to the system to submit a tender for each specific contract to be awarded under the system. To that end they shall set a time limit for the submission of tenders'.

Article 2d paragraph 2 of Directive 89/665/EEC stipulates that the consequences of a contract being considered ineffective must be provided by national law. National law might thus provide for the retroactive cancellation of all contractual obligations or limit the scope of cancellation to these obligations which still have to be performed. In the latter case, Member States must provide for alternative penalties.

Article 2d, paragraph 3, of Directive 89/665/EEC allows Member States to provide that the review body may not consider a contract ineffective, if the review body finds that overriding reasons relating to a general interest require that the effects of the contract should be maintained. In this case, alternative penalties are instead applied.

Pursuant to Article 2d, paragraph 4, of Directive 89/665/EEC, Member States may also provide that the sanction of ineffectiveness will not apply if the following conditions are met:

(i) the contracting authorities consider that the award of a contract without a prior publication of a contract notice in the Offical Journal of the European Union / Tenders Electronic Daily (OJEU/TED) is permissible in accordance with Directive 2004/18/EC and Directive 2004/17/EC;

(ii) contracting authorities publish in the OJEU/TED a voluntary ex ante transparency notice ('VEAT') expressing its intention to conclude the contract; and

(iii) contracting authorities do not conclude the contract before the expiry of a period of at least 10 days with effect from the day following the date of the publication of this notice.[28]

3.2.5. *Time limits for bringing an action for ineffectiveness*

According to Article 2f paragraph 1 of Directive 89/65/EEC, actions for ineffectiveness can be lodged within:

(a) 30 days with effect from the day following the date on which contracting authorities published a contract award notice (provided that it contains reasons for a direct award) or the contracting authorities informed the tenderers concerned of the conclusions of the contract (provided that this information contains a summary of the relevant reasons); or

(b) in other cases before the expiry of at least six months with the effect from the day following the date of the conclusion of the contract.

3.2.6. *Alternative penalties*

Article 2e, paragraph 1, of Directive 89/665/EEC provides for alternative penalties where Member States might consider ineffectiveness to be inappropriate.

[28] In its judgment of 11 September 2014 in case C-19/13 *Fastweb SpA* the Court of Justice held that the contract may not be declared ineffective if the above-mentioned conditions are in fact satisfied, which it is for the referring court to determine. In particular, the review body is under a duty to determine whether, when the contracting authority took the decision to award a contract by means of a negotiated procedure without prior publication of a contract notice, it acted diligently and whether it could legitimately hold that the award of a contract without a prior publication of a contract notice in the OJEU/TED was permissible in accordance with Directive 2004/18/EC and Directive 2004/17/EC.

Alternative penalties can also be applied in an optional manner, for instance:

- when the contract is not declared ineffective because of overriding reasons relating to a general interest;

- when ineffectiveness was declared only for those obligations which would still have to be performed (*ex nunc*); and

- in the case of infringements of the standstill period or the automatic suspension if that infringement, for example, is not combined with an infringement of substantive provisions.

Article 2e paragraph 2 of Directive 89/665/EEC specifies that '*alternative penalties must be effective, proportionate and dissuasive*'. It can be either the imposition of fines on the contracting authority or the shortening of the duration of the contract. Member States can provide for both, the imposition of fines and the shortening of the duration of the contract.

The same provision allows Member States to confer on the review body broad discretion to take into account all relevant factors, including the seriousness of the infringement, the behaviour of contracting authorities and the extent to which the contract remains in force.

The same provision also makes it clear that the award of damages does not constitute an alternative penalty.

3.3. Other aspects related to remedies

As seen above, the Remedies Directives are not exhaustive and they only provide for minimum harmonisation, which Member States may adapt in the national legislation transposing the Directives. Member States may also transpose some or all of their optional provisions. Finally, beyond those aspects that are regulated in the Remedies Directives, other aspects related to remedies such as costs and time limits for the duration of the review procedures are relevant for the overall performance of the remedies systems in Member States.

3.3.1. *Costs of proceedings*

The Remedies Directives are silent about the costs of proceedings. Nonetheless, they require Member States to take the measures necessary to ensure that decisions taken by contracting authorities may be reviewed effectively. It is therefore indispensable to strike a balance between, on the one hand, the right of public authorities to impose (if they choose to do so) reasonable fees that cover actual administrative or judicial costs and deter frivolous litigation and, on the other hand, the right of economic operators to have easy access to an effective remedy.

Cases on court fees in the area of public procurement have been recently brought before the Court in preliminary ruling proceedings.

In its judgment of 6 October 2015 in case C-61/14 *Orizzone Salute*, the Court ruled that Article 1 of Directive 89/665/EC and the principles of equivalence and effectiveness must be interpreted as not precluding national legislation which requires the payment of court fees in

public procurement cases. In paragraph 58 of its judgment the Court considered that the court fees which do not exceed 2 % of the value of the contract concerned are not liable to render practically impossible or excessively difficult the exercise of rights conferred by EU public procurement law.

Furthermore, in the same judgment, the Directive does not preclude the charging of multiple court fees to an individual who brings several court actions concerning the same award of a public contract or that individual from having to pay additional court fees in order to be able to raise supplementary pleas concerning the same award of a public contract within ongoing judicial proceedings.

However, in *Orizzone Salute* the national court is required to examine the subject-matter of the actions submitted by an individual or the pleas raised by that individual within the same proceedings. If it finds that the subject-matter of those actions is not in fact separate or does not amount to a significant enlargement of the subject-matter of the dispute that is already pending, it is required to relieve that individual of the obligation to pay cumulative court fees.

In its order of 7 April 2016 in case C‑ 495/14, *Tita*, the Court relied extensively on the resoning developed in *Orizzone Salute* and found compatible with Directive 89/665/EEC fees that amount to € 2 000 when the value of the contract is equal or inferieur to € 200 000, € 4 000 when the value of the contract is between € 200 000 and € 1 000 000 and € 6 000 when the value of the contract exceeds € 1 000 000.

In its judgment of 15 September 2016 in case C-488/14, *Star Storage*, the Court found that Directive 89/665/EEC, read in the light of Article 47 of the Charter of Fundamental Rights, allows contracting authorities to require from applicants the constitution of a good conduct guarantee, provided that it is refunded to the applicant whatever the outcome of the action.

Finally, other costs of proceedings, such as those deriving from the legal representation before review bodies, may also have an effect on the functioning of the national review systems.

3.3.2. *Time-limit for the duration of the review procedures*

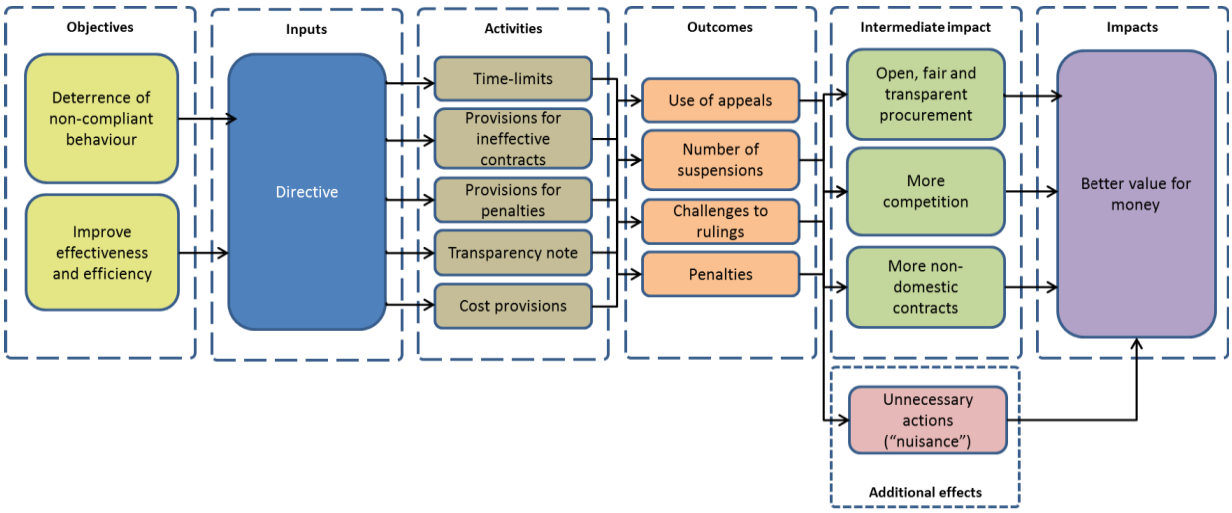
According to Article 1, paragraph 1, of Directive 89/665/EEC, Member States are to take the necessary measures to ensure that decisions made by contracting authorities may be reviewed effectively and, in particular, as rapidly as possible. One of the major elements that might impact the effectiveness of the rules on remedies is the time it takes to obtain a decision. It is in interest of both the contracting authority and economic operator to obtain a quick decision. Notwithstanding this, the review procedures should allow at least for the assessment of the legal elements of the case.

4. EVALUATION — GENERAL ASPECTS

4.1. Intervention logic

The overall dynamics of various provisions foreseen under the Remedies Directives may be presented in a simplified form in an intervention logic model, which is shown in Figure 1.

Figure 1: Intervention logic model



Source: '*Economic efficiency and legal effectiveness of review and remedies procedures for public contracts*', Europe Economics and Milieu, April 2015

Based on the diagram above, the Remedies Directives ('Input') stem from the need to deter non-compliant behaviour and to improve the effectiveness and efficiency of public procurement rules. These rules must be understood within the general objectives of facilitating the freedoms of the single market and rationalising public spending ('Objectives'). Following the transposition of Directive 2007/66/EC, Member States introduced the various measures listed under ('Activities') to allow challenges before national review bodies.

The initiative entered into force and produced direct results ('Outcomes '). These can be observed in the form of use of the appeal provision, which can lead to challenging a given decision or even suspending a procurement outcome or imposing penalties. The desired impact of the Remedies Directives is to make the procurement process more open, fair transparent and competive, and to increase non-domestic contracts awarded while trying to avoid additional effects such as an excessive amount of unnecessary actions ('Intermediate impact').

The remedy actions incur costs for market players and contracting authorities. It must be however kept in mind that most of these costs are not imposed by the Remedies Directives themselves. Finally, within the freedom to undertake the remedy action it may be possible that there are also some additional or side effects in the form of 'nuisance' or unnecessary actions being brought forward. The intermediate impacts, less the potential additional effects, are expected to lead to final benefits in the form of procurement outcomes that reflect better value for money ('Impacts').

4.2. Evaluation criteria and evaluation questions

The evaluation of the Remedies Directives has been carried out paying particular attention to the following evaluation criteria and questions in order to guide the analysis of the Directives' functioning:

- **Effectiveness**:

- Have the Remedies Directives been effective in meeting, or moving towards, the defined objectives? To what extent do the Directives contribute to transparency, fairness and openness of the market?

- What factors influenced the achievements observed? (e.g. to what extent are the various provisions envisaged in the Remedies Directives being used, in particular in relation to the use of complaints, appeals and damages?) Are there factors which are hindering this effect?

- **Efficiency:** What are the main costs and benefits of the Remedies Directives for contracting authorities and economic operators? Are there significant differences in costs or benefits between Member States? Does it create administrative burden? To what extent is the system being used unnecessarily? Do the benefits of the Directives outweigh their costs? Could the same benefits have been achieved at a lower cost?

- **Relevance:** Are the objectives of the Remedies Directives still relevant today? How has the original need for intervention evolved in recent years? In particular, is there any reason to believe that the initiative is no longer justified or that alternative provisions or soft measures are needed?

- **Coherence with other policies:** To what extent are the Remedies Directives consistent with each other, with the substantive public procurement rules and with regulatory measures adopted for the purposes of other policy objectives at EU and national level?

- **EU added value:** What is the ongoing added value of EU legislation in this field? What would be the effects if the Remedies Directives were to be withdrawn and Member States were free to adjust their national regulatory frameworks? Would these benefits have been achieved in the absence of the Directives?

The main focus of the evaluation is whether the Remedies Directives contribute to better enforcement of substantive public procurement legislation at national level.

5. METHODOLOGY

In December 2013, Directorate General for Internal Market, Industry, Entrepreneurship and SMEs (or DG GROW)[29] launched an evaluation of the amendments introduced to the Remedies Directives by Directive 2007/66/EC, announced in the Commission's Communication 'Regulatory Fitness and Performance (REFIT): Results and Next Steps'[30]. This evaluation formed part of the Commission's Agenda Planning[31] and Work Programme.[32]

As already explained, the main goal of this evaluation was to assess the functioning of the Remedies Directives, i.e. whether they have been efficient, effective, coherent, relevant and whether there is an added value at the EU level.

In order to reach the above objectives, the following sources were used in this evaluation:

[29] At the time of launching the evaluation: Directorate General for Internal Market and Services (DG MARKT).
[30] COM(2013) 685 final.
[31] 2015/GROW/048.
[32] COM(2014) 910 final.

- the Study '*Economic efficiency and legal effectiveness of review and remedies procedures for public contracts*' (''the Study'), commissioned to an external consultant[33] (information and data used in the Study were mainly collected through stakeholder interviews, contracting authority interviews, case studies and market data collection; as part of its task, the consultant also carried out surveys);

- a number of consultations described in detail in Annex 2 – synopsis report of consultation activities, namely: an open online public consultation, targeted consultations with Member States and with experts and practitioners in public procurement litigation; and

- review of national legislation and case-law.

Furthermore, in line with the evaluation guidelines, an inter-service steering group was created to gather a broader view from other Commission departments. The inter-service steering group was composed, in addition to DG GROW, of the Commission's Secretariat-General, the Legal Service, DG Justice and Consumers, DG Environment and DG Regional and Urban Policy. The group was consulted on various important aspects for the evaluation process.

One of the difficulties encountered in the evaluation related to data gathering, which made it a challenge to assess the achievement of the objectives to date. For example, in some cases (e.g. evidence of the indirect deterrent effect of the Remedies Directive), the results were related to only a small number of Member States, so it was difficult to generalise the findings to the rest of the EU. Although the 'Impact Assessment Report – Remedies in the field of Public Procurement' that preceded Directive 2007/66/EC already mentioned the need to establish monitoring and evaluation system of remedies actions in Member States, this system was never established as at that time the focus was on the transposition of Directive 2007/66/EC into national laws of Member States.

Moreover, in most Member States, the information on the operation of review procedures in the field of public procurement and more specifically on the complaints lodged by economic operators in the field of public procurement is not collected in a structured manner. Details of cases are not always publically available on online sites and, even when they are available, they are not often presented in a suitable electronic format that enables interrogation, collection and comparison of relevant data (such as dates, type of remedy sought, number of decisions produced and OJEU identification number).
Notwithstanding these limitations, the evaluation was based on a review of best available quantitative and qualitative evidence of causality between actions and effected changes. It made extensive use of stakeholders' and experts' view as well as case studies on the functioning of the different provisions of the Directives.

[33] Study "*Economic efficiency and legal effectiveness of review and remedies procedures for public contracts*" written by Europe Economics and Milieu, April 2015 (the 'Study'): http://ec.europa.eu/growth/single-market/public-procurement/modernising-rules/evaluation/index_en.htm
The Commission consulted Member States on the Study *via* the Commission Government Expert Group on Public Procurement Committee. The Commission received comments from 16 Member States (Austria, Germany, Finland, Estonia, France, Croatia, Hungary, Italy, Latvia, Lithuania, the Netherlands, Poland, Slovenia, Slovakia, Sweden, the UK). Those comments were taken into account in the evaluation.

6. IMPLEMENTATION — STATE OF PLAY[34]

Directive 2007/66/EC, with significant and widespread delays[35], was fully transposed by all Member States. National transposition measures notified to the Commission are listed in Annex 5.

6.1. First instance review bodies

Review bodies varying in nature have been established in each Member State: in some, there are independent administrative review bodies, be they specialised or not, while in others, a judicial body is responsible for the review. For details see Annex 6.

6.2. The right to bring an action or to appear before a court

The *locus standi* differs across Member States. All Member States require the review procedure to be available to persons having or having had an interest, and some specifically provide that this includes operators not tendering (in the Czech Republic, Denmark, Hungary, Ireland and Slovenia). However, a number of Member States also provide that other undertakings are eligible to start a review procedure, which includes third parties (the Czech Republic, Denmark and Portugal). In other jurisdictions this may also include professional associations (Bulgaria, Denmark, Hungary and Poland), the Competition Authority (the Czech Republic, Denmark, Sweden and Slovenia), the contracting authority or other representatives of the State (France, Finland, Croatia, Hungary and Slovenia).

6.3. Interim measures, set aside decisions and damages

In all Member States, provisions exist for the three compulsory types of remedies:

(1) interim measures;

(2) set aside decisions;

(3) and damages.

The conditions for granting interim measures are comparable in Member States (a strong *prima facie* case, a balance of interest test). However, courts and review bodies in Member States differ in their approaches to interim measures from adopting a very restrictive approach of hardly ever granting interim measures (e.g. Denmark, Portugal) to a more liberal one (e.g. Finland).[36]

Member States vary considerably in their approaches to set aside decisions, depending on their legal traditions. For instance, French courts look into possible breaches of any procurement rules while the UK courts focus on major breaches.[37] Accordingly, the relevant

[34] To a large extent, this Chapter is based on Chapter 5 of the Study, completed with the comments received from Member States on the Study (see footnote 32) and DG GROW's internal research.

[35] Infringement procedures were initiated against 20 Member States for non-communication of national transposition measures. Most Member States completed the transposition during the year 2010.

[36] R. Caranta, General Report, Public Procurement Law: Limitations, Opportunities and Paradoxes, The XXVI FIDE Congress in Copenhagen, 2014, p. 165.

[37] R. Caranta, 'Many Different Paths, but Are They All Leading to Effectiveness?', in: S. Treumer, F. Lichère (ed.), 'Enforcement of the EU Public Procurement Rules', DJOF Publishing Copenhagen, 2011, p. 69-69.

grounds for annulment, the extent to which contracting authorities' decisions are reviewed and the scope and effects of annulment are specified in national laws.

As far as damages are concerned, divergent solutions are adopted by Member States, in particular, on the issue of causation or recoverable losses. As far as causation is concerned, some legal systems require a 'certain casual' link (Nordic countries); others, the balance of probabilities (Ireland), a serious chance (France) or a 'real and substantial chance' of being awarded a contract (the UK).[38] As far as recoverable losses are concerned, in the Nordic and German systems the recovery of the loss of profits is exceptional whereas latin countries rely more on corrective and dissuasive effect of damages.[39] Judges from supreme administrative courts in the EU, during a meeting organised on 22-23 October 2015 in Helsinki, considered that the right to damages lacked a sufficient level of harmonisation at EU level.

6.4. Automatic debrief and 'standstill period'

In general terms, Member States apply the minimum standstill period, as required by the Remedies Directives (i.e. 10 or 15 days, depending on the means of communication used).

In a number of cases, a longer standstill period has been specified. For example, in Bulgaria and Estonia the standstill period is 14 calendar days from notification of the candidates/participants in the public procurement procedure, while in Ireland it is a minimum of 14 calendar days if sent by fax or electronic means and 16 days if sent by other means. In Finland the standstill period is 10 days from the receipt of the decision only if a DPS is used, with the longer period of 21 days from the receipt of the decision applying in all other cases. The longest standstill period applies in Italy, where a period of 35 days applies from the date of the last communication of the contract award decision.

Over half of the Member States[40] have made use of the option to derogate from the standstill period and have applied the derogation in all three cases specified in the Remedies Directives[41]. In a further eight Member States, the derogation has been used in one or two of the cases specified in the Remedies Directives. Only four Member States (Austria, Greece, Malta and Slovakia) have opted not to make use of the derogation at all, and therefore apply the standstill period set in their countries in all cases.

6.5. Automatic suspension

With regard to the period of suspension of the contract award procedure, in almost half of the Member States, the period of suspension applies until a decision is taken on application for interim measures[42]. In over half of the Member States the period of suspension applies until a decision is taken on the application for review (i.e. on the merits of the case)[43], whereas in the vast majority of Member States the suspension can also be brought to an end at an earlier stage. For example, in the UK, courts may make an interim order bringing to an end the

[38] R. Caranta, 'Damages for Breaches of EU Public Procurement Law. Issue of Causation and Recoverable Losses', in: D. Fairgrieve, F. Lichère (ed.), 'Public Procurement Law. Damages as an Effective Remedy', Hart Publishing, 2011, p. 176.
[39] Ibidem, p. 184.
[40] BE, BG, CY, DK, FI, HU, IE, LI, LU, LV, NL, PT, RO, SE, SI and UK.
[41] As already indicated in section 3.2.1, Member States may provide that the standstill period does not apply in cases where no publication is required, there are no concerned candidates and in specific cases concerning contracts based on framework agreements or specific contracts based on DPS.
[42] AT, BE, CY, CZ, EL, HR, IE, IT, LT, NL, PT, SE and UK.
[43] BG, CZ, DE, DK, ES, FI, FR, HR, HU, IE, LU, LV, PL, RO, SE and UK.

suspension of the contract award procedure. In eight Member States (Bulgaria, the Czech Republic, Finland, Ireland, Malta, Slovenia, Slovakia and UK), the period of suspension can apply until a decision on appeal against the first instance decision or longer.

6.6. Ineffectiveness

All Member States provide for ineffectiveness where a contracting authority has awarded a contract without prior publication of a contract notice in the OJEU/TED without this being permissible in accordance with the Procurement Directives.

Moreover, Member States provide for ineffectiveness where certain infringements have deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies. Examples of infringements which can lead to a declaration of ineffectiveness in this case include cases where the award of the contract was not in compliance with the information contained in the contract notice, where the procurement procedure was withdrawn unlawfully or where there was a breach of the standstill provisions.

Over half of the Member States[44] also consider a contract ineffective if the Member State has invoked the derogation of the standstill period for contracts based on a framework agreement or a DPS and an infringement occurs.

Two Member States (Slovenia and Slovakia) also refer to 'other' specific grounds for ineffectiveness, which include failure by the contracting authority to provide the court with the complete documentation of the tender (Slovakia), and where the contract was concluded as a consequence of a criminal offence committed by the contracting authority or by the successful tenderer (Slovenia).

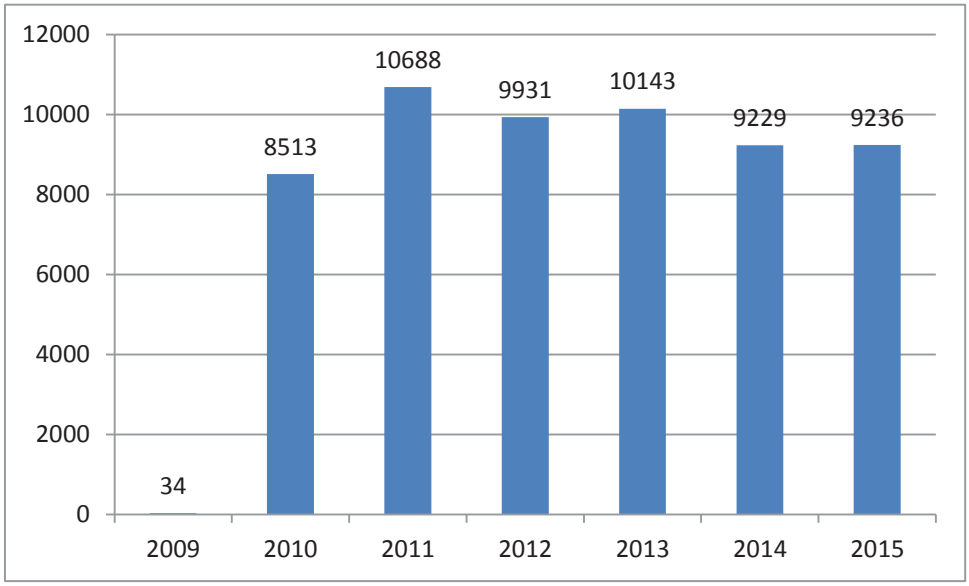
Most Member States allow either the cancellation of all contract obligations or the cancellation of only those contract obligations that are still to be performed, with the exception of Spain, which only provides for the cancellation of all contract obligations.

The majority of Member States transposed the provisions on the VEAT notice, which, if specific circumstances are fulfilled, allows the contracting authorities to avoid the sanction of ineffectiveness. Based on the information available in the OJEU/TED, the use of this notice remains relatively stable since 2010 with around nine to ten thousands notices of this kind published every year.

(see Figure 2 below).

[44] AT, DK, EL, ES, FI, HR, HU, IE, LT, LU, LV, PL, RO, SE, SI and UK.

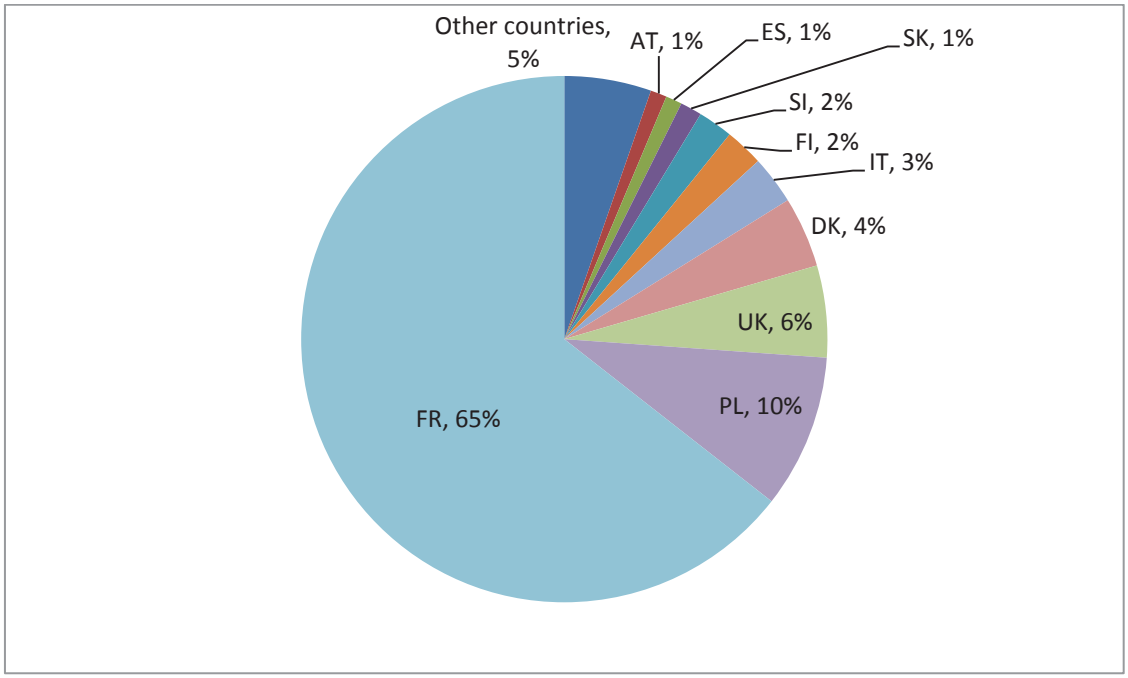
Figure 2: The number of VEAT notice published in OJEU/TED by year 2009-2015



Source: OJEU/TED

Based on TED data, since the deadline for transposition of Directive 2007/66/EC, there were more than 57 000 notices published across the EU-28. The majority of VEAT notice usage was by France (37 226 notices), followed far behind by Poland (5 453), the United Kingdom (3 256) and Denmark (2 504). The least frequent notice usage was in Romania (1), Hungary (4), Luxembourg (4) and Estonia (22).

Figure 3: The share of VEAT notices published in OJEU/TED 2009-2015 by country



Source: OJEU/TED

Altogether, 10 countries[45] accounted for 95 % of the total VEAT notices published in the period 2009-2015. This is shown in Figure 3 above. Further details on the OJEU/TED publication levels are provided in Annex 7.

6.7. Alternative penalties

Concerning alternative penalties, the majority of Member States transposed both fines and/or the shortening of the duration of the contract. Details are specified in Annex 8.

However, alternative penalties are sporadically used in Member States. For example, in Austria, since the transposition of Directive 2007/66/EC in 2009, alternative penalties have overall been imposed in 20 to 30 cases. In Sweden, the Competition Authority must pursue cases for alternative penalties when an administrative court has first decided that a contract may remain valid, although it was awarded in breach of a standstill period. The Competition Authority has had the power to pursue these cases since 2011 and so far there have been around 60 non-mandatory applications and 30 mandatory applications for alternative penalties.

6.8. Time limits for review

6.8.1. *Pre-contractual remedies*

The time limits for pre-contractual remedies laid down in Article 2c of Directive 89/665/EC are 10 calendar days if electronic means or fax are used and 15 calendar days if other means of communication are used. In both cases, these time limits apply with effect from the day following the date in which the decision is sent to the tenderer or candidate. If the application concerns a decision that is not subject to a specific notification, the time limit shall be at least 10 calenday days from the date of its publication. In the majority of Member States the time limits follow the structure of the Remedies Directives and thus lay down time limits that mirror the minimum standstill period. In some cases, such as the UK, a longer period of up to 30 days is set.

6.8.2. *Ineffectiveness*

In cases of ineffectiveness, Article 2f of Directive 89/665/EC provides that an application for review must be made before the expiry of at least 30 calendar days. This takes effect from the day following the date on which the contracting authority published a contract award notice or the day following the date on which the contracting authority informed the tenderers and candidates concerned of the conclusion of the contract, and in any other case before the expiry of a period of at least six months with effect from the day following the date of the conclusion of the contract. Several Member States follow exactly the structure of the Remedies Directives while some others do not foresee that both the publication and the notification of the award decision trigger the start of the 30 days' time limit. In any event, all Member States lay down a six months' time limit. An overview of the applicable time limits is provided in Annex 9.

[45] DK, ES, FR, IT, AT, PL, SI, SK, FI and UK.

6.8.3. *Damages*

The regime for the recognition of damages is not regulated by the Remedies Directives. It is therefore for the Member States to lay down the detailed procedural rules governing actions for damages, including time limits. Those detailed procedural rules must, however, be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness).[46]

For example, in the Netherlands, the standard limitation for legal claims of five years is applied[47]. In Germany the time limit is three years from the end of the year in which the damaged party has knowledge of both the damage and the identity of the tortfeasor. In France, the prescription period is governed by the *prescription quadriennale*. The time limit starts to run from the first day of January following the claimant's becoming aware of the violation.[48]

In the preliminary ruling in case C-166/14 *MedEval*, the Court ruled that national legislation (in this case, Austrian) cannot make an action for damages conditional upon a prior declaration of ineffectiveness when the latter is subject to a six-month limitation period even when the award is not given publicity. The Court considered that such limitation would render impossible or extremely difficult to bring an action for damages.

7. ANSWERS TO THE EVALUATION QUESTIONS

It is important to remind that the amendments introduced by Directive 2007/66/EC ensure only minimum harmonisation. The Remedies Directives leave Member States discretion in the choice of review procedures and the formalities. Moreover, the Remedies Directives also contain several optional provisions as explained above. In the light of this, the remedies process varies from Member State to Member State according to how the Remedies Directives have been implemented and enforced in national law, and more fundamentally, to how effective the administrative and judicial systems are. In general, Member States have used the discretionary powers conferred on them in the Remedies Directives to go beyond their minimum requirements.

As a result, the implementation of rules on remedies in the public procurement area varies considerably across different Member States. One of the major challenges in the context of the present evaluation is therefore to distinguish the outcomes directly associated with the Remedies Directives from those that stem from national implementing measures and national approaches to enforcement.

It is equally challenging to measure the deterrence effect of the Remedies Directives which is correcting any illicit practice before such a practice can be observed and working through the credibility of the system. It can be assumed that as long as there are no major deficiencies in the system established by the Remedies Directives, their deterrence effect is present.

[46] See judgment of the Court of Justice of 26 November 2015 in case C-166/14 *MedEval*, paragraph 37.
[47] H. Schebesta, '*Towards an EU law of Damages. Damages claims for violations of EU public procurement law before national and European judges*', doctoral thesis, EUI Florence, p. 113.
[48] *Ibidem*, p. 148.

7.1. Effectiveness

7.1.1. *Actual usage of the provisions*

The first and most important indicator of the effectiveness of the Remedies Directives is the actual usage of provisions provided therein, especially as far as the newly introduced provisions are concerned (e.g. the usage of VEATs). Some key data about the actual uptake of the new provisions were presented in section 6. As previously explained, the majority of Member States transposed provisions on the VEAT notice and, based on the information available in the OJEU/TED, the use of this notice remains relatively stable since 2010 with around nine to ten thousands notices of this kind published every year (see: Figure 3 above).

Referring to the frequency of remedy decisions, the Study indicates that there were around 50 000 first instance decisions across Member States during the period 2009-2012, with more than 20 000 coming from Sweden (11 144) and Poland (10 570). While no other Member States approach the numbers of these two countries, Croatia (6 939) and Bulgaria (4 411) also have a considerable number of decisions (see tables 1 and 2 below[49]).

[49] In the context of the preparation of the Study, it was difficult to obtain data about the number of decisions in some Member States (Table 1 presents the data obtained, covering the years 2009-12). As indicated in footnote 28 above, the Commission also consulted Member States and it received data from some of them about the number of decisions (which is presented in Table 2, covering the years 2012-2014).

Table 1: Number of decisions by Member State and year in 2009-2012[50]

MS	2009	2010	2011	2012	Total
AT	253	204	241	234	**932**
BE	138	160	192	221	**711**
BG	1 224	1 072	1 146	969	**4 411**
CY	111	130	73	66	**380**
CZ	508	511	710	1 049	**2 778**
DE	1 275	1 065	989	893	**4 222**
DK	75	99	201	205	**580**
EE	193	208	224	254	**879**
EL	-	~207	~207	~207	**~621**
ES	-	~441	~441	~441	**~1 323**
FI	610	587	569	425	**2 191**
FR		6	16	18	**40**
HR	1 374	1 810	1 888	1 867	**6 939**
HU	598	673	688	460	**2 419**
IE	1	1	11	8	**21**
IT	69	91	180	0	**340**
LT	235	413	409	353	**1 410**
LU	18	8	10	3	**39**
LV	901	835	1 019	1 020	**3 775**
MT		5	83	152	**240**
NL	254	279	271	307	**1 111**
PL	1 985	2 823	2 820	2 942	**10 570**
PT	16	18	30	22	**86**
RO	225	401	619	427	**1 672**
SE	1 990	3 156	2 960	3 038	**11 144**
SI	392	419	537	516	**1 864**
SK	189	284	314	472	**1 259**
UK	5	13	16	13	**47**
Total	**11 265**	**13 461**	**14 328**	**14 067**	**55 064**

Review of case-law.

Number of decisions only for Member States where information was available.

~ indicates approximate figure.

[50] Study, Table 6.2 (p. 83).

Table 2: Number of decisions by Member State and year in 2012-2014

MS	2012	2013	2014
AT	281	229	348
DE	893 cases (332 decisions)	817 cases (284 decisions)	751 cases (297 decisions)
EE	272 cases (48 decisions)	287 cases (39 decisions)	331 cases (65 decisions)
FI	425	450-500	611
FR		6 042	
HR	1 729	2 135	1 315
HU	695	572	986
IT	3 281 (data for first and second instance)	3 165 (data for first and second instance)	3 518 (data for first and second instance)
LT	Information for 2012-2014: 990 cases		
LV	614	567	550
NL	115	No data available	115
PL	2 873	3 055	2 835
SE	3 265	3 201	3 508
SI	516	545	354
SK	484	411	403
UK	No data available	No data available	No data available

Source: information provided by Member States (those not included in the table did not provide data).

During the same period, there were also 10 103 second instance decisions made (for Member States where information was available[51]). Out of the Member States with available information, Romania and Sweden had the highest numbers (2 231 and 2 386, respectively). For details see Annex 12.

Information on the number of third instance decisions was available for only three Member States (Estonia, Lithuania and Sweden). Out of the total 800 decisions, 686 came from Sweden with Estonia and Lithuania having significantly fewer cases. For details see Annex 13.

The Study points to the fact that the most frequently type of remedy sought is set aside decision, followed at a distance by interim measures and the removal of discriminatory specifications. In the second instance review of the sample, a set aside decision is the most used appeal by both applicants and contracting authorities, followed by discriminatory specifications. A similar pattern is observed for third instance decisions. For details see Annex 14.

[51] CZ, CY, DE, DK, EE, HU, IE, LT, LU, RO, SE, SI.

7.1.2. *Effectiveness in meeting the objectives*

> ***Evaluation questions to be answered:*** *Have the Remedies Directives been effective in meeting, or moving towards, the defined objectives? To what extent do they contribute to transparency, fairness and openness of the market?*

Questions concerning the effectiveness of the Remedies Directives were asked to the stakeholders in the context of the Study via two surveys that gathered 616 responses from suppliers and 832 from contracting authorities, as well as further 112 responses from legal practitioners. Their results reveal a general agreement with regard to the beneficial impact of the Remedies Directives on the way public procurement procedures are implemented.

In the context of a Commission's public consultation, stakeholders were also asked whether the Remedies Directives helped the public procurement process to become more transparent, fairer, open, accessible and more compelling for compliance. The majority of respondents agreed that the Remedies Directives have (fully or partially) improved the transparency of the public procurement process (81 %) and helped to make the award procedure more open and accessible (78 %) and fairer (80 %). This is presented in Table 3 to Table 5 below.

Table 3: Effectiveness of the Remedies Directives — transparency

		Answers	Ratio
Yes		87	51.18 %
Partly		50	29.41 %
No		26	15.29 %

Source: Public consultation, Directorate General for Internal Market, Industry, Entrepreneurship and SMEs

Table 4: Effectiveness of the Remedies Directives — fairness

		Answers	Ratio
Yes		76	44.71 %
Partly		59	34.71 %
No		30	17.65 %

Source: Public consultation, Directorate General for Internal Market, Industry, Entrepreneurship and SMEs

Table 5: Effectiveness of the Remedies Directives — openness and accessibility

		Answers	Ratio
Yes		58	34.12 %
Partly		74	43.53 %
No		31	18.24 %

Source: Public consultation, Directorate General for Internal Market, Industry, Entrepreneurship and SMEs

The respondents also agreed that the Remedies Directives helped the public procurement process to become more compelling for contracting authorities to comply with the Procurement Directives (82 % agreed or agreed partially).

Similar patterns emerge from the survey that was carried out for the purposes of the Study and where a general appreciation of the rules on remedies prevailed among the two main groups of respondents[52] (i.e. contracting authorities and economic operators, Figure 4).

In particular, about 71 % of contracting authorities in this survey took the position that the Remedies Directives were effective in achieving its objectives. Over 60 % of public respondents 'agreed' or 'strongly agreed' that the rules on remedies have helped to improve the fairness of award procedures. As much as three quarters of the contracting authorities responding to the survey were positive about the impact of the rules on remedies on transparency in public procurement. The aspect of the Remedies Directives that was the least valued by the contracting authorities consulted in the survey concerned their impact on the openness of the award procedure — only a half of the participating contracting authorities (49 %) noticed an improvement in this respect.

As far as the economic operators were concerned, their general appreciation of the Remedies Directives was also pronounced, however to a lesser extent. Roughly 50 % of suppliers 'agreed' or 'strongly agreed' that the rules on remedies are an effective way for reviewing and challenging the procurement decisions. Just over half of the respondents felt that the provisions of the remedies have helped the public procurement process to become more transparent. In terms of the fairness and openness of the market, only around respectively 38 % of suppliers 'agreed' and 35 % 'strongly agreed'that the Remedies Directives have helped to improve these aspects of the market. In general, around 30 % of suppliers were neutral when replying to the questions posed.

[52] See Section 6.4. of the Study.

Figure 4: Perceptions of improvement of public procurement aspects

Source: Survey of suppliers and contracting authorities/entities by Europe Economics[53]

Legal practitioners, who participated also in a separate survey in the context of the Study, were more positive with respect to the success of the rules on remedies in all areas (Table 6).

Table 6: Legal practitioners' perceptions of the impact of the remedies —percentage of respondents

[53] The questions formulated were:
'The 'Remedies' are an effective way for reviewing and challenging procurement decisions?'
'The 'Remedies' have helped the public procurement process to become fairer (all companies have the same opportunities to bid for public procurement contracts)?'
'The 'Remedies' have helped the public procurement process to become more open (there are fewer barriers to companies participating in public procurement contracts, cross-border procurement is easier)?'
'The 'Remedies' have helped the public procurement process to become more transparent (more information is available to all companies about the details of public contracts, how they have been awarded, and how parties may challenge decisions)?'

	Effective	Transparent	Fairer	More Open
Strongly agree	9 %	9 %	4 %	4 %
Agree	74 %	74 %	58 %	58 %
Do not know or Indifferent	11 %	8 %	26 %	25 %
Disagree	6 %	9 %	12 %	13 %
Strongly disagree	0 %	0 %	1 %	0 %

Source: the Study, survey of legal practitioners by Europe Economics

In particular, 83 % of the legal practitioners that participated in the survey in the context of the Study 'agreed' or 'strongly agreed' with the statements related to providing an effective way for the review and challenge of decisions and to improving the transparency of public procurement. 62 % also 'agreed' or 'strongly agreed' that the Remedies Directives have helped the public procurement process become fairer and more open. The legal practitioners' survey also provided insight into views of the impact of the Remedies Directives on suppliers taking action against contracting authorities in the event of a suspected breach of procurement law.

7.1.3. *Factors affecting the effectiveness*

Evaluation questions to be answered: *What factors influenced the achievements observed? (e.g. to what extent are the various provisions envisaged in the Remedies Directives being used? In particular in relation to the use of: complaints, appeals and damages?) Are there factors which are hindering this effect?*

a) The duration of the review procedures

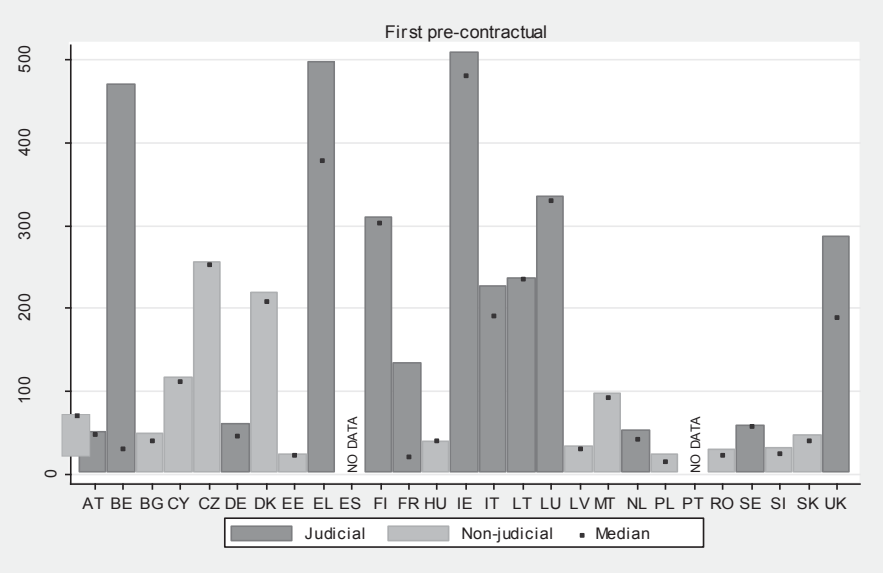
One of the major elements that may impact the effectiveness of the rules on remedies is the time it takes to obtain a decision.

According to the Study, in some Member States there are no legislative provisions on the duration of the review procedures. Over half of Member States, however, specify a maximum duration for review proceedings, including of administrative and, also in some cases, judicial nature[54].

The duration of review procedures carried out under the Remedies Directives were subject to scrutiny within the Study, covering the interim measures, pre-contractual remedies in the first, second and third instance. The length of the most frequently used review for pre-contractual remedies in the first instance is provided in Figure 5.

[54] According to the Study, four Member States set a maximum duration of over 30 days (35, 42, 45 and 60 days in DE, AT, CY and LT, respectively), the maximum period being 60 days/two months in Lithuania, as well as in certain Lander in Austria. Eight Member States (BE, BG, CZ, EL, HR, HU, LV and SK) set a maximum duration for the review procedure of 30 days. Two Member States (FR and RO) specify 20 days, while the shortest period for review is found in Poland and Slovenia, where the review body is required to take a decision within 15 days from the submission of the application for review.

Figure 5: Estimated length of the review in first instance (pre-contractual remedies 2009-2012)



Note:

AT system is entirely judicial as of 2014, but was non-judicial for the period of analysis 2009-2012. Statistics based on the following number of observations: AT: 62; BE: 118; BG: 118; CY: 119; CZ: 60; DE: 92; DK: 103; EE: 44; EL: 100; FI: 26; FR: 17; HU: 116; IE: 4; IT: 24; LT: 2; LU: 31; LV: 134; MT: 60; NL: 37; PL: 164; RO: 116; SE: 18; SI: 114; SK: 109; UK: 7.

CZ — The total length is calculated by adding the duration of the initial application for review before the Office for the Protection of Competition plus the duration of appeal to the Head of the Office.

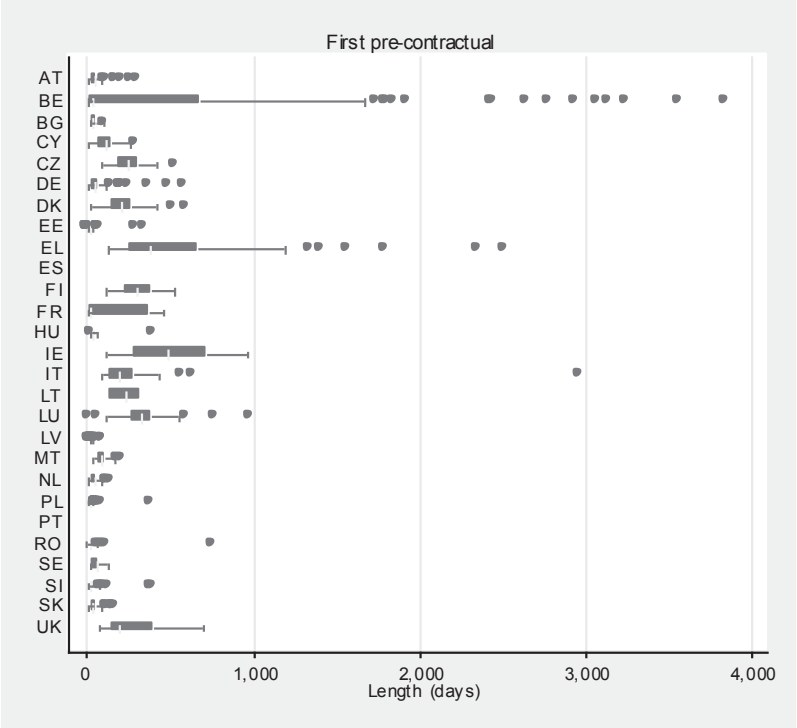
ES — No data.

PT — No data.

Source: Review of case-law. Figure 6.7 of the Study, p. 88.

As the above Table from the Study shows, the length of first instance pre-contractual remedies varies significantly across Member States. Moreover the review lengths appear to be influenced by the type of first instance review body. A general trend shows that Member States with a first instance administrative review body have the shorter review lengths, while Member States where a judicial process need to be followed have the longest review lengths (Belgium, Greece, Ireland, Luxembourg, Finland and the UK). This confirms the general trend of effectiveness of the administrative review bodies over the judicial ones in first instance pre-contractual remedies (for more details, see point b) below).

Figure 6: Dispersions of length of review in first instance (pre-contractual remedies 2009-2012)



Source: The Study, review of case-law; Member States with only one observation are not shown.

The lengths of the review proceedings to grant interim measures in first instance and to reach a decision on the merits of the case in the context of pre-contractual remedies in second and third instances, as identified by the Study, are provided in Annex 10. In general terms, it appears that the first instance (interim measures) is the shortest on average and the second and third instance reviews are the longest.

As far as data from the Commission's public consultation are concerned, it appears that in first instance:

(i) review procedures concerning interim measures (which in most cases are initiated before the award of the contract) most often take up to one month;

(ii) review procedures for the setting aside of decisions (which are also in most cases initiated before the award of the contract) and those for ineffectiveness (which, in turn, are initiated after the award of the contract) most often take between one and three months; and

(iii) review procedures for damages (which are also initiated after the award of the contract) most often take more than a year. For details see Annex 3 (summary of the replies to question 3).

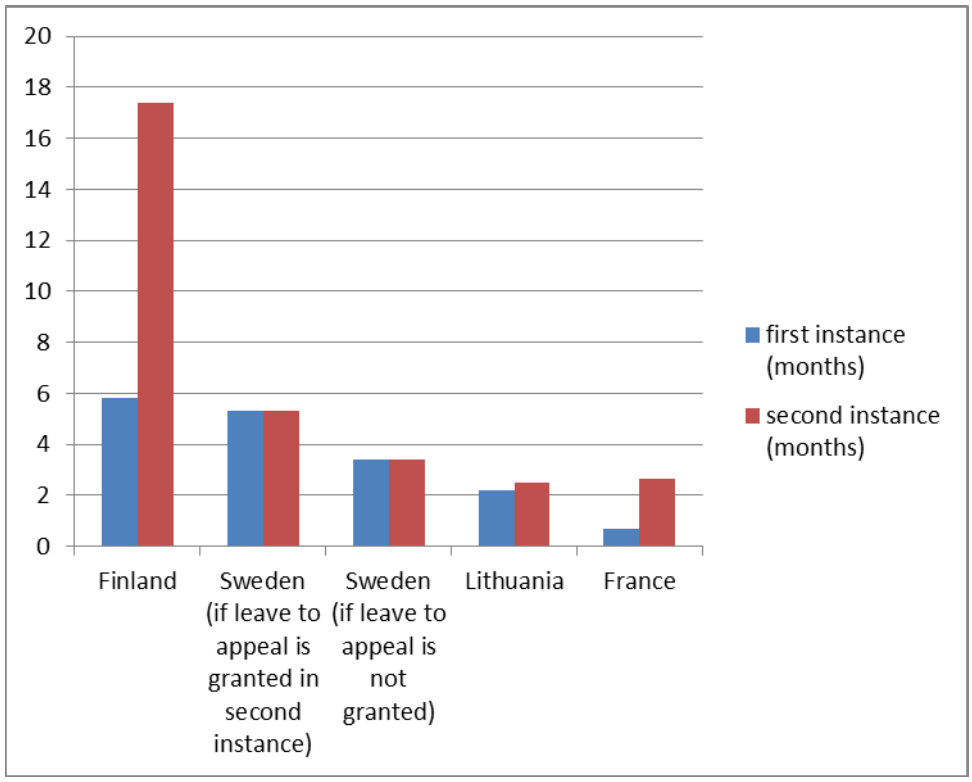
Member States that replied to the Commission's questionnaire do not identify any examples of the remedy system causing delays in the award of public contracts or only exceptionally identify such delays. None of the Member States that replied to the questionnaire identified systematic abuses of appeals to the detriment of the timely functioning of their national system. However, 40 % of respondents replied that the remedy system in their Member State caused delays in the award of public contracts, 44.71 % replied that it happened only occasionally and 11.18 % replied 'No'. For details see Annex 3 (a summary of replies to question 8).

b) Administrative first instance review bodies v ordinary courts

As already outlined in the previous section, the duration of review procedure often depends on whether the case is dealt by an administrative review body or an ordinary court. This has been confirmed by a large majority of stakeholders, who consider that the type of review body has an impact on time and/or standard for review (74.7 % of participants). In general terms, procedures before the ordinary courts take longer. Strict time limits to deal with a case can be imposed on administrative review bodies whereas they are not often imposed on courts. Administrative review bodies with specialised functions also focus on public procurement law and do not deal with other areas of law. This specialisation tends to result in higher standards of adjudication. For details see Annex 3 (a summary of replies to question 5).

These findings are confirmed by the data gathered in the context of the Study which demonstrates that review before the ordinary courts most often takes longer.[55] Based on data provided by some Member States, the average length of review procedures in Member States where ordinary courts adjudicate on public procurement matters in first instance is provided in Figure 7 below.

Figure 7: Average length of review procedures in months (review before the ordinary courts)

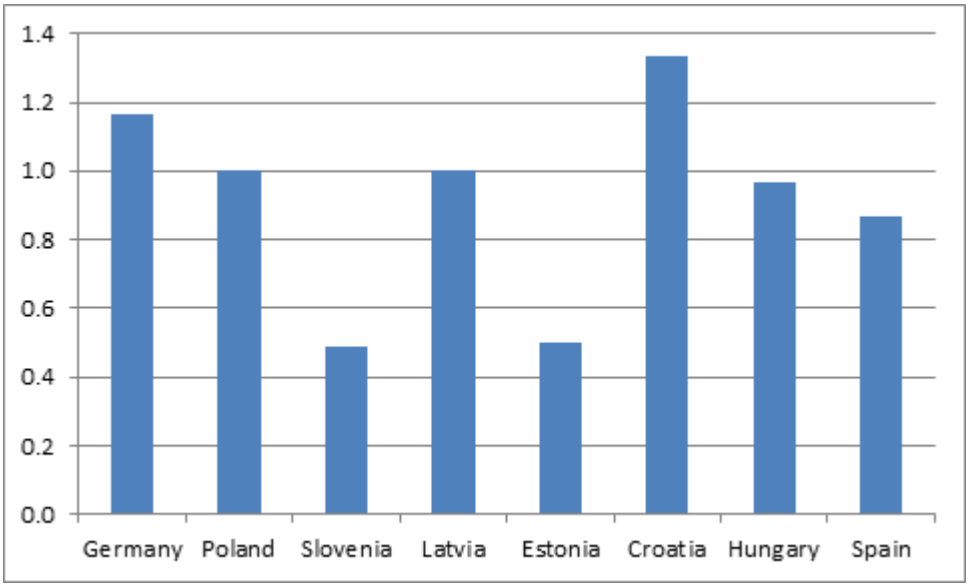


Source: Targeted consultation with Member States; Directorate General for Internal Market, Industry, Entrepreneurship and SMEs

To compare, the average length of review procedures in some of the Member States where specialised administrative review bodies adjudicate is shown in Figure 8 (also based on data provided by the Member States).

[55] In France, however, judicial review appears to be fast.

Figure 8: Average length of review procedures in months (review before administrative body)



Source: Targeted consultation with Member States: Directorate General for Internal Market, Industry, Entrepreneurship and SMEs

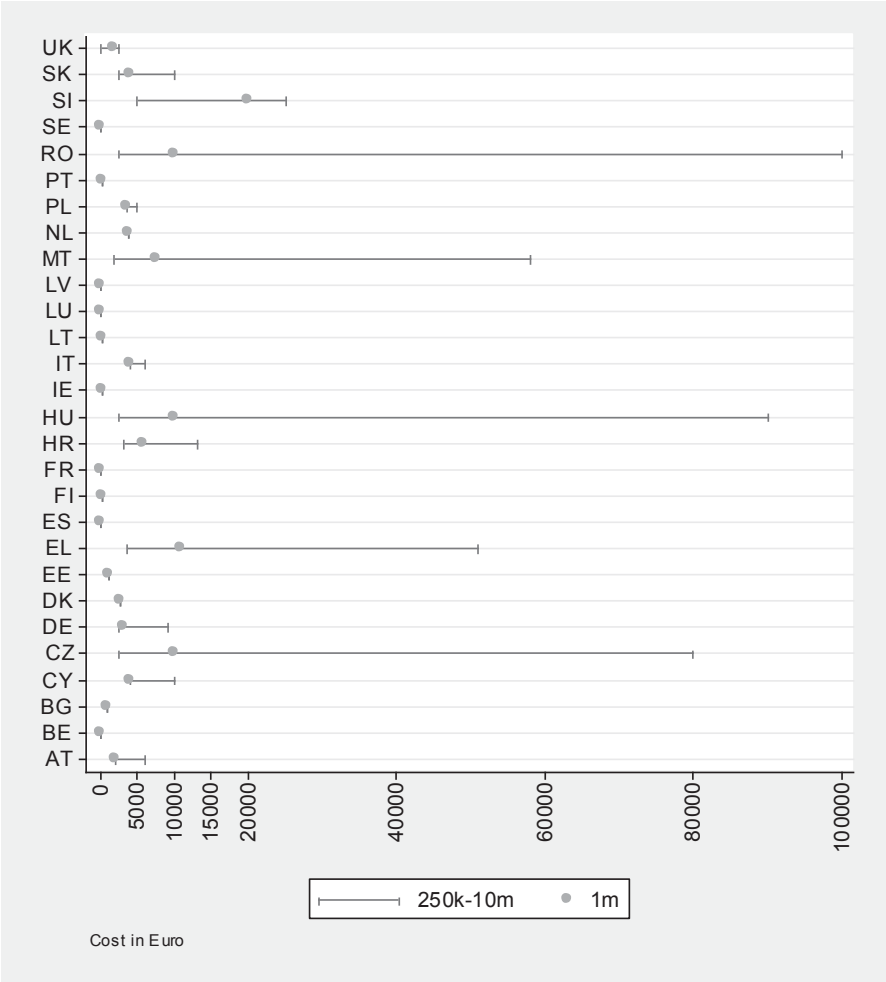
In general, the number of appeals to first instance decisions taken by administrative bodies is rather low. The success rate for appeals is also low, which can be interpreted as an indicator proving the seriousness of the work carried out in first instance by the administrative review bodies. For instance, in Poland the success rate of appeals in 2012 was 17 %; in 2013, 11 %; and in 2014, 12 %. In Hungary, in 2012, 71.4 % of decisions reviewed were upheld by courts, while only 0.7% of first instance decisions were altered; in 2013, 73 % of claims for appeal were rejected and only 4.7 % of first-instance decisions were altered; in 2014, 73.7 % of the claims for appeal were rejected and only 6.5 % of first-instance decisions were altered.

c) Costs of the proceedings

Another essential aspect of remedial action is the cost of the proceedings (i.e. application fees and legal advocacy costs) taking into account that costs may be covered by the financial compensation awarded in a very limited number of some specific types of review (i.e. damages).

The fee for applying for a review differs across Member States. In some countries the application fee for a review procedure is a fixed flat rate, irrespective of the characteristics of the contract. In others, the costs are determined by a scale criteria or by a value-range that depends on the size or the type of contract (for works, supply or services). Some Member States have a percentage-based fee which is capped at a maximum value. The differences in fee levels and structures is driven by a range of factors, such as the level of national procedural autonomy, different systems and procedures or the existence of administrative review bodies. A summary of the costs in the different Member States as identified in the Study is shown in Annex 11. The wide disparities across counties are also clearly visible in Figure 9 below. For each Member State the figure presents the levels of fees (marked on the x-axis) for three exemplary contract values: EUR 250 000, EUR 1 million and EUR 10 million.

Figure 9: Dispersion of review fees within Member States (for contract values of EUR 250 000, EUR 1 million, and EUR 10 million)



Source: The Study, research by network of legal experts

Specific questions on litigation costs, including fees, were asked in the Commission's public consultation (questions 16 to 19 of the questionnaire). 37.65 % of respondents consider the level of fees as 'dissuasive', while 50.59 % do not consider them as such. For example, many participants from the UK indicated that the fee of up to £10 000 for commencement of proceedings is clearly dissuasive[56]. However, in some Member States, access to review is free (e.g. in Sweden, Latvia, France and Spain there is no fee to submit a complaint in first instance).

Member States that replied to the Commission's questionnaire recognise that fees are a factor to be taken into account by potential plaintiffs but they also help to ensure that only well-founded cases are brought for review. In general, Member States do not consider that the fees they impose have a dissuasive effect on economic operators to file complaints. Some Member States are in the process of reforms to lower the amount of fees, whereas others consider imposing higher fees in the future. The UK considers that minor breaches of public procurement rules are effectively addressed via means such as their 'Mystery Shopper' scheme. This is a free option offered to economic operators whereby the Crown Commercial

[56] In UK, the information gathered concerning the fee of £10 000 diverges substantially from data provided in the Study and taken over in Figure 9.

Service carries out an investigation with the contracting authority and makes recommendations to resolve the matter and/or improve best practice for the future.[57]

Several respondents to the Commission's public consultation – members of first instance specialised administrative review bodies and some Member States – considered that it would be useful to have further legal guidance concerning the fees in the area of remedies in public procurement.

Finally, a large majority of respondents considered also that costs of legal advice and representation have an impact on access to justice. Even if it is not always mandatory, in particular in first instance, legal advice seems to be sought in most cases due to the complexity of public procurement law. For details see Annex 3 (a summary of replies to question 19).

d) Equal balance towards stakeholders

The effectiveness of the Remedies Directives can be also evaluated by the extent to which it creates a system of checks and balances that makes them evenly equilibrated towards all stakeholders.

Table 7: The interest of economic operators v contracting authorities

		Answers	Ratio
The balance is too much on the interest of economic operators		40	23.53 %
The balance is on the middle		97	57.06 %
The balance is too much on the interest of contracting authorities / entities		27	15.88 %

Source: Public consultation, Directorate General for Internal Market, Industry, Entrepreneurship and SMEs

As shown in Table 7 above, 57.06 % of participants to the Commission's public consultation considered that the Remedies Directive evenly balance the interest of economic operators in ensuring the effectiveness of public procurement law and the interest of contracting authorities in limiting frivolous litigation; 23.53 % indicated that the balance is too much on the interest of economic operators; and 15.88 % pointed out that the balance is too much on the interest of contracting authorities/entities.

These results confirm that the Remedies Directives are generally well balanced in addressing the interests of all parties concerned. Based on this, it is plausible to conclude that the Remedies Directives have established conditions for the remedies system to work effectively.

e) The clarity of the Remedies Directives

As explained above, the Remedies Directives ensure only the minimum harmonisation which is necessary to guarantee the private enforcement of the Procurement Directives. Moreover,

[57] For more information: https://www.gov.uk/government/publications/mystery-shopper-scope-and-remit

as a result of the principle of national procedural autonomy, the Remedies Directives are not as prescriptive as the substantive Procurement Directives. As a consequence, the provisions of the Remedies Directives are formulated in a manner to cover the situation of Member States with very different traditions in terms of administrative and procedural law.

In the context of the Commission's public consultation, several stakeholders underlined that some provisions of the Remedies Directives could be more precise. In particular, more clarity would be welcome in a number of areas related to institutional aspects (for example, professional standards for members of an administrative review body), procedural aspects (for example, criteria for lifting the automatic suspension, for granting interim measures and to award damages) and the interplay between the Remedies Directives and the new Public Procurement Directives (for example, how the Remedies Directives apply to the modification and termination of public contracts and concessions and the so-called 'light regime').

f) National implementing measures and national approaches to enforcement

Contributions received during the Commission's public consultation also identified problems that persist at national level and whose origin may not be found in the implementation of the provisions of the Remedies Directives at national level. Various stakeholders confirmed that some problems identified are rooted either in national legislation beyond the Remedies Directives or in national practices rather than stem from the Remedies Directives. One example of this is time-limits for seeking review that are significantly longer than those laid down in the Remedies Directives, which in some cases may create undue delays to the detriment of contracting authorities and successful tenderers. Other examples included in particular: (i) a high number of complaints lodged due to the lack of court fees, (ii) prohibitive court fees and cost of legal representation, (iii) too lengthy review procedures that result from an insufficient allocation of human resources by Member States to allow the proper functioning of the review system, (iv) the instances of non-enforceability of the review decisions, (v) difficulties in ensuring consistency in the case-law of first instance review bodies, (vi) the absence of effective remedies in procedures below the EU thresholds having a cross-border interest and (vii) the application of restrictive conditions to grant interim measures. For more details see Annex 3 (replies to question 20).

g) Data gathering

Data gathering related to national review procedures does not affect the effectiveness of the Remedies Directives themselves. However, it prevents assessing the performance, including the effectiveness, of the Directives. Indeed, data is essential to design consistent national policies in the field of procurement review and for example to:

- identify the resources needed or the abusive complaints;

- analyse the consistency of decisions based on effective searching tools; and

- enable the identification of contracting authorities/entities against which successful complaints are lodged most often and of the aspects of procurement procedures which are appealed against successfully.

During the assessment of the functioning of the Remedies Directives, it became apparent that data on review procedures is often not readily available or even not available at all. The difficulty to collect data related to review in the field of procurement (and to do so in a comparable manner) first became clear during the preparation of the Study by the contractor and subsequently in the Commission's consultation of Member States.

7.1.4. *Deterrent effects of the Remedies Directives*

As mentioned previously, when evaluating the effectiveness of the Remedies Directives two different aspects need to be considered in parallel:

(i) the direct impacts of its implementation and usage; and

(ii) the indirect effects for the prevention of illegal practices in public procurement.

The first type of impacts has been addressed in the preceding sections of this staff working document by discussing the implementation and the practical use of the Remedies Directives across Member States. As far as the second type of effects is concerned, it occurs when the Directives act as a deterrent to breaching EU public procurement laws because contracting authorities perceive that there is reasonable risk of being challenged. Hence the Remedies Directives serve to avoid illicit practices.

The assessment of the extent to which the provisions in the Remedies Directives are acting as a deterrent to non-compliant behaviour of contracting authorities was one of the tasks for the Study. The consultants approached it by testing a hypothesis that past complaints and their associated costs incentivise contracting authorities to improve their behaviour in a manner that results in a decreased probability of having a complaint lodged against them. Using a sample of complaints and tender notices in OJEU/TED for four Member States (the Czech Republic, Denmark, Slovenia and the Slovak Republic), the Study found that past complaints had a statistically significant negative effect (of a small magnitude[58]) on the probability of having a complaint lodged in the Czech Republic. This can be also linked to reputational effects of complaints; many complaints against one contracting authority indicate potential problems of compliance and may push that contracting authority to improve its procurement practices. This effect, although only observed for one Member State in the limited sample, pointed to the deterrent effect of the Remedies Directive in the particular context defined in the hypothesis.

With regard to the corrective mechanism described in section 3.1 of this document, the Commission has only exceptionally used it mainly due to its time constraints (the Commission’s formal decision need to be adopted and notified before the conclusion of the contract) and the strengthening of the remedies system by Directive 2007/66/EC. However, the possibility of using the corrective mechanism gives leverage to the Commission during investigations carried out during the award procedure and therefore may deter the contracting authority or entity in question from concluding the contract and thus consummating the alleged breach.

The measurement of the effectiveness of the remedies system in this aspect is however very difficult as it consists of preventive impacts: i.e. the mere existence of the Remedies Directives avoids breaches of EU public procurement law before they occur. The practical

[58] See: section 6.5 of the Study.

effect of the deterrence role of the Remedies Directives is that fewer illicit practices can be observed and hence fewer review decisions are requested. However, the importance of the absence of complaints (i.e. the number of complaints that would have been lodged in the absence of the Remedies Directives) cannot be reasonably estimated. Despite that lack of quantification, the broadly understood deterrent effects of the Remedies Directives can be indirectly inferred from:

(i) the overall uptake of the rules; and

(ii) the generally positive perceptions on its impacts.

7.1.5. *Conclusions — effectiveness:*

The Remedies Directives have generally met their objectives of: increasing the guarantees of transparency and non-discrimination; allowing effective and rapid action to be taken when there is an alleged breach of the Procurement Directives; and providing economic operators with the assurance that all tender applications will be treated equally. The available data on the actual usage of the provisions added further evidence on the effectiveness of the Directive. In general, the remedies provided in the Remedies Directives were frequently used in most of Member States. There were around 50 000 first instance decisions across Member States during 2009-2012. The most frequently type of remedy sought is set aside decision, followed at distance by interim measures and the removal of discriminatory specifications. As far as the opinions of the stakeholders were concerned, a clear majority of respondents to the public consultation carried out by the Commission departments considered that the Remedies Directives have had a positive effect on the public procurement process. It is considered to be more transparent (80.59%), fairer (79.42%), more open and accessible (77.65%) and it provides greater incentive to comply with substantive public procurement rules (81.77%). As confirmed by virtual consensus among all the interested parties, Directive 2007/66/EC substantially increased the effectiveness of pre-contractual remedies by introducing a minimum standstill period between the notification of an award decision and the signing of the contract.

Some national systems require that legal protection in public procurement procedures is provided at first instance by administrative review bodies rather than ordinary courts. As a general trend, these tend to be more effective. This is confirmed by a large majority of respondents to the public consultation (74.7%) who considered that procedures before ordinary courts take generally longer and result in lower standards of adjudication than the procedures before specialised administrative review bodies.

In most cases, the costs of review procedures, albeit very divergent across Member States, do not seem to have decisive dissuasive effect on the access to remedies. Moreover, the Remedies Directives are also well balanced in addressing the interest of all parties concerned. In particular, 57.06% of respondents to the public consultation considered that the Directives evenly balance the interest of economic operators in ensuring the effectiveness of public procurement law and the interest of contracting authorities in limiting frivolous litigation. As a final point, the Remedies Directives are also effective as a deterrent to non-compliant behaviour in the area of public procurement.

Alternative penalties are sporadically used in Member States and were considered by respondents to the online public consultation (carried out by the Commission departments) and by some Member States to be the least relevant remedy. Nonetheless, views were expressed that all remedies provided for in the Remedies Directives contribute to their deterrent effect and provide for a comprehensive and effective system for sanctioning irregularities in public procurement. Concerning time limits, no specific evidence was gathered in the context of the evaluation that would demonstrate that time limits that follow the structure of the Remedies Directives are either too long and cause undue delays in the public procurement process or too short and thereby do not allow economic operators to enforce their rights.

The evaluation revealed that certain aspects of the Remedies Directives could be made clearer. This is confirmed by the contributions received. This applies, for example, to matters such as the interplay between the Remedies Directives and the new legislative package on public procurement, and the development of criteria to be applied to lift the automatic suspension of the conclusion of the contract following the lodging of a legal action.

The evaluation also made it possible to identify problems that persist at national level. In particular, various stakeholders confirmed in the context of the public consultation that problems identified are rooted either in national legislation beyond the Remedies Directives or in national practices, and not in the Remedies Directives.

Finally, the Commission also recognises that in most Member States, the information on national remedies systems is not collected in a structured manner, making the analysis of the performance of the Directives extremely difficult. In addition, it is rarely used for policymaking purposes (for example, identification of resources needed or abusive complaints; consistency of decisions based on effective searching tools; identification of contracting authorities/entities against which successful complaints are lodged most often; and identification of the aspects of procurement procedures that are appealed successfully).

7.2. Efficiency

Evaluation questions to be answered: *What are the main costs and benefits of the Remedies Directives for contracting authorities and economic operators? Are there significant differences in cost or benefits between Member States? Do they create administrative burden? To what extent is the system being used unnecessarily? Do the benefits of the Remedies Directives outweigh its costs? Could the same benefits have been achieved at a lower cost?*

7.2.1. *Cost / benefits*

As pointed out in the Impact Assessment, the legal process linked to a remedy action can sometimes be lengthy, while the cost involved may be high and not even be covered by the financial compensation awarded (if any). Consequently, the potential costs can deter an aggrieved supplier from bringing a damages action. In principle, the key types of costs that affect such decisions are the legal costs of bringing the action (administrative/court fees and the costs of legal services). As presented in the previous section, the Remedies Directives are

perceived as effective by the majority of stakeholders. Nevertheless, their existence could entail additional operational costs for them, which are analysed below.[59]

In the survey of suppliers carried out in the context of the Study, respondents were asked to provide an estimate of all elements of costs associated with a review, which included internal and external costs. The estimates of costs were based on 136 responses from suppliers and 162 from contracting authorities.

The median total costs for suppliers and contracting authorities are in the order of EUR 4 000 for both suppliers and contracting authorities, while the mean is EUR 11 100 for suppliers and EUR 23 800 for authorities (Table 8).

Table 8: The cost of review (mean and median) by economic operators and contracting authorities

	Suppliers	Contracting authorities/entities
Mean	€11 100	€23 800
Median	**€4 100**	**€3 900**
Minimum	€0	€0
Maximum	€76 900	€1 718 200

Source: the Study, suppliers and contracting authorities surveys by Europe Economics

It is worth underlining that due to the presence of extreme values, the median should be considered to be the best indicator of average costs across respondents. Even if the total costs of EUR 3 900 appears to be high in absolute terms, in particular for small contracting authorities, it can be assumed that public contracts being awarded in breach of Procurement Directives would result in higher prices and lower quality and therefore, the costs of not having a review mechanism in place would be even higher.

Moreover, considering the value of the public contracts at stake (i.e. above the thresholds defined in the Procurement Directives) in proportional terms, those costs seem reasonable. Indeed, in terms of costs incurred expressed as a percentage of the contract size, the average ranged from 1.2 % for suppliers and 1.6 % for contracting authorities. The median of a contract size was found to be around 0.6 % for suppliers and 0.4 % for contracting authorities (Table 9).

Table 9: The cost of review as a percentage of the size of contract

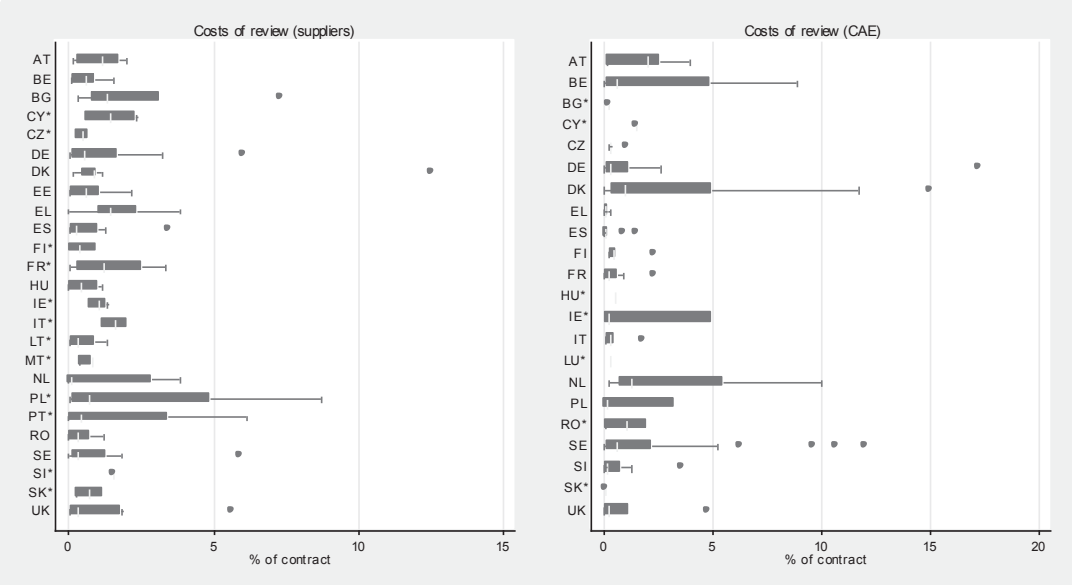
	Suppliers	Contracting authorities/entities
Mean	1.2 %	1.6 %
Median	**0.6 %**	**0.4 %**
Minimum	0 %	0 %
Maximum	12.5 %	17.2 %

Source: the Study, suppliers and contracting authorities surveys by Europe Economics

[59] In this context, the notion of costs differs from the one used under section 7.1.3, point c) above. Indeed, for the needs of the analysis of the efficiency of the Remedies Directives, the costs considered cover all elements of costs associated with a review, which include internal and external costs.
Internal costs included the time of internal staff to prepare and administrate a review, both by economic operators and contracting authorities, and were addressed by asking respondents to provide the number of day spent by junior and senior staff in the review process (the numbers were subsequently multiplied by national wage level for junior and senior staff in the private sector). External costs included direct payments for legal advice, court fee and other external costs associated to a review.

However, cost estimates made by economic operators and contracting authorities reveal a significant disparity. This is shown in box plots in Figure 10, where the boxes represent the distribution range (containing 50 % of respondents with a maximum estimated cost between the 25th and 75th percentiles). The white gap dissecting the boxes represent the median value and outliers in the responses are presented as dots.

Figure 10: Dispersion of review costs as a percentage of the size of contract (estimates by Member States)



Source: The Study, suppliers and contracting authorities/entities surveys
Note: * Member States with less than 5 responses

By comparison, the survey addressed to legal practitioners provided a more focused overview of costs incurred in bringing forward a review case, as it included both the costs of legal services and other costs.[60] The table below presents the average and median costs of three different contract sizes based on the data gathered from legal practitioners. As shown in Table 10, the median cost of the review process represent less than 4 % of the total value of a contract, particularly at the lower value end, while the average of all contracts for the median cost oscillates around 1.9 %.

Table 10: Total cost of review according to legal practitioners, by different contract sizes

	€250 000	€1 million	€10 million	Average of all contracts
Values				
Mean	19 737	27 043	53 015	33 265
Median	9 188	18 488	30 124	19 266
% of contract size				
Mean	7.3 %	2.5 %	0.5 %	3.4 %
Median	3.7 %	1.8 %	0.3 %	1.9 %

Source: The Study, legal practitioners' survey by Europe Economics

[60] The types of 'other' costs vary across Member States but in general include court fees, administration fees (i.e. in bringing a complaint before a Review Body), stamp fees, external expert and witness costs. In some Member States clients incur a cost if the claim they bring is judged to be invalid.

To summarise, qualitative stakeholder feedback shows that the Remedies Directives induce certain operational costs. However, this operational cost remains reasonable, especially when compared with the value of contracts concerned.

7.2.2. *Overall cost/benefit relationship*

It is difficult to provide a conclusive cost/benefit analysis of the legislation evaluated as the economic impacts of the Remedies Directives are not direct, but they stem from the better application of the substantive public procurement rules (as the Remedies Directives are flanking measures to these rules). In any event, it can be assumed that the total direct cost of applying the Remedies Directives is negligible, especially when compared to the value of invitations to tender published on OJEU/TED (roughly EUR 420 billion per year, which is the total value of procurement that can be potentially concerned by remedy actions). Additionally, some costs of review and remedies would be incurred whether the Remedies Directives were in place or not. The difference in that scenario could be that without the Remedies Directives the procedural guarantees would be fewer and therefore the benefits could be substantially more limited. Consequently, the availability of remedies and their costs would not reduce to zero if the Remedies Directives were repealed. On the contrary, the costs could be even higher due to national differences in the review and remedies rules and lack of harmonisation at the EU level, as it would be more difficult for tenderers bidding in other Member States to contest decisions of the contracting authorities. Furthermore, as already demonstrated by stakeholders' perceptions of the effects of the Remedies Directives on the public procurement process, an EU wide set of rule on remedies increases the confidence of firms and the general public in transparency, fairness, openness and accessibility of public procurement systems.

Concerning benefits, the intervention logic supporting the Remedies Directives is that the rules on review and remedies not only guarantee the enforcement of the substantive Procurement Directives, and ultimately the respect of the rule of law as enshrined in the Charter of Fundamental Rights, but they also foster openness and competition in public procurement. This ultimately targets better value for money, which among other factors can be attained through savings and/or lower prices.

As far as the latter are concerned, the 2011 Evaluation Report on the impact and effectiveness of EU Public Procurement legislation[61] found that overall prices for EU advertised procedures were 2.5-10 % lower than contracting authorities initially expected (based on OJEU/TED data). This evaluation estimated that savings of 5 % realised for the EUR 420 billion of public contracts which were published at EU level would translate into savings or higher public investment of over EUR 20 billion per year. The effective and efficient implementation of the Remedies Directives can therefore make the above estimated savings potential brought by the Procurement Directives more prone to materialise.

7.2.3. *Administrative burden*

The concept of administrative burden refers to the costs incurred by business, the voluntary sector, public authorities and citizens in meeting legal obligations to provide information on their action or production, either to public authorities or to private parties. The administrative costs consist of two different cost components: the business-as-usual costs and administrative

[61] SEC(2011) 853 final.

burdens.[62] They are different from compliance costs, assessed above in section 7.2.1, which stem from the generic requirements of the legislation, although – as in the case of the Remedies Directives – they are still costs that do not stem from a legal obligation.

Access to information in the context of award procedures for contracts constitutes an expression of the principle of transparency, which, along with the principles of equal treatment and non-discrimination, underlies the EU public procurement rules and intends to preclude any risk of favouritism or arbitrariness on the part of the contracting authorities.[63]

The substantive public procurement rules impose information obligations mainly on contracting authorities, which in most cases must provide substantial *ex ante* and *ex post* information about the award procedures (for instance through the publication of a contract notice in the OJEU/TED). As already indicated, that obligation of transparency constitutes the basis of the EU public procurement rules, to the extent that those rules would be meaningless without access to information.

The Remedies Directives hardly alter the information obligations laid down in the substantive public procurement rules. One exception is the automatic debrief, that is to say, the systematic obligation for contracting authorities to inform any unsuccessful candidate or tenderer of the reasons for the rejection of its application or tender. Under the substantive public procurement rules, there is only a systematic obligation to inform them that they have not been successful whilst the reasons are provided upon request.[64]

In any event, the automatic debrief allows in practice contracting authorities to avoid an unduly long standstill period – in absence of the automatic debrief, and in order to comply with the *Alcatel* jurisprudence, contracting authorities would need to re-start the standstill period as from the moment the reasons are received by each candidate or tenderer that makes the request. Additionally, as underlined in section 7.3.1, both contracting authorities and suppliers regard the provision on the automatic debrief as the most relevant one in the Remedies Directives (see Figure 11 below).

Since other provisions of the Remedies Directives concerning the provision of information are voluntary, the additional administrative burden brought about the Remedies Directive is very limited and lies mainly with contracting authorities. In parallel, the additional information obligations increase the transparency of public procurement procedures and openness of the single market.

As a final point, the successful tenderer in a given award procedure might be affected by the use of a review procedure, in particular if the review body does not take a prompt decision. However, the potential administrative burden as defined in this subsection that is imposed on suppliers is only incidental and was not singled out as a problem by stakeholders during the consultations.

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[62] Commission staff working document Better Regulation Guidelines SWD(2015) 111 final, Toolbox Tool 53, http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf.

[63] Judgment in case C-496/99 P, *Succhi di Frutta*, paragraph 111. See also judgment of 19 June 2003 in case C-315/01, *GAT*, paragraph 73; judgment of 16 December 2008 in case C-213/07, *Michaniki AE*, paragraphs 44-45; judgment of 13 October 2005 in case C-458/03, *Parking Brixen*, paragraph 49; judgment of 3 June 1992 in case C-360/89, *Commission v Italy*, paragraph 11; judgment of 11 May 2006 in case C-340/04, *Carbotermo SpA*, paragraph 58.

[64] See in particular, with regard to the public sector, Article 2a of Directive 89/665/EEC as modified by Directive 2007/66/EC and Article 41 of Directive 2004/18/EC.

7.2.4. *Conclusions — efficiency:*

The Remedies Directives provide overall benefits in line with the intended impacts, both direct and indirect. There are clear indications that the benefits achieved through the Directives outweigh their costs. The costs to contracting authorities and suppliers of bringing forward or defending a review case (including direct and indirect costs) vary widely across the EU, typically accounting for 0.4%-0.6% of the contract value. The costs would not reduce to zero if the Remedies Directives were repealed. On the contrary, they could be even higher because of national differences in the review and remedies rules and a lack of harmonisation at the level leading to a more cumbersome context for tenderers and others.

The benefits are important in terms of sound financial management, the best price/quality ratio and deterrence, especially when considering the value of invitations to tender published in TED. The 2011 evaluation of EU public procurement legislation in general[65] estimated that savings of 5% realised for the 420 billion of public contracts that were published at EU level would translate into savings or higher public investment of over EUR 20 billion a year. The effective implementation of the Remedies Directives can therefore make such estimated savings from the Public Procurement Directives more likely to happen. Finally, the evaluation did not identify any administrative burden considered to be unnecessary for the operation of the Remedies Directives.

7.3. Relevance

Evaluation questions to be answered: *Are the objectives of the Remedies Directive still relevant today? How has the original need for intervention evolved in recent years? In particular, is there any reason to believe that the initiative is no longer justified or that alternative provisions or soft measures are needed?*

The questions on the relevance are addressed from two perspectives:

(1) examination of the user's perceptions of the relevance of the Remedies Directive in improving the effectiveness of review procedures concerning the award of public contracts and ensuring better compliance with EU law; and

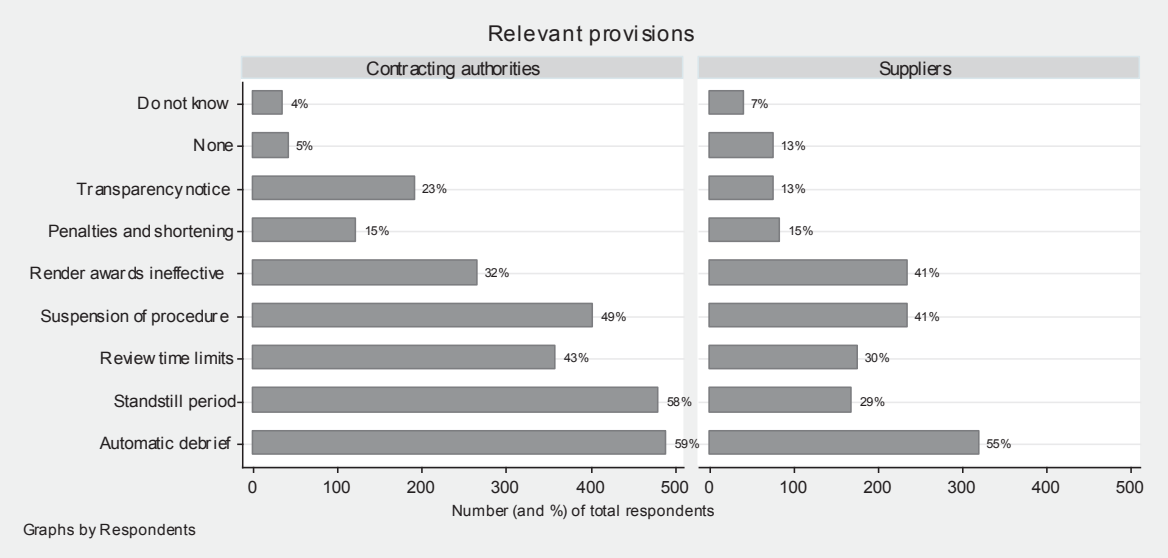
(2) examination of the data to determine whether the Remedies Directives, in particular following the amendments introduced by Directive 2007/66/EC, are relevant.

7.3.1. *Stakeholders' views on relevance*

Based on the surveys of stakeholders, the Study concludes on the continued relevance of the Remedies Directives. Many provisions of the Remedies Directives are perceived as relevant across suppliers, contracting authorities and legal practitioners, with the most relevant provision being the 'automatic debrief'. Some provisions are perceived as less relevant, such as those on the Voluntary Ex Ante Transparency Notices ('VEAT notices') and penalties. For details see Figure 11.

[65] The Evaluation Report on Impact and Effectiveness of EU Public Procurement Legislation, SEC(2011) 853 final.

Figure 11: Relevance of different provisions of the Remedies Directive

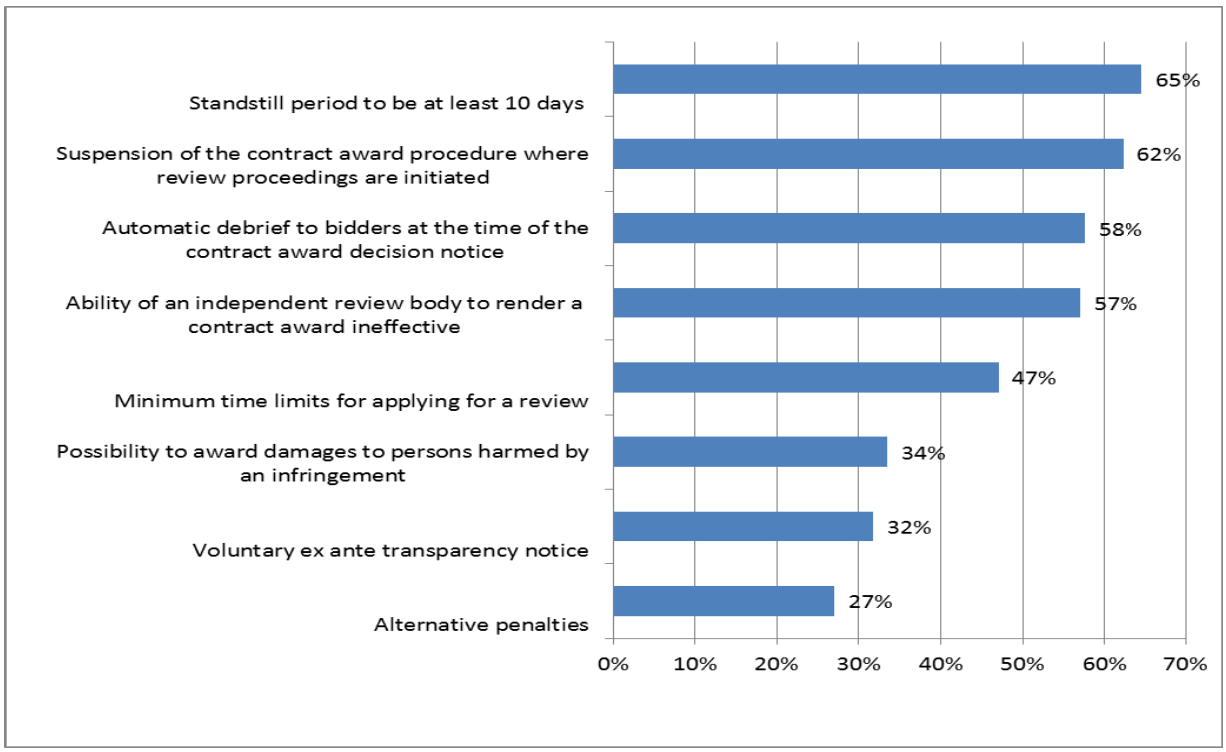


Source: The Study, survey of suppliers and contracting authorities/entities by Europe Economics

As the Study concludes, even if certain provisions are perceived as less pertinent, they are still relevant because they have a deterrent effect. A clear majority of respondents to the public consultation carried out in the context of the Study (more than 80 %) consider that the Remedies Directives helped public procurement process to become more compelling for contracting authorities to comply with the requirements of the Procurement Directives.

The results from the Commission's public consultation concerning the ranking of relevance of the provisions in the Remedies Directives (from the most relevant to the least relevant) are shown in Figure 12.

Figure 12: Remedies Directive's provisions from the most relevant to the least relevant



Source: Directorate General for Internal Market, Industry, Entrepreneurship and SMEs

Based on the results of the Commission's public consultation, the standstill period was the measure that most respondents unconditionally considered to be the most relevant one. On the other hand, alternative penalties were considered by respondents to be the least relevant remedy. For details see Annex 3 (replies to questions 9 to 13).

The majority of Member States responses to the Commission's questionnaire perceived interim measures, standstill period, alternative penalties, ineffectiveness and damages equally relevant to palliate breaches of EU public procurement rules. It was made clear that all these measures combined provide for a comprehensive and effective system for sanctioning irregularities in public procurement. Alternative penalties were perceived as less relevant by some Member States. The reason for this is that alternative penalties constitute a simple relocation of funds (i.e. the punished contracting authority financed from the State budget pays a fine to the same State budget). Damages were perceived as an important means of last resort but less relevant.

Judges from administrative supreme courts considered as the most relevant provisions in the Remedies Directives the automatic debrief to unsuccessful tenderers and the ensuing standstill period during which contracting authorities cannot conclude the contract.

Representatives of first instance specialised administrative review bodies that participated in the meeting held in Brussels on 30 September 2015 also underlined that the Remedies Directives are useful and had improved the remedy system in their respective Member States.

Notwithstanding this, the results of the Study show that perceptions of continuing problems exist in addressing breaches in procurement law among some participants to the surveys (particularly from suppliers). There is also some evidence of a perceived lack of trust in the procurement process and a perceived lack of transparency in public procurement in general. These perceptions suggest that continuing efforts are required to achieve the benefits of the Procurement Directives. The Remedies Directives are thus relevant in enabling procurement law breaches to be challenged and in promoting a more efficient and transparent procurement market.

The Commission departments' public consultation show that 62.94 % of respondents consider that there are still problems in addressing breaches in EU public procurement law, whereas 30.59 % of respondents do not see such problems. In general, those who still saw problems gave at the same time examples of how the situation could be improved by the Remedies Directives. This can be interpreted in the sense that stakeholders perceive the Remedies Directives as a relevant vehicle to address infringements of EU Public Procurement law. For details see Annex 3 (replies to question 20).

7.3.2. *Actual usage of the provisions*

As mentioned, in the introduction to this section, another indicator of the relevance of the Remedies Directives is the actual usage of provisions they provide.

As the Study indicates, there were around 50 000 first instance decisions across Member States during the period 2009-2012.

During the same period, there were also 10 103 second instance decisions made (for Member States where information was available).[66]

Finally, as mentioned in section 6.6, there were more than 57 000 VEAT notices published across EU-28 for the period 2010-2015. The majority of VEAT notice usage was by France (37 226 contracts), followed at a distance by Poland (5 453), the United Kingdom (3 256) and Denmark (2 504). After the entry into force of the provisions, the uptake of VEAT notices by the market was immediate and remains stable at around 10 000 notices per year.

7.3.3. *Conclusions — relevance:*

The objectives of the Remedies Directives are still relevant. The evaluation revealed that many provisions of the Directives are perceived as relevant across suppliers, contracting authorities and legal practitioners. Based on replies to the public consultation, the most relevant provision appears to be the standstill period (65% of respondents), followed by the suspension of the contract award procedure where review proceedings are initiated (62%) and the automatic debrief to tenderers (58%). Even if certain provisions are perceived to be of less practical value, they still contribute to the deterrent effect of the Remedies Directives. Another indicator of the relevance of the Remedies Directives is the actual use of the procedures they provide. In general, the remedies provided are frequently used in most Member States. There were around 50 000 first instance decisions across Member States during 2009-2012. The most frequently type of remedy sought is set-aside decision, followed at some distance by interim measures and the removal of discriminatory specifications.

7.4. Coherence with other policies

Evaluation questions to be answered: *To what extent are the Remedies Directives consistent with other policy objectives at EU and national level?*

Open and well regulated procurement markets are expected to contribute to a better use of public resources, with the intention of improving the quality and/or lowering the price of purchase made by contracting authorities. The experience acquired with the Procurement Directives showed that they could not realise completely their objectives if economic operators were unable to effectively ensure that the rights given them by them were observed everywhere in the EU.

Consequently, the Remedies Directives were adopted as flanking measures aimed at ensuring that economic operators everywhere in the EU would have minimum procedural guarantees to access to clear, rapid and effective procedures for seeking redress in cases where they consider contracts had been awarded in breach of Procurement Directives. This was, and is, crucial to making sure that contracts ultimately go to the company which has made the best offer, and therefore to building confidence among businesses and the public that public procurement procedures are fair.

In this context, remedies are indispensable to ensure the overall enforcement of substantive public procurement rules. Increased levels of enforcement of the law increase the incentives

[66] CZ, CY, DE, DK, EE, HU, IE, LT, LU, RO, SE, SI.

of contracting authorities to comply with the law (deterrent effect), thus helping that the markets remain open and competitive.

The Remedies Directives were generally aligned with the new legislative package on public procurement adopted in 2014, in particular to cover the concession contracts subject to Directive 2014/23/EU. Notwithstanding this, the operation of the Remedies Directives in the context of the new legislative context may need some interpretative support. In particular, and as confirmed by various stakeholders who expressed their views in the context of this evaluation, enforcement of the new rules on modification and termination of public contracts and concession contracts and the application of the Remedies Directives to the so-called "light regime" under the new substantive public procurement rules could be explained by the Commission.

As already indicated, Article 47 of the Charter of Fundamental Rights of the European Union and Article 6 of the European Convention on Human Rights enshrine the right to an effective remedy. In this respect, the Court has found that the right to an effective remedy is a general principle of EU law.[67] Furthermore, Article 19(1) of the Treaty on European Union states that: '*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*'[68]. In the light of this, the Remedies Directives are in line with the rights and general principles laid down in EU primary law concerning fundamental rights.

The Court has also acknowledged that the Remedies Directives give specific expression to the general principle enshrining the right to an effective remedy in the particular field of public procurement[69]. It is true that there is limited EU secondary legislation laying down review procedures in specific areas[70]. This fact, however, is not a sign of incoherence – it merely shows that the EU legislature has considered that certain areas, on account of their specificities, cannot rely exclusively on EU primary law or in existing national procedural systems. The specificities in the public procurement area (e.g. potential for persistent breaches of EU law, need to obtain a timely decision and economic importance) are explained below, in section 7.5.

Finally, by improving the effectiveness of national review procedures, especially those dealing with illegal direct awards of contracts, the Remedies Directives play an important role in tackling effectively breaches of Procurement Directives that could also entail irregularities with criminal implications.

The evaluation has not found any possible conflicts with other policy fields.

Conclusions — coherence with other EU policies:

The Remedies Directives are coherent with other EU policies. As confirmed by the Court, the right to an effective remedy is a general principle of EU law. In the light of this, the Remedies Directives are in line with the rights and general principles laid down in EU primary law concerning fundamental rights. The Remedies Directives lie at the core of public procurement legislation as they allow bidders to enforce their substantive rights. They were

[67] *Vanbreda*, paragraph 28.
[68] See also the judgment of 19 November 2014 in case C‑404/13 *ClientEarth*, paragraph 52.
[69] *Vanbreda*, paragraph 28.
[70] An example, in the field of environment, is Public Participation Directive 2003/35/EC, which gives rights of access to justice in relation to environmental impact assessment and integrated pollution prevention and control.

found to be generally aligned with the new 2014 legislative package on public procurement, in particular to cover the concession contracts subject to Directive 2014/23/EU. Nonetheless, as already mentioned in section referring to effectiveness of the Remedies Directives, the interplay between these Directives and the new legislative package on public procurement could be further clarified. Finally, by improving the effectiveness of national review procedures, especially those dealing with illegal direct awards of contracts, the Remedies Directives also play an important role in effectively tackling breaches of Procurement Directives that could also entail irregularities with criminal implications. The evaluation has not found any possible conflicts with other policy fields, but rather the contrary.

7.5. The EU added value

Evaluation questions to be answered: *What is the ongoing added value of EU legislation in this field? What would be the effects if the Remedies Directive were to be withdrawn and Member States were free to adjust their national regulatory frameworks? Would these benefits have been achieved in the absence of the Directives?*

As mentioned previously, the Remedies Directives do not intend to fully harmonise the remedies systems in the area of public procurement, in line with the competences conferred upon the EU in this field by Member States. The Remedies Directives lay down only '*the minimum conditions to be satisfied by the review procedures established in domestic law to ensure compliance with the requirements of EU law concerning public procurement*[71]*'*. In fact, the Remedies Directives frame the principle of national procedural autonomy of Member States so as to ensure the effective enforcement of EU public procurement rules at national level.

It is generally conceded by all the sources used to prepare this evaluation that it is very importance to have a specific system of remedies in public procurement. Substantive EU public procurement law is too complex and ordinary courts under ordinary procedural codes cannot guarantee rapid and effective review as required by the case-law of the Court. For instance, before a mandatory standstill period was introduced, no interim measure before ordinary courts was rapid enough to suspend conclusion of the awarded contract.

In general, stakeholders expressed the view that the system of remedies could not be left solely to Member States under the principle of national procedural autonomy because all bidders in the EU should benefit from at least a minimum level of protection. In particular, judges from supreme administrative courts admitted that before the Remedies Directives were amended by Directive 2007/66/EC, it was impossible to challenge the outcome of public procurement. This was reflected in a relatively low number of cased launched before 2009, as argued in the impact assessment report prior to the adoption of Directive 2007/66/EC.[72]

[71] Judgment of the Court of Justice of 30 September 2010 in case C-314/09 *Strabag AG*, paragraph 33.
[72] Impact Assessment Report — Remedies in the field of public procurement, Commission Staff Working Document, SEC(2006)557.

In the same token, national procedural rules before the adoption of Directive 2007/66/EC (which codified the most important findings of the *Alcatel* ruling[73]) were not sufficient to ensure compliance with the substantive public procurement rules by contracting authorities since they did not prevent the 'race to signature'. Even when Member States started introducing their own standstill periods as result of the *Alcatel* ruling, the solutions adopted were too divergent and could not ensure a level playing field for economic operators in the EU. According to an OECD study of 2007[74], the differences in standstill periods before the entry into application of Directive 2007/66/EC ranged from 7 to 30 days (Table 11).

Table 11: Standstill periods between the award decision and the conclusion of the contract (in days)

Austria	7 or 14	Lithuania	10
Bulgaria	10	Luxemburg	15
Czech Republic	15	Malta	10
Denmark	7 to 10	Netherlands	15
Estonia	14	Poland	7
Finland	21 or 28	Portugal	10
France	10	Romania	15
Germany	14	Slovakia	14
Hungary	8	Slovenia	20
Ireland	14	Sweden	10
Italy	30		

Source: OECD (2007), "Public Procurement Review and Remedies Systems in the European Union", SIGMA Papers, No. 41, OECD Publishing. http://dx.doi.org/10.1787/5kml60q9vklt-en

Furthermore, before the remedy of ineffectiveness was introduced by Directive 2007/66/EC there were no instruments at national level that would encourage Member States to tackle direct awards. This can be evidenced by the judgment of the Court in case C-503/04, *Commission v Germany*[75]. After the Court concluded that contracts in a waste management sector were awarded illegally, Germany sent a letter to the municipality concerned asking it to ensure compliance with the public procurement legislation in force and to notify it of the measures intended to prevent similar infringements in future. Notwithstanding this, without the risk of a contract being considered ineffective, the enforcement leverage was limited.

All the elements above confirm that the Remedies Directives add value to the single market because of the minimum level of harmonisation that they ensure. In those conditions, bidders can expect the minimum level of protection across the EU.

On another level, infringement procedures launched by the Commission under Article 258 of the TFEU are not sufficient to ensure compliance with the substantive public procurement rules by contracting authorities. Indeed, the Commission cannot pursue each and every infringement of EU public procurement rules identified in the Member States. Compared to

[73] See section 3.2.1 of this Staff Working Document.
[74] OECD (2007), 'Public Procurement Review and Remedies Systems in the European Union', SIGMA Papers, No 41, OECD Publishing. http://dx.doi.org/10.1787/5kml60q9vklt-en
[75] See footnote 25.

other fields of EU intervention, public procurement rules have certain specificities (some of which may also be present in other areas of EU law):

(1) As long as the contract is above the EU thresholds, the substantive public procurement rules are applicable, irrespective of cross-border interest.

(2) Even in the presence of perfectly EU-compliant national legislation, in only one tendering procedure conducted by only one contracting authority there is a substantial potential for numerous infringements (e.g. unlawful exclusion of tenderers, unlawful tender specifications, unlawful contract award criteria, use of the wrong procedures, accepting abnormally low tenders, conflict of interests, etc.) which cannot be all considered by the Commission in the context of Article 258 TFEU procedures.

(3) The Commission does not have the expertise necessary to take decisions concerning the technical aspects of many public contracts when they could be suspected of a breach of EU public procurement rules.

(4) Infringement procedures are not intended to protect bidders' rights, but rather to ensure future systematic Member State compliance with EU public procurement legislation. The ruling under Article 258 TFEU is primarily declaratory for the non-compliance. Moreover, the procedure under Article 258 TFEU is lengthy and the time factor is essential in public procurement review.

(5) The national public procurement activity covered by EU rules involves a very large amount of national and, in some cases, EU funds. The result is that direct rights of recourse for parties participating in public tenders under EU substantive public procurement rules are indispensable for the proper functioning of those rules and for the proper functioning of the single market for economic operators taking part in tendering procedures.

Member States responses to the Commission's questionnaire considered access to justice one of the cornerstones of the rule of law. Member States were of the opinion that in the absence of the Remedies Directives, it would still be necessary to protect bidders' individual rights due to the right to a fair trial and the right to a tribunal according to Article 6 of the European Convention on Human Rights and their constitutional laws.

Moreover, the principles laid down in the TFEU also require Member States to guarantee a minimal level of protection of bidders' individual rights in the context of contract award procedures. Nonetheless, it was made clear by Member States that in the absence of the Remedies Directives, the effectiveness of the protection of the bidders' individual rights would not be fully guaranteed. The added value of the Remedies Directives is that they allow bidders to submit the request for review before the conclusion of public contracts, when infringements can still be corrected. A minimum level of harmonisation at EU level, as guaranteed by the Remedies Directives, presents therefore an added value.

Conclusions — the EU added value:

The Remedies Directives present a clear EU added value. It was generally confirmed by all sources of information used for the purposes of the evaluation that it is of utmost importance to have EU law requirements for remedies in public procurement. Ordinary courts under ordinary procedural codes cannot guarantee rapid and effective review as required by EU case-law. For instance, before a mandatory standstill period was introduced by Directive

2007/66/EC, no interim measure before ordinary courts was rapid enough to suspend conclusion of the awarded contract.

Compared with other fields of EU law, public procurement rules have certain specificities. Firstly, as long as the contract is above the EU thresholds, the substantive public procurement rules are applicable, irrespective of cross-border interest. Secondly, in each tendering procedure conducted by any contracting authority/entity there is a significant potential for numerous infringements (e.g. unlawful exclusion of tenderers, unlawful tender specifications, unlawful contract award criteria, use of the wrong procedures, accepting abnormally low tenders, conflict of interests, etc.) The role of the Commission, when dealing with individual complaints and potential infringements of EU law, is directed to ensuring future systematic respect for EU law, rather than obtaining remedies for individual parties to public tendering procedures particularly given the large volume of contracting authorities, tenderers and procedures in the EU and the technicalities involved in each individual process.

Suitable rights of direct recourse for bidders are therefore indispensable for the correct functioning of substantive public procurement rules and for the proper operation of the single market in the public sector. As confirmed by numerous stakeholders, the minimum level of harmonisation ensured by Remedies Directives is absolutely essential in this respect.

8. CONCLUSIONS

Based on the evaluation, the Commission concludes that the Remedies Directives, in particular amendments introduced by Directive 2007/66/EC, largely meet their objectives in an effective and efficient way although it has not been possible to quantify the concrete extent of their cost/benefits. Even if specific concerns are reported in some Member States, they usually stem from national measures and not from the Remedies Directives themselves. In general qualitative terms, the benefits of the Remedies Directives outweigh their costs. They remain relevant and continue to bring EU added value.

Despite the overall positive conclusion of the evaluation, certain shortcomings were identified, in particular as regards the clarity of some provisions and the availability of data. Data for remedies actions on public contracts above thresholds brought in each Member State are not collected in a structured, coherent and systemic manner that would allow comparing the results obtained. For this reason, the proper measurement or estimation of the effects of the Remedies Directives is more difficult.

Based on the information gathered in this evaluation, the report from the Commission to the European Parliament and the Council on the effectiveness of Directive 89/665/EEC and Directive 92/13/EEC, as modified by Directive 2007/66/EC, concerning review procedures in the area of public procurement to which this document accompanies, draws the necessary operational conclusions and proposes relevant paths of action.

ANNEX 1 — CASE-LAW CONCERNING REMEDIES IN THE AREA OF PUBLIC PROCUREMENT

Judgment of 24 January 1995 in case C-359/93, *Commission v Netherlands*

Judgment of 17 September 1997 in case C-54/96, *Dorsch Consult*

Judgment of 15 January 1998 in case C-44/96, *Mannesmann Anlagenbau Austria*

Judgment of 24 September 1998 in case C-76/97, *Tögel*

Judgment of 24 September 1998 in case C-111/97, *EvoBus Austria*

Judgment of 17 December 1998 in case C-353/96, *Commission v Ireland*

Judgment of 4 February 1999 in case C-103/97, *Köllensperger and Atzwanger*

Judgment of 4 March 1999 in case C-258/97, *HI*

Judgment of 19 May 1999 in case C-225/97, *Commission v France*

Judgment of 28 October 1999 in case C-81/98, *Alcatel Austria*

Judgment of 18 November 1999 in case C-275/98, *Unitron Scandinavia and 3-S*

Judgment of 18 June 2002 in case C-92/00, *HI*

Judgment of 12 December 2002 in case C-470/99, *Universale-Bau*

Judgment of 23 January 2003 in case C-57/01, *Makedoniko Metro and Michaniki*

Judgment of 27 February 2003 in case C-327/00, *Santex*

Judgment of 10 April 2003 in joined cases C-20/01 and C-28/01, *Commission v Germany*

Judgment of 15 May 2003 in case C-214/00, *Commission v Spain*

Judgment of 19 June 2003 in case C-249/01, Hackermüller

Judgment of 19 June 2003 in case C-315/01, *GAT*

Judgment of 16 October 2003 in case C-283/00, *Commission v Spain*

Judgment of 19 June 2003 in case C-410/01, *Fritsch, Chiari & Partner*

Judgment of 4 December 2003 in case C-448/01, *EVN and Wienstrom*

Judgment of 12 February 2004 in case C-230/02, *Grossmann Air Service*

Judgment of 18 March 2004 in case C-314/01, *Siemens and ARGE Telekom*

Judgment of 24 June 2004 in case C-212/02, *Commission v Austria*

Judgment of 11 January 2005 in case C-26/03, *Stadt Halle and RPL Lochau*

Judgment of 3 March 2005 in case C-21/03, *Fabricom*

Judgment of 3 March 2005 in case C-34/03, *Fabricom*

Judgment of 2 June 2005 in case C-394/02, *Commission v Greece*

Judgment of 2 June 2005 in case C-15/04, *Koppensteiner*

Judgment of 8 September 2005 in case C-129/04, *Espace Trianon and Sofibail*

Judgment of 18 July 2007 in case C-503/04, *Commission v Germany*

Judgment of 11 October 2007 in case C-241/06, *Lämmerzahl*

Judgment of 10 January 2008 in case C-70/06, *Commission v Portugal*

Judgment of 14 February 2008 in case C-450/06, *Varec*

Judgment of 3 April 2008 in case C-444/06, *Commission v Spain*

Judgment of 21 May 2008 in case T-495/04, *Belfass v Council*

Judgment of 19 June 2008 in case C-454/06, *pressetext Nachrichtenagentur*

Order of 2 July 2009 in case T-279/06, *Evropaïki Dynamiki v ECB*

Judgment of 12 November 2009 in case C-199/07, *Commission v Greece*

Judgment of 23 December 2009 in case C-455/08, *Commission v Ireland*

Judgment of 28 January 2010 in case C-406/08, *Uniplex*

Judgment of 28 January 2010 in case C-456/08, *Commission v Ireland*

Judgment of 9 March 2010 in case C-378/08, *ERG*

Judgment of 6 May 2010 in case C-145/08, *Club Hotel Loutraki*

Judgment of 6 May 2010 in case C-149/08, *Aktor A.T.E.*

Judgment of 20 May 2010 in case T-258/06, *Germany v Commission*

Judgment of 30 September 2010 in case C-314/09, *Strabag*

Judgment of 21 October 2010 in case C-570/08, *Symvoulio Apochetefseon Lefkosias*

Judgment of 9 December 2010 in case C-568/08, *Combinatie Spijker Infrabouw-De Jonge Konstruktie*

Judgment of 3 March 2011 in case T-589/08, *Evropaïki Dynamiki v Commission*

Judgment of 29 March 2011 in case T-33/09, *Portugal v Commission*

Judgment of 9 June 2011 in case C-401/09 P, *Evropaïki Dynamiki v ECB*

Judgment of 10 November 2011 in case C-348/10, *Norma-A and Dekom*

Judgment of 12 July 2012 in case T-476/07, *Evropaïki Dynamiki v Frontex*

Judgment of 4 July 2013 in case C-100/12, *Fastweb*

Judgment of 15 January 2014 in case C-292/11 P, *Commission v Portugal*

Judgment of 8 May 2014 in case C-161/13, *Idrodinamica Spurgo Velox*

Judgment of 23 May 2014 in case T-553/11, *European Dynamics Luxembourg v ECB*

Judgment of 11 September 2014 in case C-19/13, *Fastweb*

Judgment of 11 December 2014 in case C-440/13, *Croce Amica One Italia*

Judgment of 12 March 2015 in case C-538/13, *eVigilo*

Order of 23 April 2015 in case C-35/15 P(R), *Commission v Vanbreda Risk & Benefits*

Judgment of 6 October 2015 in case C-61/14, *Orizzonte Salute*

Judgment of 6 October 2015 in case C-203/14, *Consorci Sanitari del Maresme*

Judgment of 26 November 2015 in case C-166/14, *MedEval*

Judgment of 17 December 2015 in case C-25/14, *UNIS*

Order of 7 April 2016 in case C‑495/14, *Tita*

Judgment of 15 September 2016 in case C-488/14, *Star Storage*

ANNEX 2 — SYNOPSIS REPORT OF CONSULTATION ACTIVITIES

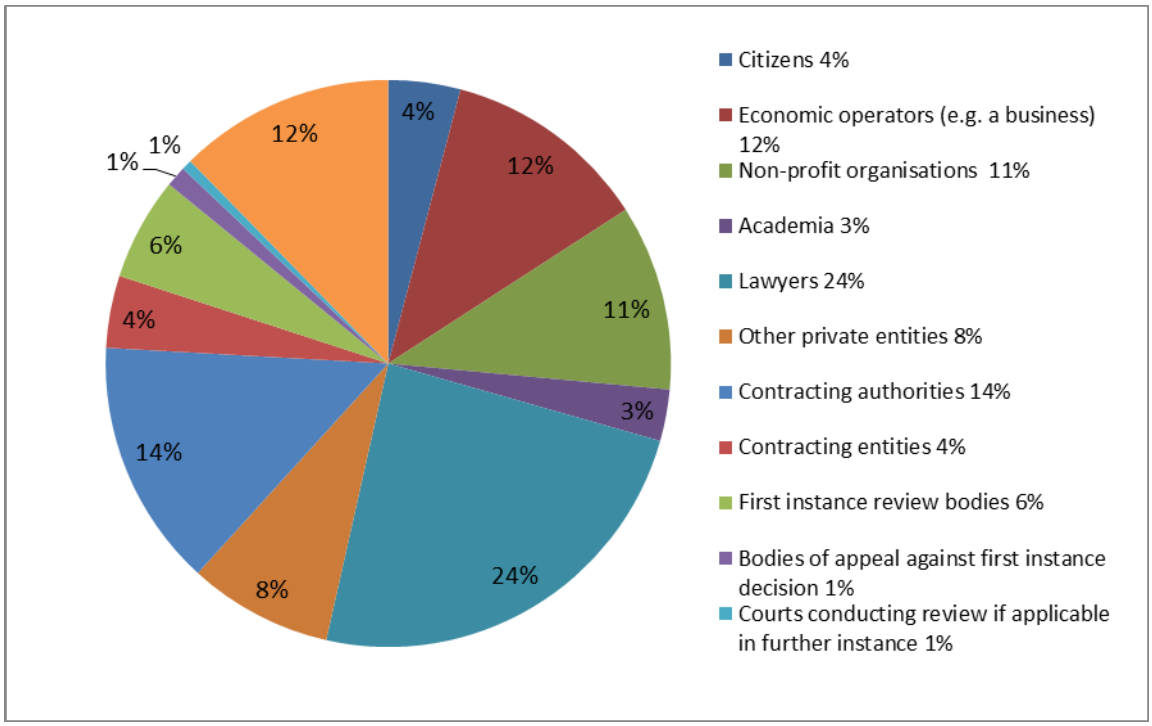
The main objective of the consultation activities was to gather expertise, opinions and evidence on the Remedies Directives' functioning.

1. Consultation activities carried out:

Open online public consultation carried out by the Commission departments

The Commission departments carried out an open online public consultation (the 'EC public consultation') which aimed to collect evidence on the Remedies Directives' functioning and added value. This consultation was open from 24 April to 20 July 2015 and yielded 170 responses coming from all EU Member States. The consultation involved contracting authorities and entities, economic operators, academics, lawyers, review bodies and citizens - the share of responses coming from different categories of stakeholders is presented in Figure 13.

Figure 13: The share of responses to public consultation by participant's category



Source: DG for Internal Market, Industry, Entrepreneurship and SMEs

Overall, 63% of the respondents declared that they have been involved in public procurement litigation over the last five years.

Targeted consultations

In addition to the open public consultation, the Commission departments also collected feedback from stakeholders via targeted / close audience consultations. The findings of these consultations were extensively used throughout the current evaluation Staff Working Document and, whenever relevant, the input was marked with quotes and references.

1.1. Consultations with Member States

Based on the results of the Study, on 15 October 2015 the Commission consulted government experts on public procurement from Member States *via* the Commission Government Expert Group on Public Procurement. As a follow up of this meeting, the Commission asked Member States two sets of questions:

i. questions related to the functioning of the Remedies Directives at national level; and

ii. questions on the overall effectiveness of the Remedies Directives.

The Commission received 16 replies from Austria, Germany, Finland, Estonia, France, Croatia, Hungary, Italy, Latvia, Lithuania, the Netherlands, Poland, Slovenia, Slovakia, Sweden, the UK. Norway also provided replies.

The content of the detailed questionnaire is provided in Annex 3.

1.2. Consultations with experts and practitioners

Within the context of this evaluation, a number of targeted consultations with experts and practitioners in public procurement litigation have been carried out, namely:

- as part of the Study, a total of 616 and 832 responses, from suppliers and contracting authorities respectively, were collected in relation to the functioning of national remedies systems; the responses covered the majority of Member States, although few or no responses were obtained from Latvia, Luxembourg and Croatia; additionally, a total of 112 responses from legal practitioners were received across all Member States, except Poland and Portugal;
- meeting of Commission Stakeholder Expert Group on Public Procurement held in Brussels on 23 February 2015;
- meeting with 11 first instance specialised administrative review bodies held in Brussels on 30 September 2015;
- meeting with supreme administrative judges via the 'Association of the Council of States and Supreme Administrative Jurisdictions of the European Union' held in Helsinki on 22-23 October 2015.

2. Results - Summary of the open online consultation and meetings

Open online public consultation

The online public consultation allowed all interested parties to express their view about the functioning of the Remedies Directives. However, despite being public, the consultation only received 170 replies (see figure 13 in this annex for the share of responses by participant's category). This relatively low number of replies might be explained by the technical nature of the Remedies Directives.

Overall, some general conclusions could be drawn from the predominant replies to the questions asked (the percentages are indicated in brackets):

- Respondents were of the opinion that the Remedies Directives have had a positive effect on the public procurement process, making it more transparent (80.59%), fairer

(79.42%), more open and accessible (77.65%) and more compelling to comply with EU substantive public procurement rules (81.77%).

- They considered that the Remedies Directive evenly balance the interest of economic operators in ensuring the effectiveness of public procurement law and the interest of contracting authorities in limiting frivolous litigation (57.06%).

- The provision most relevant to respondents was the standstill period (65%), followed by the suspension of the contract award procedure where review proceedings are initiated (62%) and the automatic debrief to tenderers (58%); alternative penalties, in turn, are the least relevant remedy (27%).

- Respondents indicated that the procedures before ordinary courts take longer and result in lower standards of adjudication than the procedures before specialised administrative review bodies (74%).

- According to respondents, the procedure in first instance often takes up to 1 month in the case of interim measures (42.35%), between 1 and 3 months for the setting aside of decisions and for ineffectiveness (32.35%) and more than a year for damages (22.94%).

- Respondents were of the view that the costs of review procedures, albeit very divergent across Member States, in most of the cases do not have decisive dissuasive effect on the access to remedies (50.59%).

- Nevertheless, some problems in addressing breaches in EU public procurement law are still present (62.94%). Respondents indicated that some problems identified are rooted either in national legislation beyond the Remedies Directives or in national practices rather than stem from the Remedies Directives.

Meeting of the Commission Stakeholder Expert Group on Public Procurement[76]

The meeting was held in Brussels on 23 February 2013.

The members of the Experts Group underlined that it is of utmost importance to have a specific system of remedies in public procurement because substantive public procurement law is too complex and ordinary courts under ordinary procedural codes cannot guarantee rapid and effective review as required by EU Court case-law. For instance, before a mandatory standstill period was introduced no interim measure before ordinary courts was rapid enough to suspend conclusion of the awarded contract. The system of remedies cannot be left for Member States under the principle of national procedural autonomy because all bidders in the EU should benefit from the same level of minimum protection.

The advantages of administrative review bodies over judicial ones in terms of delays and costs were mentioned. The example of Scotland was given where a procurement tribunal was set up and turned out to be quicker and less expensive than ordinary court proceedings. It was

[76] The Expert Group is composed of 20 public procurement experts. The task of the group is to provide the Commission with high quality legal, economic, technical and/or practical insight and expertise with a view to assisting it in shaping the public procurement policy of the Union.

suggested that Member States could be encouraged to set up such tribunals that would have jurisdiction to consider only claims that arise before the conclusion of a contract where the rapidity of review decisions is of a particular importance.

It was concluded that pre-contractual remedies (setting aside of decisions) are more effective than post-contractual remedies (damages, ineffectiveness). With regard to damages, experts underlined that it is notoriously difficult to seek damages in most Member States, mostly because of the need to prove that the economic operator was genuinely a tenderer who had a serious chance of winning the contract. Nonetheless, it was underlined that damages present a less attractive or efficient means of sanction than pre-contractual remedies because economic operators are interested in being awarded a contract and not in compensation.

Inconsistency of decisions of first instance review bodies was also mentioned by experts as a problem in many Member States.

The discussion also revealed the lack of clarity with regard to the lifting of a statutory automatic suspension of contract conclusion once the application for review is lodged with the review body. In some Member States it is possible to lift this automatic suspension. For example, because of the liberal test applied by the UK courts it is very easy to obtain the lifting of automatic suspension in that Member State. This approach is problematic form the point of view of the effectiveness of pre-contractual remedies because once the contract is signed, the bidder is left with post-contractual remedies only (damages and ineffectiveness). In Germany, on the contrary, it is difficult to obtain the lifting of a statutory automatic suspension. It was suggested that there should be more consistency across Member States in this respect.

Meeting with First Instance Specialised Administrative Review Bodies

The meeting was held in Brussels on 30 September 2015 with first instance specialised administrative review bodies.

11 Member States participated (Croatia, Spain, Poland, Malta, Slovakia, Denmark, Slovenia, Estonia, Romania, Cyprus, Hungary).

The purpose of the meeting was to gather views on the Remedies Directives' functioning and on possible future cooperation from specialised administrative review bodies adjudicating in first instance in public procurement cases.

Participants confirmed that the Remedies Directives, in particular amendments introduced in Directive 2007/66/EC, are useful and have improved the review systems in Member States. There was consensus among participants that at present there is no need to modify the Directives. Specific problems related to remedies result from national implementing measures and national approach to enforcement rather than from the Directive. However, according to the participants, further guidance from the Commission (e.g. on fees, independence of the review bodies) would be useful. Soft law from the Commission would also help to improve and strengthen national systems. Participants underlined that it would be very useful to establish a network of first instance administrative review bodies in order to share best practice and to exchange views between them on a regular basis.

Participants indicated that special administrative bodies were established because they offer faster review compared to general courts - time length for the review procedures varies from

4 months (Denmark) to 15 days (Poland). The success rate of appeals from decisions of first instance review bodies is low, which proves the seriousness of the work carried out in first instance by these bodies.

Meeting with the Supreme Administrative Court Judges

The meeting took place on 22-23 October 2015 in Helsinki during the conference "Recent case-law of the Court of Justice of the European Union and of the (Supreme) Administrative Courts in public procurement litigation", organised by the 'Association of the Council of States and Supreme Administrative Jurisdictions of the European Union' and the Supreme Administrative Court of Finland.

The purpose of the meeting was to gather views from the supreme administrative court judges on the Remedies Directives' functioning and their future.

The feedback on the relevance and the effectiveness of the Remedies Directives as amended by Directive 2007/66/EC was positive. In particular, judges mentioned that before the standstill period between the award decision and the conclusion of the contract was introduced by Directive 2007/66/EC, it was impossible to challenge the outcome of public procurement as no interim measure was rapid enough to suspend the conclusion of the awarded contract. Automatic debrief to unsuccessful tenderers and the standstill period were mentioned as the most effective and relevant provisions in the Remedies Directives.

It was underlined that it is difficult to bring actions for damages in Member States. Member States' legal systems differ on the test of causation and recoverable losses. In particular, in most cases it is practically impossible for the plaintiff to prove that it had genuine chances to win the contract if the public procurement rules had been complied with. Increased harmonisation in this field would be of added value.

Participants also underlined that the lifting of the automatic suspension of the conclusion of the contract following the lodging of a legal action and in particular, the criteria to be applied by courts to lift the suspension, could be clarified at EU level.

Some isolated problems with enforceability of judgments were mentioned by participants. It was also underlined that EU law could provide some guidance on how to ensure confidentiality of documents during the review procedure. Participant underlined that parties must enjoy the right to a fair hearing while respecting at the same time the protection of commercial secrets.

Consultations with Member States

Member States were asked on 15 October 2015 several questions related to the functioning of the Remedies Directives at national level and to the overall effectiveness of the Remedies Directives (e.g. the length of review procedures, costs and their impact on access to justice, the Remedies Directives' EU added value, problems in addressing breaches in EU public procurement law, how to improve the functioning of the remedies systems in Member States).

Whereas the length of review procedures is diverse in Member States, Member States do not identify any examples of the remedy system causing delays in the award of public contracts or only exceptionally identify such delays. Neither of Member States that replied to the

questionnaire identified systematic abuses of appeals to the detriment of the timely functioning of the system in that Member State.

The costs of review are also diverse in Member States. Member States recognise that costs are a factor to be taken into account by potential review-seekers but they also help to ensure that only well-founded cases are brought for review. In some Member States access to review is free (e.g. in Sweden, in Latvia there is no fee to submit a complaint in the first instance). In general, Member States do not consider that fees that they impose have a dissuasive effect on economic operators to file complaints. Some Member States are in the process of reforms to lower the amount of fees whereas others on the contrary, consider imposing higher fees in the future.

As far as impact on time and/or standard for review depending on whether the case is dealt with by an administrative review body or an ordinary court is concerned, some Member States report that in comparison with the usual length of procedures of ordinary courts the lengths of procedures of the administrative public procurement review bodies is substantially shorter. Another advantage is higher degree of specialisation of such bodies in the field of public procurement.

Access to justice is considered by Member States as one of the corner stones of the Constitutional State. Member States are of the opinion that in the absence of the Remedies Directives it would be possible to protect bidders' individual rights due to the right to a fair trial and the right to a tribunal according to Article 6 of the European Convention on Human Rights and their constitutional laws. The Treaty principles also require Member States to guarantee a minimal level of protection of bidders' individual rights in the context of contract award procedures. In the absence of the Remedies Directives, Member States would still need to make their national legislation compatible with judgments of the Court of Justice on public procurement remedies. Nonetheless, in the absence of the Remedies Directives the effectiveness of the protection of the bidders' individual rights would not be fully guaranteed. The added value of the Directives is that they allow bidders to submit the request for review before the conclusion of public contracts, when infringements can still be corrected. A minimum level of harmonisation at EU level, as guaranteed by the Remedies Directives, is recognised to be necessary.

The majority of Member States replying to the questionnaire perceive interim measures, standstill period, alternative penalties, ineffectiveness and damages as effective to palliate breaches of EU public procurement rules. All above mentioned measures together or the relevant combination of them provide for a comprehensive and efficient system for sanctioning of irregularities in public procurement.

In some Member States alternative penalties are either not implemented or are not awarded. Alternative penalties (fines) are also not perceived as relevant by some Member States because they constitute a simple reallocation of public funds (the punished contracting authority financed from the State budget pays a fine to the same budget). Some Member States also underline that damages are important at a last resort, but less effective.

In general, the majority of Member States consider that the Remedies Directives as modified by Directive 2007/66/EC balance the interest of economic operators in protecting their individual rights and the interest of contracting authorities/entities in limiting frivolous litigation.

Some Member States perceive the Remedies Directives as quite complex whereas others perceive them, or at least most of their provisions, as sufficiently/reasonably clear and precise. One Member State concludes that as the number of preliminary rulings before the Court of Justice of the EU shows, there will always be room for interpretation. However, that Member State does not consider a "water-tight" legislation to be necessary and doable.

At the same time no major or urgent need for amendments to the Remedies Directives is signalled by Member States. Member States do not report on problems in addressing breaches in EU public procurement law that escape the scope of application of the Remedies Directives. It is reported, however, that certain areas could be clarified by the Commission, for example, in the form of guidelines (e.g. fees, requirements for first instance administrative bodies and their work organisation). Following the adoption of the new legislative package on public procurement, more clarity would be welcome with regard to the interplay between the Remedies Directives and the new substantive rules (e.g. references to "contract notice" in the classic Remedies Directive does not reflect the fact that the new classic procurement Directive enables a prior information notice to be used, instead of a contract notice, to call for competition in certain circumstances; it could be clarified how the Remedies Directives apply to modifications of public contracts and concessions, termination of such contracts and the light regime for such contracts).

3. Conclusions

Overall, the replies to the various consultations provided a positive assesment of the functioning of the Remedies Directives.

A clear majority of respondents to the public consultation considered that the Remedies Directives have had a positive effect on the public procurement process, making it more transparent, fairer, more open and accessible and more compelling to comply with EU substantive public procurement rules.

The majority of respondents to the public consultation as well as Member States agreed that the Remedies Directives balance the interest of economic operators in protecting their individual rights and the interest of contracting authorities/entities in limiting frivolous litigation.

The consultations revealed that many provisions of the Directives are perceived as relevant across suppliers, contracting authorities and legal practitioners. Based on the replies to the public consultation, the most relevant provision appears to be the standstill period, followed by the suspension of the contract award procedure where review proceedings are initiated and the automatic debrief to tenderers. Even if certain provisions were perceived as being less pertinent they still contribute to the Remedies Directives' deterrent effect.

The consultations, however, revealed that certain aspects of the Remedies Directives are unclear. This applies to, among others, matters such as the interplay between the Remedies Directives and the new legislative package on public procurement and the development of criteria to be applied to lift the automatic suspension of the conclusion of the contract following the lodging of a legal action. In this sense, it was in particular suggested that the Commission issues guidance to provide some clarifications.

The consultations also allowed identifying problems that persist at national level in some Member States such as, for example, a high number of complaints lodged due to the lack of court fees, prohibitive court fees and cost of legal representation, too lengthy review procedures, the instances of non-enforceability of the review decisions, difficulties in ensuring consistency in the case-law of first instance review bodies, the absence of effective remedies in procedures below the EU thresholds having a cross-border interest or the application of restrictive conditions to grant interim measures. In any event, various respondents to the public consultation indicated that the problems identified are rooted either in national legislation beyond the Remedies Directives or in national practices rather than stem from the Remedies Directives.

To conclude, the consultations showed that the Remedies Directives, and in particular the amendments introduced by Directive 2007/66/EC, generally have met their objectives of increasing the guarantees of transparency and non-discrimination, allowing effective and rapid action to be taken when there is an alleged breach of the Procurement Directives and providing economic operators with the assurance that all tender applications will be treated equally. The Remedies Directives therefore present a clear EU added value.

The findings of the consultations carried out were used to support the evaluation of the performance of the Remedies Directives.

ANNEX 3 — SUMMARY OF OPEN ONLINE PUBLIC CONSULTATION

This Annex gives an overview of the answers to the different questions.

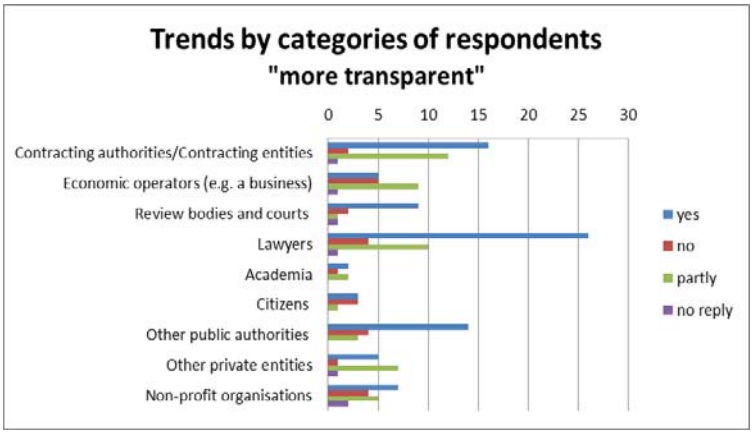
The following questions were asked:

1. Have the Remedies Directives as modified by Directive 2007/66/EC helped public procurement process to become more transparent, fairer, more open and accessible and more compelling for compliance?

A clear majority of the respondents considered that the Remedies Directives have had a positive effect on the public procurement process, making it:

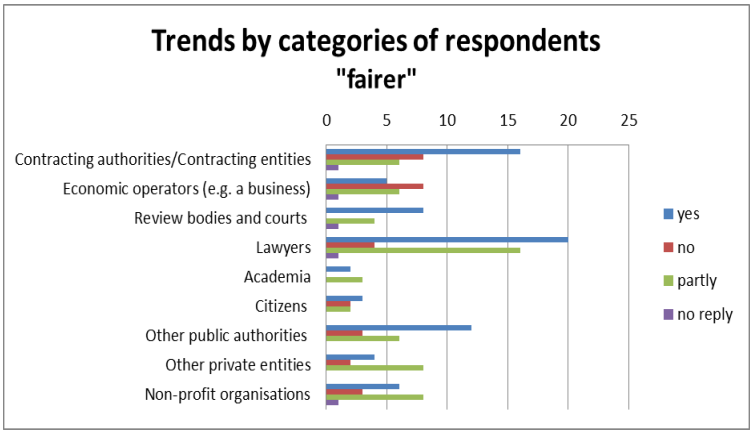
- **more transparent (80.59 %):**

		Answers	Ratio
Yes		87	51.18 %
Partly		50	29.41 %
No		26	15.29 %



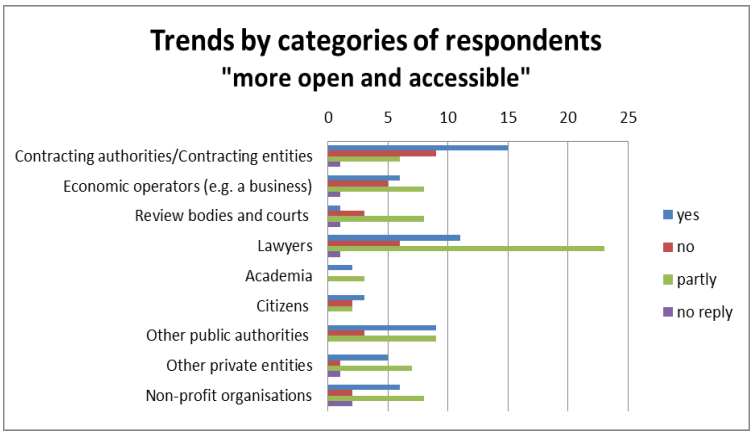
- **fairer (79.42 %):**

		Answers	Ratio
Yes		76	44.71 %
Partly		59	34.71 %
No		30	17.65 %



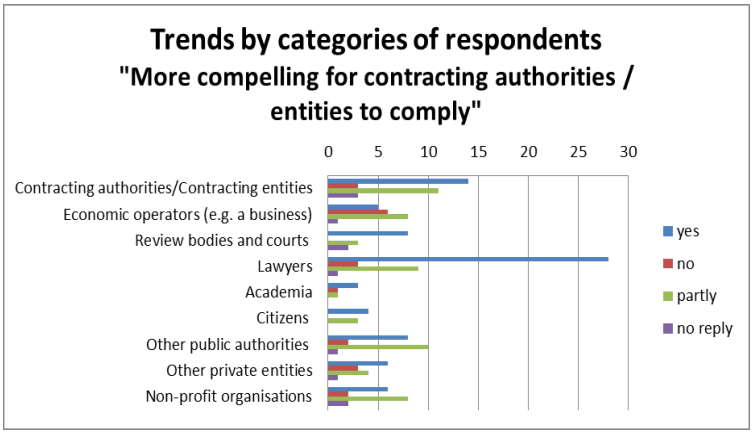
- **more open and accessible (77.65 %):**

		Answers	Ratio
Yes		58	34.12 %
Partly		74	43.53 %
No		31	18.24 %



- **and more compelling to comply with EU substantive public procurement rules (81.77 %).**

		Answers	Ratio
Yes		82	48.24 %
Partly		57	33.53 %
No		20	11.76 %



All aspects included, the average percentage of respondents who gave a positive assessment was **79.86 %**.

However, the average percentage of respondents who gave a critical assessment, at least partially, was **15.73 %.** The percentages for the four abovementioned sub-questions were, respectively, 15.29 % (transparency), 17.65 % (fairness), 18.24 % (openness and accessibility) and 11.76% (compliance with EU law).

2. In your view, what are the most relevant provisions of the Remedies Directives as modified by Directive 2007/66/EC?

Respondents were asked to grade the provisions from 1 to 5, 1 being the least relevant. The results were as follows:

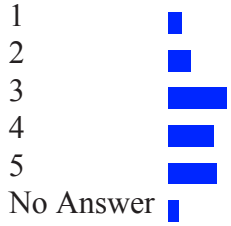
– **Automatic debrief to bidders at the time of the contract award decision notice:**

	Answers	Ratio
1	11	6.47 %
2	15	8.82 %
3	37	21.76 %
4	49	28.82 %
5	49	28.82 %
No Answer	9	5.29 %

– **Standstill period to be at least 10 days:**

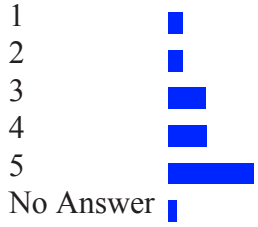
	Answers	Ratio
1	11	6.47 %
2	13	7.65 %
3	29	17.06 %
4	38	22.35 %
5	72	42.35 %
No Answer	7	4.12 %

– **Minimum time limits for applying for a review:**



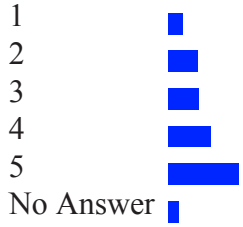
	Answers	Ratio
1	11	6.47 %
2	19	11.18 %
3	50	29.41 %
4	39	22.94 %
5	41	24.12 %
No Answer	10	5.88 %

– **Suspension of the contract award procedure where review proceedings are initiated:**



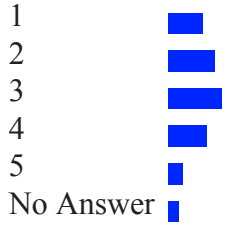
	Answers	Ratio
1	13	7.65 %
2	12	7.06%
3	32	18.82 %
4	33	19.41 %
5	73	42.94 %
No Answer	7	4.12 %

– **Ability of an independent review body to render a contract award ineffective:**



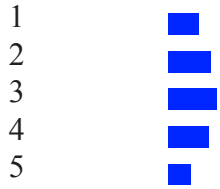
	Answers	Ratio
1	12	7.06 %
2	25	14.71 %
3	27	15.88 %
4	36	21.18 %
5	61	35.88 %
No Answer	9	5.29 %

– **Alternative penalties (fines and shortening of the contract's duration):**



	Answers	Ratio
1	30	17.65 %
2	40	23.53 %
3	45	26.47 %
4	33	19.41 %
5	13	7.65 %
No Answer	9	5.29%

– **Voluntary ex ante transparency notice:**



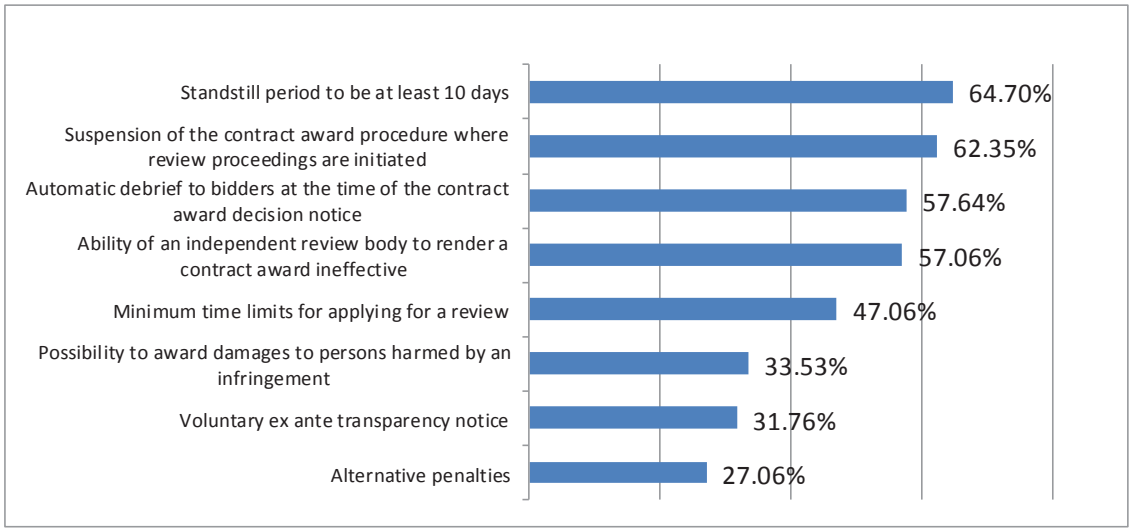
	Answers	Ratio
1	27	15.88 %
2	37	21.76 %
3	42	24.71 %
4	34	20 %
5	20	11.76 %

No Answer	10	5.88 %

– **Possibility to award damages to persons harmed by an infringement:**

	Answers	Ratio
1	26	15.29 %
2	37	21.76 %
3	40	23.53 %
4	35	20.59 %
5	22	12.94 %
No Answer	10	5.88 %

By combining the percentage of respondents that gave grades 4 and 5 to each one of the provisions, the ranking of the relevant provisions of the Remedies Directives (from the most relevant to the least relevant) would be the following:



3. How long does a review procedure usually last?

On interim measures, the replies indicated the following timelines

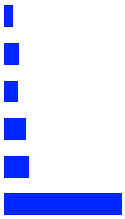
– **In first instance:**

	Answers	Ratio
Less than 1 month	72	42.35 %
Between 1 and 3 months	50	29.41 %
Between 3 and 6 months	12	7.06 %
Between 6 and 12 months	6	3.53 %
More than 1 year	1	0.59 %
No Answer	29	17.06 %

– **In second instance:**

	Answers	Ratio
Less than 1 month	20	11.76 %
Between 1 and 3 months	37	21.76 %
Between 3 and 6 months	30	17.65 %
Between 6 and 12 months	16	9.41 %
More than 1 year	13	7.65 %
No Answer	54	31.76 %

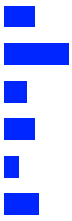
– **In third instance:**



	Answers	Ratio
Less than 1 month	8	4.71 %
Between 1 and 3 months	12	7.06 %
Between 3 and 6 months	11	6.47 %
Between 6 and 12 months	18	10.59 %
More than 1 year	21	12.35 %
No Answer	100	58.82 %

On the setting aside of decisions taken unlawfully, the replies indicated the following timelines:

– **In first instance:**



	Answers	Ratio
Less than 1 month	27	15.88 %
Between 1 and 3 months	55	32.35 %
Between 3 and 6 months	20	11.76 %
Between 6 and 12 months	26	15.29 %
More than 1 year	13	7.65 %
No Answer	29	17.06 %

– **In second instance:**

	Answers	Ratio
Less than 1 month	2	1.18 %
Between 1 and 3 months	26	15.29 %
Between 3 and 6 months	34	20 %
Between 6 and 12 months	20	11.76 %
More than 1 year	39	22.94 %
No Answer	49	28.82 %

– **In third instance:**

	Answers	Ratio
Less than 1 month	3	1.76 %

Between 1 and 3 months	9	5.29 %
Between 3 and 6 months	9	5.29 %
Between 6 and 12 months	15	8.82 %
More than 1 year	39	22.94 %
No Answer	95	55.88 %

On the review procedure for damages, the replies indicated the following timelines:

– **In first instance:**

	Answers	Ratio
Less than 1 month	10	5.88 %
Between 1 and 3 months	16	9.41 %
Between 3 and 6 months	15	8.82 %
Between 6 and 12 months	33	19.41 %
More than 1 year	39	22.94 %
No Answer	57	33.53 %

– **In second instance:**

	Answers	Ratio
Less than 1 month	3	1.76 %
Between 1 and 3 months	9	5.29 %
Between 3 and 6 months	16	9.41 %
Between 6 and 12 months	22	12.94 %
More than 1 year	59	34.71 %
No Answer	61	35.88 %

– **In third instance:**

	Answers	Ratio
Less than 1 month	2	1.18 %
Between 1 and 3 months	7	4.12 %
Between 3 and 6 months	3	1.76 %
Between 6 and 12 months	18	10.59 %
More than 1 year	49	28.82 %
No Answer	91	53.53 %

On the review procedure ineffectiveness, the replies indicated the following timelines:

– **In first instance:**

	Answers	Ratio
Less than 1 month	21	12.35 %
Between 1 and 3 months	36	21.18 %
Between 3 and 6 months	14	8.24 %
Between 6 and 12 months	26	15.29 %
More than 1 year	22	12.94 %
No Answer	51	30 %

– **In second instance:**

	Answers	Ratio
Less than 1 month	2	1.18%
Between 1 and 3 months	15	8.82 %
Between 3 and 6 months	26	15.29 %
Between 6 and 12 months	16	9.41 %
More than 1 year	49	28.82 %
No Answer	62	36.47 %

– **In third instance:**

	Answers	Ratio
Less than 1 month	1	0.59 %
Between 1 and 3 months	7	4.12 %
Between 3 and 6 months	7	4.12 %
Between 6 and 12 months	15	8.82 %
More than 1 year	39	22.94 %
No Answer	101	59.41 %

According to the abovementioned percentages, the general trend in Member States is that:

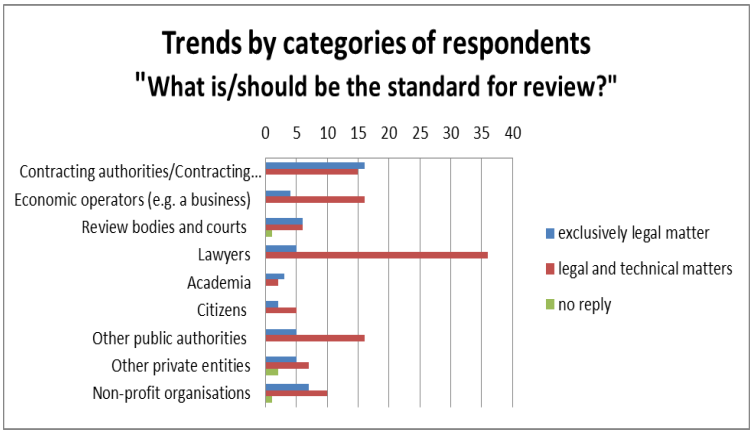
(i) review procedures concerning interim measures (which in most cases are initiated before the award of the contract) most often take up to 1 month;

(ii) review procedures for the setting aside of decisions (which are also in most cases initiated before the award of the contract) and those for ineffectiveness (which, in turn, are initiated after the award of the contract) most often take between 1 and 3 months; and

(iii) review procedures for damages (which are also initiated after the award of the contract) most often take more than a year.

4. What is/should be the standard for review in public procurement cases in your jurisdiction?

	Answers	Ratio
Exclusively legal matter	53	31.18 %
Legal and technical matters	113	66.47 %
No Answer	4	2.35 %



5. Is there any impact on time and/or standard for review depending on whether the case is dealt by a specialised review body or an ordinary court?

A large majority of stakeholders considered that there is an impact on time and/or standard for review depending on whether the case is dealt by a specialised review body or an ordinary court (**74.7 %** of participants). According to most of the replies, procedures before ordinary courts take longer. Strict time limits to deal with a case can be imposed on specialised administrative review bodies whereas they cannot be imposed on courts. Specialised administrative review bodies also focus on public procurement law and do not deal with other areas of the law. This specialisation may result in higher standards of adjudication.

	Answers	Ratio
Yes	100	58.82 %
Partly	27	15.88 %
No	24	14.12 %
No Answer	19	11.18 %

The following examples were given by respondents:

- **In Austria:** a recent revision of respective Viennese Federal State Law provides for ordinary courts in review procedures. Also, the prevailing system of specialised administrative bodies (specialists covering various areas of expertise chaired by a judge) was dropped in 2014. Since then, decision fall to regular court senates, composed of judges exclusively. As a consequence, direct clarification of preliminary technical questions is no longer feasible, but subject to comprehensive and time-consuming gathering of evidence.

- **In Belgium:** two different courts are competent for interim measures and setting aside of decisions. The tendering decisions of administrative authorities are reviewed by the Council of State. The tendering decisions of contracting authorities that are not administrative authorities are reviewed by the ordinary courts. Interim measures before the Council of State take one month, but before the ordinary courts, it can take between two and four months. After the decision of the Council of State no appeal is possible. Before the ordinary courts there are always three instances. The Council of State has judges specialised in public procurement, but the ordinary courts rarely have judges specialised in this matter.

- **In Cyprus:** the Tenders Review Authority is much quicker than judicial review by the Supreme Court (decisions are taken within three to six months whereas courts need two to three years).

- **In Ireland:** given that procurement cases are heard in the High Court, the time for review can be lengthy, often in excess of one year.

- In **Germany:** *Vergabekammern* decide much faster than German ordinary courts because of time limits imposed on them (five weeks from the submission of a complaint).

- **In Poland:** disputes are solved by a specialised administrative review body within 15 days from the submission of a complaint. Less formalised forms of communication and less formalised and faster collection and evaluation of evidence by the review body compared to ordinary courts contribute however to a faster review by the review body.

- According to **Romania**'s relevant national laws, the review body must deliver a reasoned decision within no more than 30 days from the date when the complaint was submitted. Whereas an ordinary court is only required to hand down its sentences within a 'reasonable' term (which, depending on the circumstances, may take several months).

- **In Spain:** disputes are solved by specialised administrative review bodies within 15-20 days from the submission of a complaint whereas courts would need 1 year to solve such disputes.

- **In the UK:** specialised construction adjudication bodies (the Technology and Construction Court (TCC) — a specialist court of the Queen's Bench Division of the High Court) provide for much speedier dispute resolution than ordinary courts. The TCC judges and officials have developed appreciable expertise in managing and trying public procurement cases. The typical time from issue of proceedings to trial in the TCC is between 5-12 months.

6. To what extent are the Remedies Directives as modified by Directive 2007/66/EC sufficiently clear and precise?

	Answers	Ratio
Significantly	70	41.18 %
Moderately	81	47.65 %
Not at all	7	4.12 %
No Answer	12	7.06 %

In this context, the **Federation of German Industries (BDI)** stated that '*the rules of the Remedies Directives are clear and basically well shaped. Especially, the principle of effective review laid down in Article 1 of the Directives is of fundamental importance and absolutely indispensable for public procurement and the Internal Market as a whole. Certain problems reported (...) are very often subject to insufficiencies of the relevant national transposition*'.

The **Law Society of England and Wales** reported that '*the provisions are generally sufficiently clear and precise. However, the framework of the Directives itself would benefit from consolidation and tidying-up, for example there are quite a few cross-references between articles. More certainty on how ineffectiveness might operate would be welcome, although this may be best addressed by Member States through the publication of guidance*'.

The **Procurement Lawyers' Association** of the opinion that '*on the whole the current Directives are reasonably clear. There are a small number of areas where more precise wording would assist in their interpretation*".

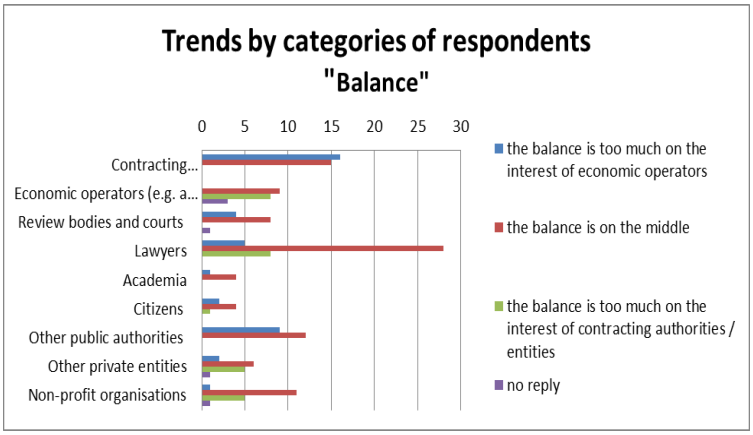
The **Italian Council of Engineers** claimed that '*despite the significantly positive impact of the remedies provided by Directive 2007/66/EC, in some of its parts the Directive appears too generic an broad, leaving the State to choose whether to adapt at their discretion many aspects of the remedies concerned to their internal system of laws or to execute such remedies 'as they are''*.

Some respondents also submitted that the structure of the Remedies Directives is not clear as to which articles correspond to pre-contractual and which to post-contractual remedies.

Some respondents also underlined that more clarity would be welcome in a number of areas related to institutional aspects (for example, professional standards for members of a specialised review body), procedural aspects (criteria for lifting the automatic suspension, for granting interim measures and to award damages) and the interplay between the Remedies Directives and the new Public Procurement Directives (how the Remedies Directives apply to the modification and termination of public contracts and concessions and the so-called 'light regime').

7. To what extent do the Remedies Directives as modified by Directive 2007/66/EC balance the interest of economic operators in ensuring the effectiveness of public procurement law and the interest of contracting authorities / entities in limiting frivolous litigation?

	Answers	Ratio
The balance is too much on the interest of economic operators	40	23.53 %
The balance is on the middle	97	57.06 %
The balance is too much on the interest of contracting authorities / entities	27	15.88 %
No Answer	6	3.53 %



The following reasons were given by those who consider the balance to be equal:

- While certain provisions are in the interest of economic operators (e.g. standstill period, automatic suspension, ineffectiveness) other provisions level the balance (e.g. review periods, VEAT notices and alternative penalties).

- Frivolous litigation might occur but it is not a substantial problem in markets where an economic operator is typically interested in cooperation with the contracting authority.
- The protection of public interest is taken into account in issuing interim measures.
- The consequence of issuing a claim (e. g. cost or cross undertaking in damages) tend to ensure that both parties act quickly and only in appropriate circumstances.

On the other hand, the following reasons were given by those who consider the balance to favour the interest of contracting authorities/entities:

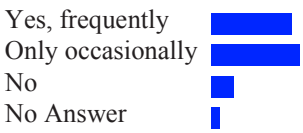
- In some cases it is too expensive to file a complaint.
- In practice, a lower standard of proof is required from contracting authorities/entities.
- In disputes related to a description of the subject-matter of a contract the lack of clarity is at the risk of an economic operator.

Finally, the following reasons were given by those who consider the balance to favour the interest of economic operators:

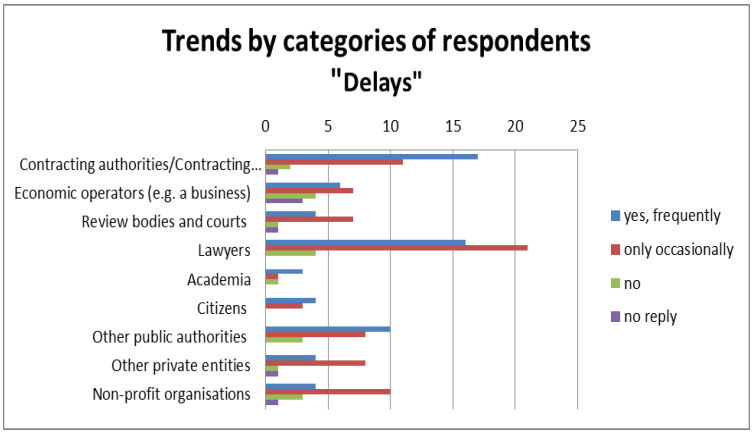
- Because of the suspension of the contract award procedure where review proceedings are initiated, many public projects are postponed.
- The Remedies Directives does not contain any provision preventing and sanctioning abuses of the remedy system by bidders.
- In some instances contractors challenge decisions to award a contract to a new contractor on insignificant grounds in an attempt to overturn or delay the contract award so that they remain under contract.

8. To your knowledge, has the remedy system in your Member State caused delays in the award of public contracts? What was in your view the main reason for the delay (other than the use of the remedy itself)?

Concerning the existence of delays in the award of public contracts due to remedies, respondents consider:



	Answers	Ratio
Yes, frequently	68	40%
Only occasionally	76	44.71 %
No	19	11.18 %
No Answer	7	4.12 %



Concerning the reasons for those delays, the following reasons were put forward:

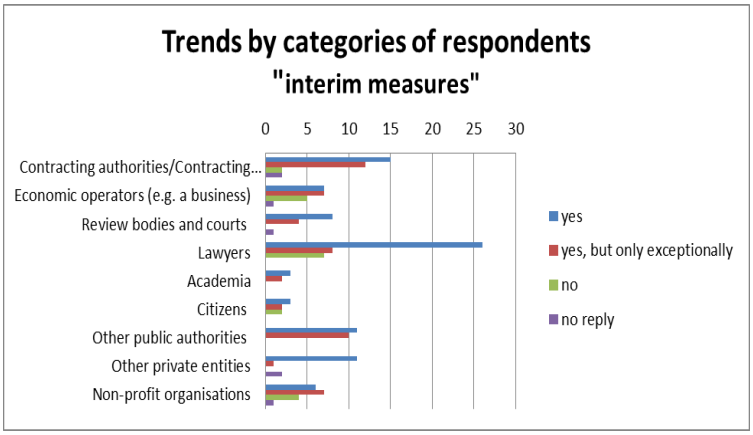
	Answers	Ratio
National procedural rules not laid down in the Remedies Directives	11	6.47 %
Conduct of parties	60	35.29 %
Ineffectiveness of the national judicial system	29	17.06 %
Other (please specify)	32	18.82 %
No Answer	38	22.35 %

Among 'other reasons' the following were given:

- lack of sufficient staff in review bodies.
- delays in contracting authorities submitting a file to a review body,
- the national procedural rules and/or the way that the courts list cases for trial,
- contracting authorities do not anticipate review procedures when they set deadlines for their tender procedures.

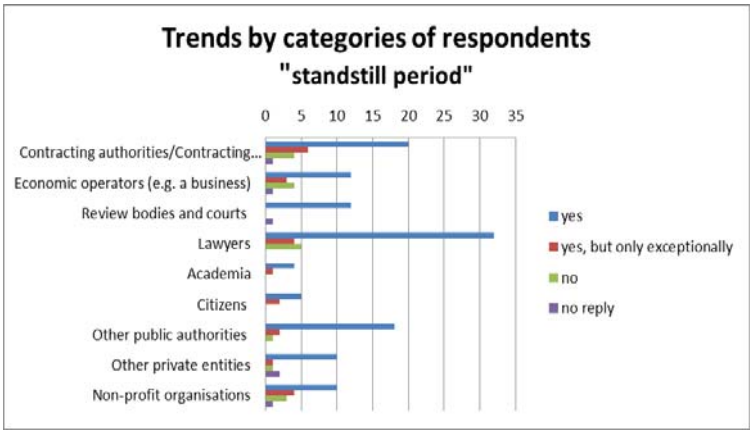
9. Should interim measures be considered an effective remedy?

	Answers	Ratio
Yes	90	52.94 %
Yes, but only exceptionally	53	31.18 %
No	20	11.76 %
No Answer	7	4.12 %



10. Should a standstill period be considered an effective remedy?

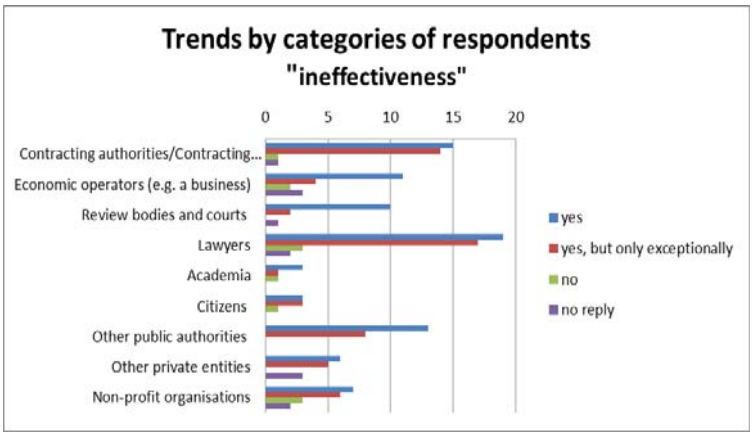
	Answers	Ratio
Yes	123	72.35 %
Yes, but only exceptionally	23	13.53 %
No	18	10.59 %
No Answer	6	3.53 %



Overall, the standstill period was the remedy that most respondents unconditionally considered to be the most effective one.

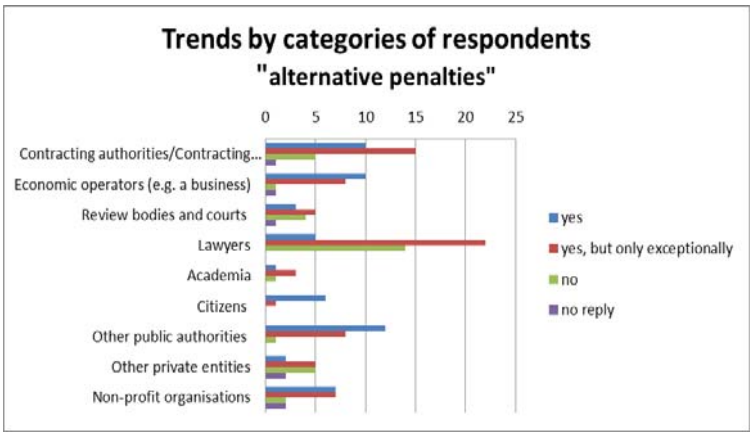
11. Should ineffectiveness be considered an effective remedy, in particular helping to tackle direct awards?

	Answers	Ratio
Yes	87	51.18 %
Yes, but only exceptionally	60	35.29 %
No	11	6.47 %
No Answer	12	7.06 %



12. Should alternative penalties be considered an effective remedy?

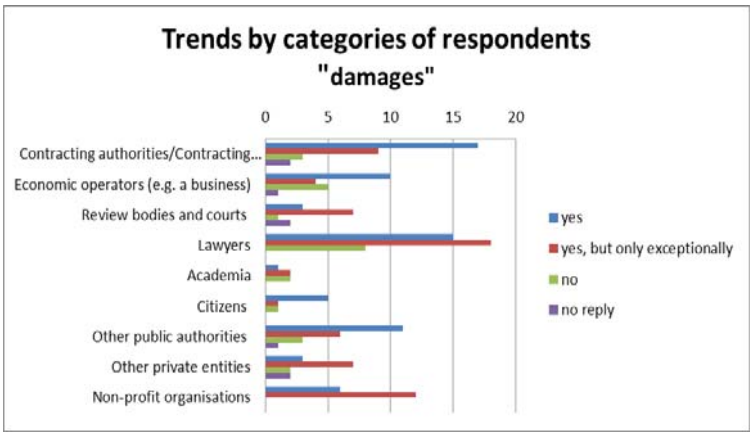
	Answers	Ratio
Yes	56	32.94 %
Yes, but only exceptionally	74	43.53 %
No	33	19.41 %
No Answer	7	4.12 %



Overall, alternative penalties were considered by respondents to be the least effective remedy.

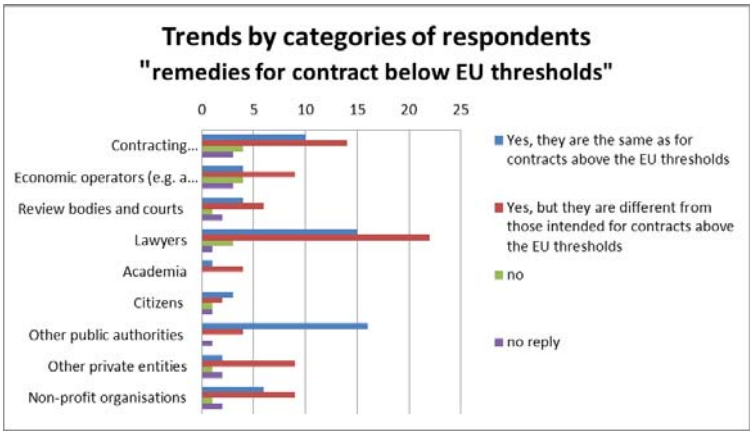
13. Should damages be considered an effective remedy?

	Answers	Ratio
Yes	71	41.76 %
Yes, but only exceptionally	66	38.82 %
No	25	14.71 %
No Answer	8	4.71 %



14. Do remedies exist for contracts below the EU thresholds in your jurisdiction?

	Answers	Ratio
Yes, they are the same as for contracts above the EU thresholds	61	35.88 %
Yes, but they are different from those intended for contracts above the EU thresholds (please specify the differences)	79	46.47 %
No	15	8.82 %
No Answer	15	8.82 %



In most Member States remedies for contracts below the EU thresholds are different than those above the thresholds. The lack of effective remedies in procedures below the EU thresholds having a cross-border interest was mentioned as one of persisting problems in addressing breaches of public procurement law.

The respondents made the following remarks on remedies for contracts below the EU thresholds:

Austria: for contracts below the thresholds, there are shorter periods and lower court fees.

Belgium: there is no obligatory standstill period for contracts below the thresholds.

Ireland: while there is no specific regime for below threshold procurement remedies, general administrative law on remedies are available (e. g. certiorari, mandamus, declarations, etc.).

Finland: ineffectiveness, alternative penalties and standstill regulation (automatic suspension and standstill period) apply only above the EU thresholds.

France: for contracts below the thresholds, irrespectively of the nature of the contract and the existence of cross-border interest, there is no obligation to give an automatic debrief to bidders at the time of the contract award decision notice and there is no standstill period.

Germany: for contracts below the thresholds, irrespectively of the nature of the contract and the existence of cross-border interest, there is no standstill period, no automatic suspension, no mandatory information to those who will not be awarded the contract. In Germany it is significantly more difficult to be successful in a remedies procedure below the thresholds as compared to above the thresholds.

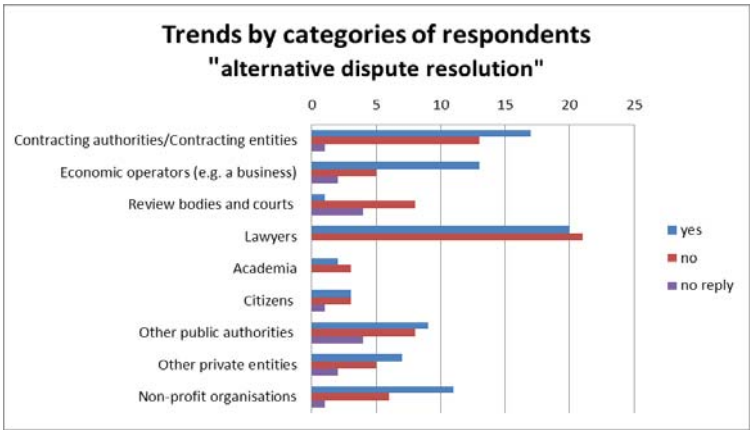
Poland: there are limited numbers of actions against which economic operators can complain for public contracts below the thresholds (e.g. choice of negotiated procedure without publication, exclusion of the appellant from the contract award procedures).

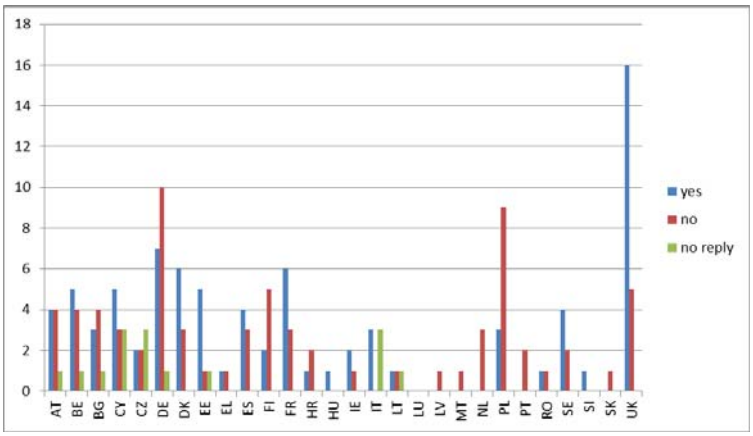
Romania: there is a shorter standstill period and time limit for filling complaints related to public contracts below the thresholds.

UK: there is no specific regime for below threshold procurements in England and Wales; therefore there is a lack of standstill period and of automatic suspension. In those cases award decisions can be challenged by way of judicial review in the same way as any other decisions under public law. Claims for below thresholds procurements are rare (cost of litigation is disproportionate for low value procurements and it is difficult to demonstrate breaches of law, because the claimant must first prove that there is a certain cross-border interest).

15. Would alternative dispute resolution (ADR)/mediation prove operational in the context of public procurement disputes?

	Answers	Ratio
Yes	83	48.82 %
No	72	42.35 %
No Answer	15	8.82 %





The **General Council of the Bar of England & Wales** submits that '*mediation works well where settlements are confined to awards of damages. The situation is more complex where other remedies are in play, not least because the remedies are likely to affect others such as the winning bidder and the users of any service and these parties are often not involved in the process. There may be legitimate public policy concerns as to whether mediation should ever be deployed in such cases involving public policy issues that ought not to be resolved in confidential mediation*'.

The **Law Society of England and Wales** adds that '*arbitration or mediation can be as expensive as courts proceedings. These dispute settlement methods are also private and confidential which is inappropriate for procurement complaints*'.

The **Austrian Economic Chamber** considers that mandatory ADR would be useful as it '*allows the candidates and bidders to present their points of view in a less formalistic environment and to find out, if their request is substantiated or not without starting a formal procurement review procedure in court*'. According to **CMS Hungary and Foot Anstey LLP**, considering reputational risks for bidders related with complaints, a less formal procedure would help to preserve commercial relationship and enable the parties to work together again in the future.

16. Do court fees apply to public procurement cases in your jurisdiction?

	Answers	Ratio
Yes	138	81.18 %
No	23	13.53 %
No Answer	9	5.29 %

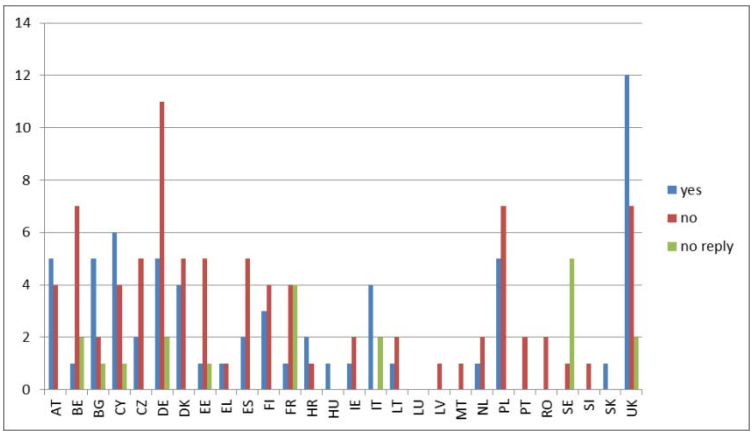
According to the respondents, there are no court frees in Bulgaria, Croatia, Cyprus, Estonia, France, Germany, Lithuania, Spain and Sweden.

17. Do administrative fees apply to public procurement cases in your jurisdiction?

	Answers	Ratio
Yes	80	47.06 %
No	78	45.88 %
No Answer	12	7.06 %

18. If the answer to question 16 or 17 is affirmative, would you define the level of fees as dissuasive for users of the review and justice system?

		Answers	Ratio
Yes (if possible, please specify)		64	37.65 %
No		86	50.59 %
No Answer		20	11.76 %



Respondents from the UK considered that the fee of up to £10 000 (roughly EUR 13 000 in 2016) for commencement of proceedings is clearly dissuasive.

19. Are there any other costs (such as the cost of legal advice and representation) that may have an impact on access to justice in your jurisdiction?

	Answers	Ratio
Yes (if possible, please specify)	117	68.82 %
No	42	24.71 %
No Answer	11	6.47 %

A large majority of participants consider costs of legal advice and representation as having an impact on access to justice. According to some respondents, even if not mandatory, legal advice seems to be sought in most cases due to the complexity of public procurement law.

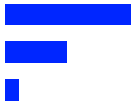
According to some respondents, in some Member States legal representation is mandatory in second instance. According to some respondents, in few Member States (Cyprus, Austria) economic operators are not reimbursed for costs when winning the case.

Some respondents stated that in Poland, the cost of legal advice and representation is high because there are only few lawyers who specialise in public procurement. On the other hand, it is claimed that in Latvia legal market is competitive and fees for advice are not exorbitant and are not an obstacle to accessing justice.

According to **Public Procurement Lawyers' Association**, legal costs and disbursement of a procurement case that usually goes to trial are usually '*over six figures*'. Furthermore, it is uncommon for lawyers specialising in public procurement to act on a conditional fee basis (i.e. where the payment of the lawyer's costs depends on achieving a settlement or success at trial) where it is likely to be difficult to assess the merits of the claim at the outset of the matter.

According to the **Italian National Anticorruption Authority**, for contracts below a certain value it is not worthwhile to file a complaint because for low value contracts lawyers' fees are too expensive. Participants also underlined that for voluntary organisations and SMEs the costs of litigation is a significant factor explaining why many SMEs decide not to bring proceedings.

20. Do you think that there are still problems in addressing breaches in EU public procurement law?



	Answers	Ratio
Yes (please briefly describe such problems)	107	62.94 %
No	52	30.59 %
No Answer	11	6.47 %

The respondents perceived the Remedies Directives as relevant to address infringements of EU public procurement law to the extent that, in general, those who still see problems in addressing breaches in EU public procurement law, gave at the same time examples of how the situation could be improved.

Some respondents highlighted a number of problems related to institutional and procedural aspects:

- the absence of guarantees at EU level for independence of specialised administrative review bodies;
- the absence of explicit provisions in the Remedies Directives on how to protect business secrets in the review procedure;

- excessive court fees and costs of legal advice;
- non-enforceability of judgments in some Member States; and
- the absence of effective remedies in procedures below the EU thresholds having a cross-border interest and the shortness of the time limits for pre-contractual and post-contractual remedies.

Respondents also pointed out problems not related to the Remedies Directives as such:

- the fear of being blacklisted;
- the general lack of knowledge of public procurement rules on the part of contracting authorities; and
- the general lack of awareness of the law by contractors who are often unaware of the tight timescales for challenges and fail to seek timely legal advice.

Contributions received also allowed to identify problems that persist at national level. In fact, stakeholders often repeated that problems in addressing breaches in EU public procurement law persist at national level rather than stem from EU guarantees from the Remedies Directives. One example of this would be (i) Member States where time-limit for seeking review is significantly longer than the one laid down in the Remedies Directives which in some cases may create undue delays to the detriment of contracting authorities and successful tenderers. Other examples included in particular: (ii) a high number of complaints lodged due to the lack of court fees, (iii) prohibitive court fees and cost of legal representation, (iv) too lengthy review procedures that result from an insufficient allocation of human resources by Member States to allow the proper functioning of the review system, (v) the instances of non-enforceability of the review decisions, (vi) difficulties in ensuring consistency in the case-law of first instance review bodies, (vii) the absence of effective remedies in procedures below the EU thresholds having a cross-border interest and (viii) the application of restrictive conditions to grant interim measures.

Respondents mentioned the following problems rooted in national law:

Bulgaria: Damages are reviewed by courts in Bulgaria. It is reported that the shortcomings of the national judicial system limits the efficiency of this remedy.

Denmark: Interim measures are hardly ever used.

Ireland: The lack of clarity on the lifting of automatic suspension by courts is perceived as a problem.

Italy: The 35-day standstill period stipulated in national legislation transposing the Remedies Directives sometimes causes significant delays in procurement procedures.

Finland: The length of review proceedings is perceived as disproportionate (e.g. a year in first instance before the Market Court and two years in second instance). A control of public procurement by a competent supervising authority would be useful and could ease the workload of the Market Court.

Latvia: The lack of predictability and inconsistent jurisprudence from the first instance review body is perceived as a problem.

Netherlands: It is reported that in 90 % of cases courts rule in favour of the contracting authority. Decisions in favour of competitors are based on indisputable grounds.

Poland: In Poland review by the National Chamber of Appeal is rapid. However, due to the fact that the National Chamber of Appeal should examine the appeal within 15 days from the date of its submission, it rarely calls experts. The lack of consistent jurisprudence from the National Chamber of Appeal is also perceived as a weakness in the system. Common courts, due to the lack of specialised chambers and time constraints, are in a difficult position to thoroughly investigate public procurement matters in second instance. Consequently, a small number of complaints are lodged against judgments of the National Chamber of Appeal.

Romania: A very high number of complaints are lodged. The main problem is to distinguish between justified and frivolous complaints.

Sweden: There are no court fees in Sweden. This results in frequent litigation, which does not however cause any major blockage in the review system.

UK: Repeated case-law in the UK suggests that courts are reluctant to continue automatic suspension even where there is a *prima facie* case for breach of EU procurement law. Moreover, decisions tend to favour the contracting authorities. In general terms, there is a prevailing view that damages are an adequate and effective remedy, which undermines the effectiveness of the review procedures. The lack of a administrative review body is also perceived as a problem in the UK. The costs of legal representation are prohibitive, in particular for smaller economic operators. The court fee typically payable on the issue of a procurement claim is £10 000 (roughly EUR 13 000 in 2016), which is the highest on the fee scale. Other court fees are payable as the claim progresses, including in most cases a hearing fee of £1 090 and £155 (roughly EUR 1400 and EUR 200 respectively in 2016) in respect of any interim applications that are made before trial. No declaration of contract being ineffective has been made in the UK so far.[77]

[77] According to the most recent publicly available information, after the end of a public consultation one contract was declared ineffective in the UK.

ANNEX 4 — QUESTIONNAIRE CIRCULATED TO MEMBER STATES ON 15/10/2015 (DEADLINE TO REPLY: 23/11/2015)

The length of review procedures:

- What is the average length of review procedures in your Member States, including first and second instance review?

- Are there any provisions at national level that govern the length of review procedures?

- Are there any examples of the remedy system causing delays in the award of public contracts?

- Have you identified systematic abuses of appeals to the detriment of the timely functioning of the system in your country?

Costs and their impact on access to justice:

- Do you consider costs of review (including lawyers' fees) in your Member States as properly ensuring access to justice or rather dissuasive?

Institutional aspect:

- Is there any impact on time and/or standard for review depending on whether the case is dealt with by a specialised review body or an ordinary court?

The standard of review:

- What is the standard of review in your Member States, including first and second instance review? Are both legal and technical matters adjudicated?

Factual information:

- What is the number of cases dealt in first instance from 2012 to 2014?

- What is the number of appeals to the decisions and their success rate?

The Remedies Directives' EU added value / Way forward:

- In the absence of the Remedies Directives, would it be possible to protect bidders' individual rights?

- Are there still problems in addressing breaches in EU public procurement law that escape the scope of application of the Remedies Directives? Please give examples.

- What could be done to improve the functioning of the remedies system in your country? Would it be necessary to amend the text of the Remedies Directives or to adopt non-legislative measures for a greater effectiveness in the system?

Overall effectiveness of the Remedies Directives:

- To what extent do the Remedies Directives as modified by Directive 2007/66/EC balance the interest of economic operators in protecting their individual rights and the interest of contracting authorities / entities in limiting frivolous litigation?

- To what extent are the Remedies Directives as modified by Directive 2007/66/EC sufficiently clear and precise?

- Interim measures, standstill period, alternative penalties, ineffectiveness and damages — are they effective to palliate breaches of EU public procurement rules?

ANNEX 5 — NATIONAL MEASURES TRANSPOSING DIRECTIVE 2007/66/EC

National measures transposing Directive 2007/66/EC were notified by the Member States and since then, some measures have been amended or even replaced. Some Member States notified the national transposition measures after the deadline, which expired on 20 December 2009. For details, see the table below.

Member state	*Title communication*	Notification
Belgium	*SERVICE PUBLIC FEDERAL CHANCELLERIE DU PREMIER MINISTRE — 10 FEVRIER 2010. — Arrêté royal modifiant certains arrêtés royaux exécutant la loi du 24 décembre 1993 relative aux marchés publics et à certains marchés de travaux, de fournitures et de services.*	16/02/2010
	Loi du 23 décembre 2009 introduisant un nouveau livre relatif à la motivation, à l'information et aux voies de recours dans la loi du 24 décembre 1993 relative aux marchés publics et à certains marchés de travaux, de fournitures et de services	30/12/2009
Bulgaria	*Закон за изменение и допълнение на Закона за обществените поръчки (обн., ДВ, бр. 28 от 2004 г.; изм., бр. 53 от 2004 г., бр. 31, 34 и 105 от 2005 г., бр. 18, 33, 37 и 79 от 2006 г., бр. 59 от 2007 г., бр. 94, 98 и 102 от 2008 г. и бр. 24 и 82 от 2009 г.)*	09/07/2010
Czech Republic	*Zákonné opatření Senátu č. 341/2013 Sb., kterým se mění zákon č. 137/2006 Sb., o veřejných zakázkách, ve znění pozdějších předpisů, a zákon č. 55/2012 Sb., kterým se mění zákon č. 137/2006 Sb., o veřejných zakázkách, ve znění pozdějších předpisů*	11/11/2014
	Zákon č. 303/2013 Sb., kterým se mění některé zákony v souvislosti s přijetím rekodifikace soukromého práva	11/11/2014
	Zákon č. 167/2012 Sb., kterým se mění zákon č. 499/2004 Sb., o archivnictví a spisové službě a o změně některých zákonů, ve znění pozdějších předpisů, zákon č. 227/2000	11/11/2014

	Sb., o elektronickém podpisu a o změně některých dalších zákonů (zákon o elektronickém podpisu), ve znění pozdějších předpisů, a další související zákony	
	Zákon č. 89/2012 Sb., občanský zákoník	11/11/2014
	Zákon č. 55/2012 Sb., kterým se mění zákon č. 137/2006 Sb., o veřejných zakázkách, ve znění pozdějších předpisů	11/11/2014
	Zákon č. 258/2011 Sb., kterým se mění zákon č. 137/2006 Sb., o veřejných zakázkách, ve znění pozdějších předpisů	11/11/2014
	Zákon č. 179/2010 Sb., kterým se mění zákon č. 137/2006 Sb., o veřejných zakázkách, ve znění pozdějších předpisů, a některé další zákony	11/11/2014
	Zákon č. 281/2009 Sb., kterým se mění některé zákony v souvislosti s přijetím daňového řádu	11/11/2014
	Zákon č. 417/2009 Sb., kterým se mění zákon č. 137/2006 Sb., o veřejných zakázkách, ve znění pozdějších předpisů, a některé další zákony	08/02/2010
	Zákon č. 110/2009 Sb., kterým se mění zákon č. 130/2002 Sb., o podpoře výzkumu a vývoje z veřejných prostředků a o změně některých souvisejících zákonů (zákon o podpoře výzkumu a vývoje), ve znění pozdějších předpisů, a další související zákony	08/02/2010
	Zákon č. 6/2002 Sb., o soudech, soudcích, přísedících a státní správě soudů a o změně některých dalších zákonů (zákon o soudech a soudcích)	08/02/2010
	Zákon č. 273/1996 Sb., o působnosti Úřadu pro ochranu hospodářské soutěže	08/02/2010
	Zákon č. 509/1991 Sb., kterým se mění, doplňuje a upravuje občanský zákoník	08/02/2010

	Zákon č. 40/1964 Sb., občanský zákoník	08/02/2010
	Concordance table 32007L00 66_081014	14/10/2008
	Zákon č. 76/2008 Sb., kterým se mění zákon č. 137/2006 Sb., o veřejných zakázkách, ve znění zákona č. 110/2007 Sb.	14/10/2008
	Zákon č. 30/2008 Sb., kterým se mění zákon č. 139/2006 Sb., o koncesních smlouvách a koncesním řízení (koncesní zákon)	14/10/2008
	Zákon č. 344/2007 Sb., kterým se mění zákon č. 513/1991 Sb., obchodní zákoník, ve znění pozdějších předpisů, a zákon č. 200/1990 Sb., o přestupcích, ve znění pozdějších předpisů	14/10/2008
	Zákon č. 139/2006 Sb., o koncesních smlouvách a koncesním řízení (koncesní zákon)	14/10/2008
	Zákon č. 137/2006 Sb., o veřejných zakázkách	14/10/2008
	Zákon č. 500/2004 Sb., správní řád	14/10/2008
	Zákon č. 150/2002 Sb., soudní řád správní	14/10/2008
	Zákon č. 30/2000 Sb., kterým se mění zákon č. 99/1963 Sb., občanský soudní řád, ve znění pozdějších předpisů, a některé další zákony	14/10/2008
	Zákon č. 519/1991 Sb., kterým se mění a doplňuje občanský soudní řád a notářský řád	14/10/2008
	Zákon č. 513/1991 Sb., obchodní zákoník	14/10/2008
	Zákon č. 133/1982 Sb., kterým se mění a doplňuje občanský soudní řád	14/10/2008

	Zákon č. 99/1963 Sb., občanský soudní řád	14/10/2008
Denmark	*Lov om håndhævelse af udbudsreglerne mv.*	18/05/2010
Germany	*Gesetz zur Modernisierung des Vergaberechts*	13/01/2010
Estonia	*RIIGIHANGETE SEADUS 1*	17/05/2010
Ireland	*European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010*	06/04/2010
	European Communities (Public Authorities Contracts) (Review Procedures)Regulations 2010	06/04/2010
Greece	*Δικαστική προστασία κατά τη σύναψη δημόσιων συμβάσεων − Εναρμόνιση της ελληνικής νομοθεσίας με την Οδηγία 89/665/ΕΟΚ του Συμβουλίου της 21ης Ιουνίου 1989 (L 395) και την Οδηγία 92/13/ΕΟΚ του Συμβουλίου της 25ης Φεβρουαρίου 1992 (L 76), όπως τροποποιήθηκαν με την Οδηγία 2007/66/ΕΚ του Ευρωπαϊκού Κοινοβουλίου και του Συμβουλίου της 11ης Δεκεμβρίου 2007 (L 335).*	01/10/2010
Spain	*Ley Foral 3/2013, de 25 de febrero, de modificación de la Ley Foral 6/2006, de 9 de junio, de Contratos Públicos*	04/03/2013
	Ley 34/2010, de 5 de agosto, de modificación de las Leyes 30/2007, de 30 de octubre, de Contratos del Sector Público, 31/2007, de 30 de octubre, sobre procedimientos de contratación en los sectores del agua, la energía, los transportes y los servicios postales, y 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-Administrativa para adaptación a la normativa comunitaria de las dos primeras	06/09/2010
France	*Décret No 2009-1456 du 27 novembre 2009 relatif aux procédures de recours applicables aux contrats de la commande publique*	04/12/2009

	Ordonnance No 2009-515 du 7 mai 2009 relative aux procédures de recours applicables aux contrats de la commande publique	05/06/2009
	LOI No 2008-735 du 28 juillet 2008 relative aux contrats de partenariat (1)	02/09/2008
Croatia	*Zakon o izmjenama i dopunama Zakona o javnoj nabavi*	05/07/2013
	Zakon o koncesijama	19/06/2013
	Zakon o Državnoj komisiji za kontrolu postupaka javne nabave	19/06/2013
	Zakon o javnoj nabavi	19/06/2013
Italy	*Attuazione della direttiva 2007/66/CE che modifica le direttive 89/665/CEE e 92/13/CEE per quanto riguarda il miglioramento dell'efficacia delle procedure di ricorso in materia d'aggiudicazione degli appalti pubblici.*	14/04/2010
Cyprus	*Ο περί των Διαδικασιών Προσφυγής στον Τομέα της Σύναψης των Δημοσίων Συμβάσεων Νόμος του 2010.*	22/11/2010
Latvia	*Ministru kabineta 2010.gada 28.septembra noteikumi Nr.904 'Noteikumi par koncesijas procedūras paziņojumu saturu, to iesniegšanas kārtību un paziņojumu veidlapu paraugiem'*	14/10/2010
	Ministru kabineta 2010.gada 28.septembra noteikumi Nr. 904 'Noteikumi par koncesijas procedūras paziņojumu saturu, to iesniegšanas kārtību un paziņojumu veidlapu paraugiem'	04/10/2010
	Grozījumi Publiskās un privātās partnerības likumā	03/09/2010
	Sabiedrisko pakalpojumu sniedzēju iepirkumu likums	03/09/2010

	Ministru kabineta 2010.gada 27.jūlija noteikumi Nr.698 'Noteikumi par publisko iepirkumu paziņojumu saturu un sagatavošanas kārtību'	10/08/2010
	Publisko iepirkumu likums	18/06/2010
Lithuania	*Lietuvos Respublikos viešųjų pirkimų įstatymo 2, 4, 7, 8, 10, 11, 16, 18, 19, 22, 23, 24, 27, 28, 30, 31, 33, 38, 39, 40, 43, 45, 49, 57, 62, 74, 85, 86, 89, 92 straipsnių pakeitimo ir papildymo, įstatymo papildymo 151 straipsnių įstatymas Nr. XI-395*	31/08/2011
	Lietuvos Respublikos civilinio proceso kodekso pakeitimo ir papildymo įstatymas Nr. XI-1480	31/08/2011
	Lietuvos Respublikos viešųjų pirkimų įstatymo 93, 94, 95, 951 ir 952 straipsnių pakeitimo ir papildymo įstatymas Nr. XI-1487	31/08/2011
	Lietuvos Respublikos viešųjų pirkimų įstatymo 2, 4, 6, 8, 9, 10, 18, 19, 20, 21, 22, 23, 24, 25, 27, 33, 37, 38, 40, 41, 56, 57, 71, 73, 81, 82, 83, 85, 86, 91, 92, 94, 95(1), 97 straipsnių, V skyriaus pavadinimo, 1, 2, 4 priedėlių ir priedo pakeitimo ir papildymo įstatymas Nr. XI-1255	28/02/2011
	Lietuvos Respublikos koncesijų įstatymo, Vietos savivaldos įstatymo pakeitimo ir papildymo įstatymas Nr. X-749	10/03/2010
	Lietuvos Respublikos civilinio proceso kodekso patvirtinimo, įsigaliojimo ir įgyvendinimo įstatymas Nr. IX-743	10/03/2010
	Lietuvos Respublikos viešųjų pirkimų įstatymo 2, 6, 7, 8, 10, 13, 15, 18, 22, 23, 24, 31, 32, 39, 41, 54, 58, 78, 85, 89, 90, 91, 92, 93, 94, 95, 96, 97 straipsnių, V skyriaus pavadinimo ir priedo pakeitimo ir papildymo, Įstatymo papildymo 21(1), 94(1), 95(1), 95(2) straipsniais ir 98, 99, 100 straipsnių pripažinimo netekusiais galios įstatymas	10/03/2010

	Nr. XI-678	
	Lietuvos Respublikos viešųjų pirkimų įstatymo 2, 6, 7, 8, 9, 10, 11, 12, 16, 17, 18, 19, 22, 23, 24, 27, 28, 30, 31, 33, 38, 39, 41, 51, 57, 58, 70, 72, 75, 79, 81, 93, 95, 98, 100 straipsnių, IV skyriaus, 1 ir 2 priedėlių ir priedo pakeitimo ir papildymo įstatymas Nr. X-1673	10/03/2010
	Lietuvos Respublikos civilinio kodekso pavirtinimo, įsigaliojimo ir įgyvendinimo įstatymas Nr. VIII-1864	10/03/2010
	Lietuvos Respublikos viešųjų pirkimų įstatymo pakeitimo įstatymas Nr. X-471	10/03/2010
Luxemburg	*Règlement grand-ducal du 22 janvier 2011 portant exécution de l'Article 19 de la loi du 10 novembre 2010 instituant les recours en matière de marchés publics.*	02/02/2011
	Loi du 10 novembre 2010 instituant les recours en matière de marchés publics.	12/11/2010
Hungary	*Az igazságügyi és rendészeti miniszter 5/2009. (III. 31.) IRM rendelete a közbeszerzési és tervpályázati hirdetmények, a bírálati összegezések és az éves statisztikai összegezések mintáiról*	21/01/2010
	2008. évi CVIII. törvény a közbeszerzésekről szóló 2003. évi CXXIX. tör vény módosításáról	21/01/2010
	2003. évi CXXIX. törvény a közbeszerzésekről	21/01/2010
Malta	*Public Procurement (Amendment) Regulations, 2013*	20/02/2013
	Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations, 2005	29/10/2012

	SUBSIDIARY LEGISLATION 174.04 PUBLIC PROCUREMENT REGULATIONS LEGAL NOTICE 296 of 2010, as amended by Legal Notices 47, 104, 255 and 312 of 2012.	08/10/2012
	FINANCIAL ADMINISTRATION AND AUDIT ACT(CAP. 174)Public Procurement (Amendment No 4) Regulations, 2012	02/10/2012
	L.N. 107 of 2011 *FINANCIAL ADMINISTRATION AND AUDIT ACT (CAP. 147)* *Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors (Amendment)* *Regulations, 2011*	02/04/2011
	L.N. 296 of 2010 Public Procurement Regulations 2010 ARRANGEMENT OF REGULATIONS	24/05/2010
	L.N. 281 of 2010 FINANCIAL ADMINISTRATION AND AUDIT ACT (CAP. 174) Public Procurement Regulations, 2010	10/05/2010
Netherlands	*Wet van 28 januari 2010 tot implementatie van de rechtsbeschermingsrichtlijnen aanbesteden (Wet implementatie rechtsbeschermingsrichtlijnen aanbesteden)*	16/02/2010
Austria	*Gesetz vom 13. Dezember 2013, mit dem ein Gesetz über den Rechtsschutz bei der Vergabe von Aufträgen (Kärntner Vergaberechtsschutzgesetz 2014 — K-VergRG 2014) erlassen wird*	10/01/2014
	Wiener Vergaberchtsschutzgesetz 2014	07/11/2013
	Landesgesetz, mit dem das Oö. Vergaberechtsschutzgesetz 2006 geändert wird (Oö. Vergaberechtsschutzgesetz-Novelle 2010)	02/11/2010

	NÖ Vergabe-Nachprüfungsgesetz	10/09/2010
	Änderung des Kärntner Vergaberechtsschutzgesetz	20/08/2010
	Gesetz vom 17. März 2007, mit dem das Salzburger Vergabekontrollgesetz 2007 geändert wird	05/07/2010
	Gesetz über eine Änderung des Vergabenachprüfungsgesetzes	26/05/2010
	Gesetz vom 9. Februar 2010, mit dem das Steiermärkische Vergaberechtsschutzgesetz — StVergRG geändert wird — Vergaberechtsschutz-gesetznovelle 2010	03/05/2010
	Gesetz vom 17. Dezember 2009, mit dem das Tiroler Vergabenachprüfungsgesetz 2006 geändert wird	26/03/2010
	Gesetz, mit dem das Wiener Vergaberechtsschutzgesetz 2007 geändert wird	16/03/2010
	Gesetz, mit dem das Burgenländisches Vergaberechtsschutzgesetz geändert wird	16/03/2010
	Bundesvergabegesetz-Novelle 2009	16/03/2010
Poland	*Ustawa z dnia 2 grudnia 2009 r. o zmianie ustawy - Prawo zamówień publicznych oraz niektórych innych ustaw*	04/01/2010
Portugal	*Ministério das Obras Públicas, Transportes e Comunicações* *Introduz o mecanismo do anúncio voluntário de transparência, modifica o regime da invalidade de actos procedimentais de formação de contratos administrativos, clarifica a aplicação de regras do Código dos Contratos Públicos, procede à quinta alteração ao Código dos Contratos Públicos, aprovado pelo Decreto-Lei n.º 18/2008, de 29 de Janeiro, e transpõe a Directiva n.º 2007/66/CE, do Parlamento Europeu e do Conselho, de 11 de Dezembro, que altera as Directivas n.os*	14/12/2010

	89/665/CEE, do Conselho, de 21 de Dezembro, e 92/13/CEE, do Conselho, de 25 de Fevereiro, no que diz respeito à melhoria da eficácia do recurso em matéria de adjudicação de contratos públicos	
	•Decreto-Lei n.º 18/2008. D.R. n.º 20, Série I de 2008-01-29 *Ministério das Obras Públicas, Transportes e Comunicações* *Aprova o Código dos Contratos Públicos, que estabelece a disciplina aplicável à contratação pública e o regime substantivo dos contratos públicos que revistam a natureza de contrato administrativo*	08/09/2010
	•Lei n.º 15/2002. D.R. n.º 45, Série I-A de 2002-02-22 Assembleia da República *Aprova o Código de Processo nos Tribunais Administrativos (revoga o Decreto-Lei n.º 267/85 de 16 de Julho) e procede à quarta alteração do Decreto-Lei n.º 555/99 de 16 de Dezembro, alterado pelas Leis n.os 13/2000, de 20 de Julho, e 30-A/2000, de 20 de Dezembro, e pelo Decreto-Lei n.º 177/2001 de 4 de Julho*	08/09/2010
Romania	*Ordonanţă de urgenţă privind unele măsuri în domeniul legislaţiei referitoare la achiziţiile publice*	14/01/2010
	Ordonanţa de urgenţă pentru modificarea şi completarea Ordonanţei de urgenţă a Guvernului nr. 34/2006 privind atribuirea contractelor de achiziţie publică, a contractelor de concesiune de lucrări publice şi a contractelor de concesiune de servicii	04/09/2009
Slovenia	*Zakon o pravnem varstvu v postopkih javnega naročanja (ZPVPJN)*	27/07/2011
	Zakon o spremembah in dopolnitvah Zakona o javnem naročanju na vodnem, energetskem, transportnem področju in področju poštnih storitev (ZJNVETPS-C)	27/07/2011

	Zakon o spremembah in dopolnitvah Zakona o javnem naročanju (ZJN-2B)	27/07/2011
	Zakon o spremembah in dopolnitvah Zakona o javnem naročanju na vodnem, energetskem, transportnem področju in področju poštnih storitev (ZJNVETPS-B)	27/07/2011
	Zakon o spremembah in dopolnitvah Zakona o javnem naročanju (ZJN-2C)	27/07/2011
Slovakia	*Zákon č. 95/2013 Z. z., ktorým sa mení a dopĺňa zákon č. 25/2006 Z. z. o verejnom obstarávaní a o zmene a doplnení niektorých zákonov v znení neskorších predpisov a o zmene zákona č. 455/1991 Zb. o živnostenskom podnikaní (živnostenský zákon) v znení neskorších predpisov*	08/07/2013
	Zákon č. 28/2013 Z. z., ktorým sa mení a dopĺňa zákon č. 25/2006 Z. z. o verejnom obstarávaní a o zmene a doplnení niektorých zákonov v znení neskorších predpisov	08/07/2013
	Zákon č. 503/2009 Z. z., ktorým sa mení a dopĺňa zákon č. 25/2006 Z. z. o verejnom obstarávaní a o zmene a doplnení niektorých zákonov v znení neskorších predpisov a o doplnení niektorých zákonov	04/01/2010
Finland	*Laki vesi- ja energiahuollon, liikenteen ja postipalvelujen alalla toimivien yksiköiden hankinnoista annetun lain muuttamisesta / Lag om ändring av lagen om upphandling inom sektorerna vatten, energi, transporter och posttjänster*	07/05/2010
	Laki julkisista hankinnoista annetun lain muuttamisesta / Lag om ändring av lagen om offentlig upphandling	07/05/2010

	LANDSKAPSLAG om ändring av 4 § landskapslagen om allmänna handlingars offentlighet	16/02/2010
	LANDSKAPSLAG om ändring av landskapslagen angående tillämpning i landskapet Åland av lagen om offentlig upphandling	16/02/2010
Sweden	*Lag om ändring i lagen (2007:1092) om upphandling inom områdena vatten, energi, transporter och posttjänster*	15/06/2010
	Lag om ändring i lagen (2007:1091) om offentlig upphandling.	15/06/2010
	1. lag om ändring i lagen (2007:1091) om offentlig upphandling *2. lag om ändring i lagen (2007:1092) om upphandling inom områdena vatten, energi, transporter och posttjänster.*	02/06/2010
United Kingdom	*Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2009 SSI 2009 No 428*	17/12/2009
	Utilities Contracts (Amendment) Regulations 2009 SI 2009 No 3100	17/12/2009
	Public Contracts (Amendment) Regulations 2009 SI 2009 No 2992	17/12/2009

ANNEX 6 — TYPES OF FIRST INSTANCE REVIEW BODIES IN MEMBER STATES AS OF MARCH 2016

MS	Review body
AT	Judicial body
BE	Judicial body
BG	Administrative body: *Комисия за защита на конкуренцията* (Commission for Protection of Competition)
CY	Administrative body: *Αναθεωρητική Αρχή Προσφορών* (Tenders Review Authority)
CZ	Administrative body: *Úřad pro ochranu hospodářské soutěže* (Office for the Protection of Competition)
DE	Administrative body: *Kartellamt* (Competition Protection Body); similar bodies exist at regional and local level
DK	Administrative body: *Klagenævnet for Udbud* (Review Body for Public Tenders)
EE	Administrative body: *Riigihangete Vaidlustuskomisjon* (Public Procurement Appeals Committee)
EL	Judicial body
ES	Administrative body: *Tribunal Administrativo Central de Recursos Contractuales* (Central Administrative Tribunal for Public Procurement); similar bodies exist in all regions and in some provinces and municipalities
FI	Judicial body
FR	Judicial body
HR	Administrative body: *Državna komisija za kontrolu postupaka javne nabave* (State Commission for Supervision of Public Procurement Procedures)
HU	Administrative body: *Közbeszerzési Döntőbizottság* (Public Procurement Arbitration Board)
IE	Judicial body
IT	Judicial body
LT	Judicial body
LU	Judicial body
LV	Judicial body
MT	Administrative body: *Bord ta'Reviżjoni dwar il-Kuntratti Pubbliċi* / Public Contracts Review Board
NL	Judicial body
PL	Administrative body: *Krajowa Izba Odwoławcza* (National Appeal Chamber)
PT	Judicial body
RO	Administrative body: *Consiliului Naţional de Soluţionare a Contestaţiilor* (National Council for Solving Complaints)
SE	Judicial body
SI	Administrative body: *Državna revizijska komisija* (National Review Commission)
SK	Administrative body: *Úrad pre verejné obstarávanie* (Office of Public Procurement)
UK	Judicial body

ANNEX 7 — THE USE OF VEAT NOTICES BY MEMBER STATE IN THE PERIOD 2009-2012

	2009	2010	2011	2012	2013	2014	2015	Total
AT		39	85	75	129	124	125	**577**
BE		3	3	7	11	4	3	**31**
BG		14	8	21	53	57	50	**203**
CY		1	8	20	18	23	29	**99**
CZ		15	12	23	45	24	25	**144**
DE		18	19	17	124	84	67	**329**
DK		111	232	552	534	550	525	**2 504**
EE		8	6	4		4		**22**
ES		38	100	85	126	89	140	**578**
FI		107	222	225	289	260	261	**1364**
FR	31	6 755	7 737	6 603	6 201	5 118	4 781	**37 226**
GR		1	7	13	6	1	3	**31**
HU		1		1	1	1		**4**
HR					57	125	118	**300**
IE		5	4	12	10	4	15	**50**
IT		156	261	247	265	335	455	**1 719**
LT		18	31	68	81	83	89	**370**
LV		13	32	31	26	25	19	**146**
NL	2	21	38	61	75	68	62	**327**
PL		677	1012	919	923	940	982	**5 453**
PT		3	8	5	1	3	3	**23**
RO			1					**1**
SE		44	99	73	75	87	78	**456**
SI		112	187	198	208	240	292	**1 237**
SK		131	143	150	135	123	86	**768**
UK	1	222	431	483	605	667	853	**3 262**
IS			1			6	4	**11**
LU			1	1	1	1		**4**
NO				37	144	183	171	**535**
Total	**34**	**8 513**	**10 688**	**9 931**	**10 143**	**9 229**	**9 236**	**57 774**

Source: OJEU/TED

ANNEX 8 — IMPLEMENTATION OF ALTERNATIVE PENALTIES BY MEMBER STATE

MS	Alternative penalties applied
AT	Fines (up to 20 % of the contract value), to be used in a fund for the stimulation of scientific research or in other funds pursuing issues of general interest
BE	Fines (up to 15 % of the contract value) or shortening of the contract duration
BG	No provision for alternative penalties
CY	Fines and/or shortening of the contract duration
CZ	Fines
DE	No provision for alternative penalties
DK	Fines (ranging between 3 % and 5 % of the contract value); criminal sanctions in the case of private undertakings operating in the utilities sector
EE	Shortening of the contract duration
EL	Fines and in some cases shortening of the contract duration
ES	Fines (ranging between 5 % and 20 % of the contract value) or shortening of the contract duration
FI	Fines (up to 10 % of the contract value) or shortening of the contract duration
FR	Fines (up to 20 % of the value of the contract) or shortening of the contract duration
HR	Fines (ranging between 10 % and 20 % of the contract value or, in case of partial annulment, of the performed part of the contract) or shortening of the contract duration.
HU	Fines.
IE	Fines (up to 10 % of the contract value), shortening of the contract duration or termination of the contract
IT	Fines (ranging between 0.5 % and 5 % of the contract value) and/or shortening of the contract duration (ranging between 10 % to 50 % of the remaining duration at the time of publication of the review decision)
LT	Fines (up to 10 % of the contract value).
LU	Fines (up to 15 % of the contract value) or shortening of the contract duration
LV	The possibility of imposing alternative penalties is laid down in the legislation but they are not defined
MT	Fines (in the amount of 15 % of the contract value but not exceeding € 50 000) or shortening of the contract duration
NL	Fines (up to 15 % of the contract value) or shortening of the contract duration
PL	Fines (5 % or 10 % of the contract value) or shortening of the contract duration
PT	Fines (up to the total contract value) or shortening of the contract duration
RO	No provision for alternative penalties
SE	Fines (between Skr 10 000 and Skr 10 000 000 — i.e. between € 1 050 and € 1 050 000 — up to 10 % of the contract value)
SI	The possibility of not declaring a contract ineffective is laid down in the legislation but the alternative penalties are not defined
SK	Fines
UK	Fines and/or shortening of the contract duration

Source: Directorate General for Internal Market, Industry, Entrepreneurship and SMEs, based on publicly available information

ANNEX 9 — TIME LIMITS BY MEMBER STATE

1. Time limits in pre-contractual remedies

MS	Pre-contractual time limits
AT	At Federal and Länder levels, 15 days or 10 days with effect from the day following the date in which the decision is transmitted or published.
BE	15 days with effect from the day the decision is published or notified; electronic means or fax are always used.
BG	10 days with effect from the day the decision is notified.
CY	10 days if fax or electronic means are used or if there is publication; 15 of other means of communication are used,; in both cases the time starts on the date following the date on which the decision is notified or published.
CZ	15 days after the delivery of the decision (into the hands of the tenderer/candidate).
DE	Review must first be sought with the contracting authority immediately after being aware of the error (under new legislation, within 10 days of being aware of the error); if the claim is rejected, review with an administrative review body can be sought within 15 days.
DK	30 days from the moment of sending of the information on the award decision.
EE	10 days from the moment of receipt of the information on the award decision.
EL	Review must first be sought with the contracting authority within 10 days of the transmission of the award decision; the contracting authority then has 15 days to reach a decision; if no decision concerning the review is reached within those 15 days, the claim is deemed to be rejected; as from the moment of the explicit or implicit rejection, the tenderer or candidate has 10 days to seek review with administrative courts.
ES	15 working days (including Saturdays), regardless of the means of communication used, with effect from the day following the date in which the decision is published or notified.
FI	14 days with effect from the date of receipt of the notification.
FR	The time limit is the conclusion of the contract, which is subject to a standstill period of 16 days as from the day the information on the award decision is sent out (11 days if the information is sent out electronically); during that time and until there is a decision of the relevant review body, the conclusion of the contract is suspended
HR	10 days with effect from the day following the date in which the decision is received.
HU	15 days from the date when the applicant learned of the infringement.
IE	30 calendar days after the applicant was notified of the decision or knew or ought to have known of the infringement alleged in the application.
IT	30 days from the date of reception of the communication on the decision of the contracting authority.
LT	Review must first be sought with the contracting authority within 15 days of the transmission of the award decision or within 10 days in cases where it is not required to send information; the tenderer or candidate can seek review with a court within 15 days of the date in which the contracting authority should provide written information concerning its decision.
LU	10 of 15 calendar days, depending on communication method used, with effect from the day following the date on which the contracting authorities' decision is sent to the tenderer or candidate.
LV	10 days if fax o electronic means are used or the notification is handed to the tenderer and 15 days if postal mail is used; in both cases the time limit starts on the date of the notification but 1 working day is added.

MT	10 days with effect from the day following the date of notification by fax or electronic means.
NL	No time limit.
PL	10 and 15 days, depending on communication method, with effect from the day of notification.
PT	10 working days with effect from the day following the date in which the decision is notified; electronic means are always used.
RO	10 days with effect from the day following the date of notification or publication.
SE	10 and 15 days depending on the means of communication used.
SI	8 working days with effect from the date of publication of the decision or receipt of the notification.
SK	The contract may be concluded at earliest on the 16th day after sending the contract award notice.
UK	30 days with effect from the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen; the court may extend this time limit by maximum 3 months.

Source: Directorate General for Internal Market, Industry, Entrepreneurship and SMEs, based on publicly available information

2. Time limits for the ineffectiveness remedy

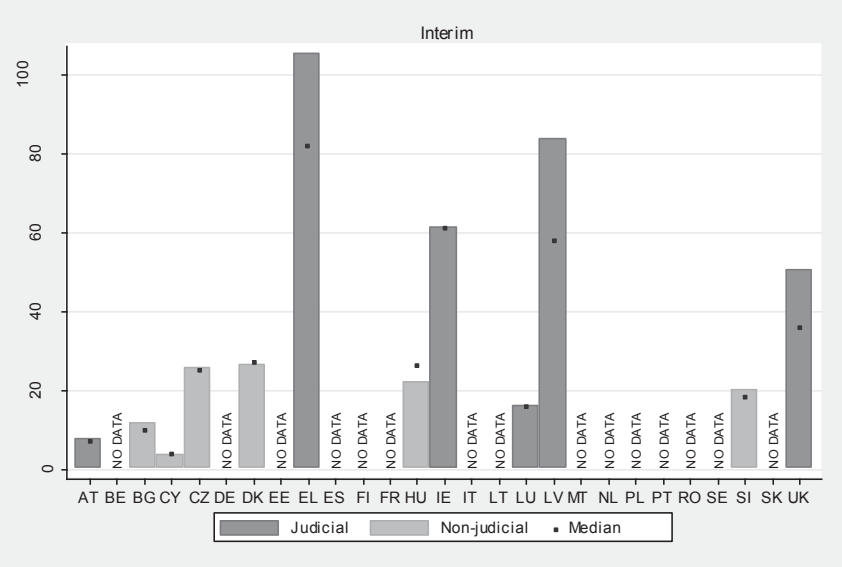
MS	Ineffectiveness time limits
AT	30 days with effect from the date on which the decision is published or notified and six months in other cases.
BE	30 days with effect from the day following the date on which the decision is published or notified and six months in other cases.
BG	2 months with effect on the date the decision is published or notified; in other cases, 2 months after finding out about the conclusion of the contract and in any event 1 year.
CY	30 days with effect from the day following the date on which the decision is published or notified and six months in other cases.
CZ	30 days with effect from the day following the date on which the decision is published and six months in other cases.
DE	30 days with effect from the day following the date on which the decision is published or notified and six months in other cases.
DK	30 days with effect from the day following the date on which the decision is notified and six months in other cases.
EE	30 days with effect from the day following the date on which the decision is published and six months in other cases.
EL	30 days with effect from the day following the date on which the decision is published or notified and six months in other cases.
ES	30 working days (including Saturdays) with effect from the day following the date on which the decision is published or notified and six months in other cases.
FI	30 days with effect from the day following the date on which the decision is notified and six months in other cases.
FR	30 days with effect from the day following the date on which the decision is published or notified and six months in other cases.
HR	30 days with effect from the day following the date on which the decision is published or notified and six months for other cases, but only if the legal ground is the non-publication of a contract notice; for other legal grounds, 10 days.

HU	15 days from the date when the applicant learned of the infringement; 1 year from the date of conclusion of the contract if there was no award procedure.
IE	30 days with effect from the day following the date on which the decision is published or notified and six months in other cases.
IT	30 days with effect from the day following the date on which the decision is published and six months in other cases.
LT	6 months in all cases.
LU	30 days with effect from the day following the date on which the decision is published or notified and six months in other cases.
LV	30 days with effect from the day following the date on which the decision is published or notified and six months in other cases.
MT	30 days with effect from the day following the date on which the decision is published or notified and six months in other cases.
NL	30 days with effect from the day following the date on which the decision is published or notified and six months in other cases.
PL	30 days with effect from the day following the date on which the decision is published or notified and six months in other cases.
PT	30 days with effect from the day following the date on which the decision is published or notified and six months in other cases.
RO	30 days with effect from the day following the date on which the decision is published or notified and six months in other cases.
SE	30 days with effect from the day following the date on which the decision is notified and six months in other cases.
SI	8 working days with effect from the date of publication of the contract award notice in the Public Procurement Portal; six months with effect with effect from the date of start of performance of the contract if no contract award notice was published.
SK	30 days with effect from the day following the date on which the decision is published and six months in other cases.
UK	30 days with effect from the day following the date on which the decision is published or notified and six months in other cases.

Source: Directorate General for Internal Market, Industry, Entrepreneurship and SMEs, based on publicly available information

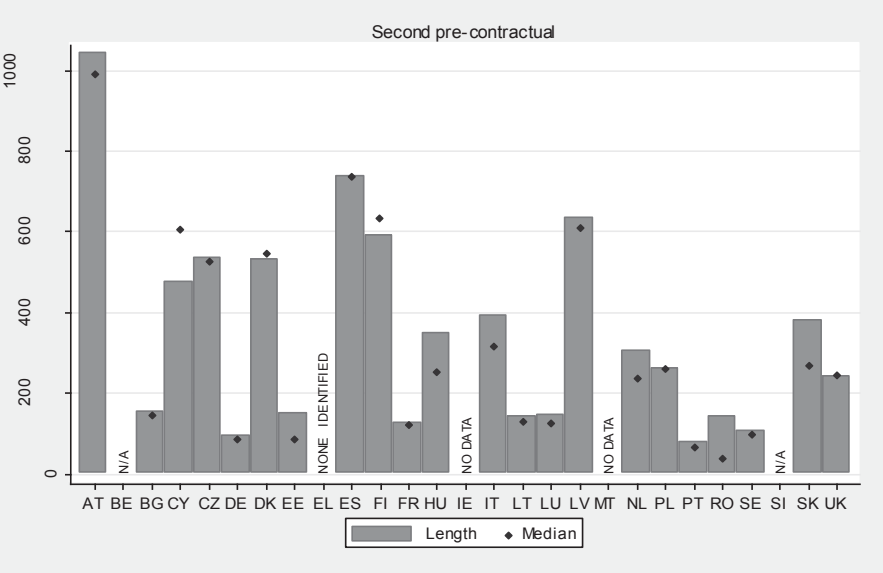
ANNEX 10 — LENGTH OF REVIEW

1. Estimated length of the review (interim measures 2009-2012)



Note:
Review of case-law
Statistics based on the following number of observations: AT: 88; BG: 31; CY: 111; CZ: 42; DK: 90; EL: 104; HU: 39; IE: 1; LU: 24; LV: 3; SI: 4; UK: 11.
Source: Study, Figure 6.6 (page 87)

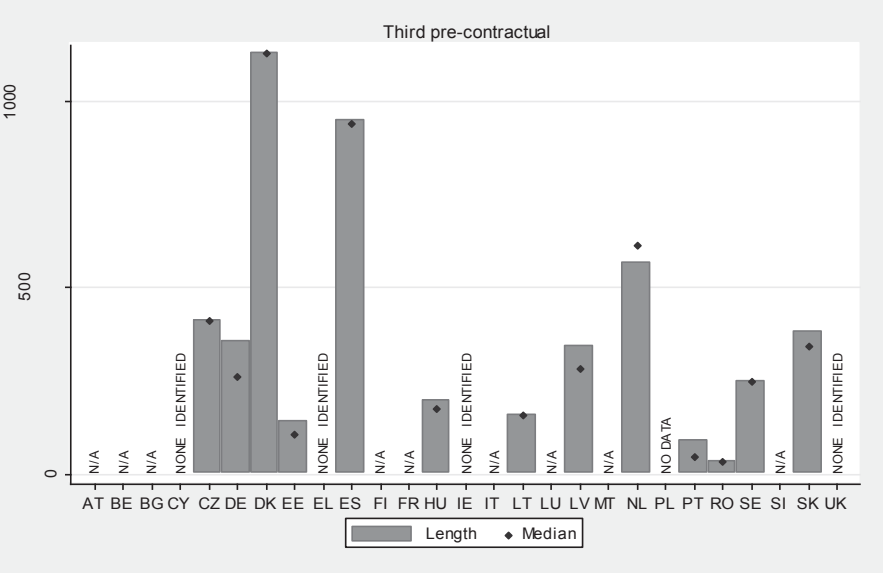
2. Estimated length of the review (second instance 2009-2012)



Note:
Review of case-law
Statistics based on the following number of observations: AT: 44; BG: 124; CY: 5; CZ: 27; DE: 139; DK: 10; EE: 73; ES: 2; FI: 49; FR: 21; HU: 113; IT: 93; LT: 105; LU: 14; LV: 58; NL: 24; PL: 1; PT: 14; RO: 34; SE: 32; SK: 17; UK: 4
BE — N/A (no appeal from Council of State)
EL — None identified from sample reviewed
IE — No data (there is 1 case in 2011 and 1 in 2012 but dates of decision are missing)
MT — No data
SI — N/A (no appeal from National Review Commission).

Source: Study, Figure 6.8 (page 89)

3. Estimated length of the review (third instance 2009-2012)



Review of case-law
Note:
statistics based on the following number of observations: CZ: 1; DE: 7; DK: 1; EE: 30; ES: 10; HU: 69; LT: 47; LV: 17; NL: 3; PT: 14; RO: 1; SE: 2; SK: 14
AT — N/A (second is final instance)
BE — N/A
BG — N/A
CY — None identified from sample reviewed
EL — None identified from sample reviewed
FI — N/A
FR — N/A
IE — None identified from sample reviewed
IT — N/A
LU — N/A
MT — N/A
PL — No data
SI — N/A
UK — None identified from sample reviewed.

Source: Study, Figure 6.9 (page 90)

ANNEX 11 — PROVISIONS FOR THE COSTS OF REVIEW PROCEDURES BY MEMBER STATE[78]

MS	Litigation Costs	MS	Litigation Costs
AT	Fee: Scaled based criteria (depending on object, nature of the procedure, procedure relates to above or below threshold contract).	**IE**	Fee €210 Originating notice €190, affidavit €20
BE	Procedural fees: €200 Ordinary courts: €400 Inscription on the roll: €100 Summon [€140; €500]	**IT**	Contract value < 200 000€: €2 000 Contract value [€200 000; 1m]: €4 000 Contract value>€1 000 000: €6 000 For appeals, fees are increased by 50 %
BG	Below threshold: €435 (Stamp duty) Above threshold: €869 (Stamp duty)	**LT**	Stamp fee: €290
CY	Fees [€4 000; €20 000] (depending on the value of the contract)	**LU**	Fee: €0 Excluding lawyers and bailiffs fee
CZ	Deposit 1 % of contract [CZK 50 000; 2 000 000] Unknown contract value: CZK 100,000 Cancelled award: CZK 30 000 Law suit against decision: CZK 3 000 Appeal First instance: CZK 5 000	**LV**	Fee: €0 Appeal to decision: €30 Excluding lawyers and bailiffs fee
DE	Fee: [€2 500; €50 000] Fee in exceptional case: [€250;€100 000]	**MT**	Deposit 0.75 % of contract value [€1 200; €58 000]
DK	Fee: 20 000 DKK (Public Sector) Fee:10 000 DKK (Other)	**NL**	Fee: €3829 (legal persons) Contract value >€100 000: €1519 (natural persons)
EL	Fee 1% of contract (max €50 000) Supreme Court: €2466 Courts of Appeals: €1020	**PL**	For supplies and services: - Public authority below €134.000: €1.800; above €134.000: €3.600 - Other authority below €207.000: €1.800; above €207.000: €3.600 For works: - Public authority below €5.186.000: €2.500; above €5.186.000: €5.000 - Other authority below €5.186.000: €2.500; above €5.186.000: €5.000
EE	Fee below threshold: €639.11 Fee above threshold: €1278.23	**PT**	The justice tax: €102 Pre-contractual justice tax: €204
ES	Fee: €0	**RO**	€13 860-€92 400: 1 % of this value; €92 401-€924 000: €924+0.1 % excess of 92 401; €924 000-€9 240 000: €1756+0.01 % excess of 9 240 000 €9 240,000-€92 400,000: €2587+0.001 % excess of 9 240 000 €92 400,000-€924 000 000: €3418+0.0001 % excess of 92 400 000 €924 000 000 or more: €4 250+0.00001 % excess of 924 000 000 Note: these are not costs paid to the review body, but amount withheld from participation guarantee In addition a deposit is required of 1% of contract value (to a maximum of €100 000), retained if complainant's case unsuccessful.
FI	Fee general court: €244	**SE**	Fee: €0
FR	Administrative tribunal: €0 High Courts: ~ €100 - including summons ~[€40; €100]	**SI**	2% of best bid price [€500; €25 000] Goods or services: Low value: €1 500; Open procedure: €3 500 Works: Low value: €2 500; Open: €7 000 Other €1 000 (defence and security B service; framework agreement; dynamic purchasing system or design contests).
HR	0-€197 202.69: €1 314.89 €197 202.69-€986 180.64: €3 287.27 €986 180.64-€3 287 218.27: €5 917.08 €3 287 218.27-€7 889 338.44: €9 204.23 above €7 889 338.44: €13 148.90	**SK**	Before opening of tender: Goods and services: -Above:1 % max €4000, -Below:3 % max €2000 Works: -Above: 0.1 % max €10 000, -Below:5 % max €5 000 After opening of tender: 1% value (max €300 000) Unknown contract value: €3 000 1% contract value [€600; €30 000] low price exclusion
HU	Fee: 1 % of contract value/lot Revision of decision: HUF 30 000 Court proceedings: 6 % of contract value [HUF 15.000; HUF1.5 m] Above threshold: (max: HUF 25 000 000) Below threshold: [HUF 200 000;HUF 6 000 000] In cases pursuant to paragraph 1, fee: a) 1-3 elements fee is amount in paragraph 1 b) 4-6 elements: fee is 125 % of (a) c) 7-10 elements: fee is 150 % of (a) d) 11-15 elements: fee is 175 % of (a) e) 16 or more elements: twice the of (a)	**UK**	Fees: [€44; €2423] (based on contract value) Contract value £200 001- £250 000: €1912 Contract value >£300 000: €2423

[78] Study, Table 5.1 (p. 67)

ANNEX 12 — THE NUMBER OF SECOND INSTANCE DECISIONS IN 2009-2012

MS	2009	2010	2011	2012	Total
CZ	100	167	155	229	**651**
CY	14	11	13	10	**48**
DE	199	226	241	184	**850**
DK	10	3	4	5	**22**
EE	48	37	57	55	**197**
HU	193	196	164	130	**683**
IE	111	17	79	0	**207**
LT	137	284	305	280	**1 006**
LU	4	4	4	2	**14**
RO	784	401	619	427	**2 231**
SE	409	544	717	716	**2 386**
SI	365	401	537	505	**1 808**
Total	**2 374**	**2 291**	**2 895**	**2 543**	**10 103**

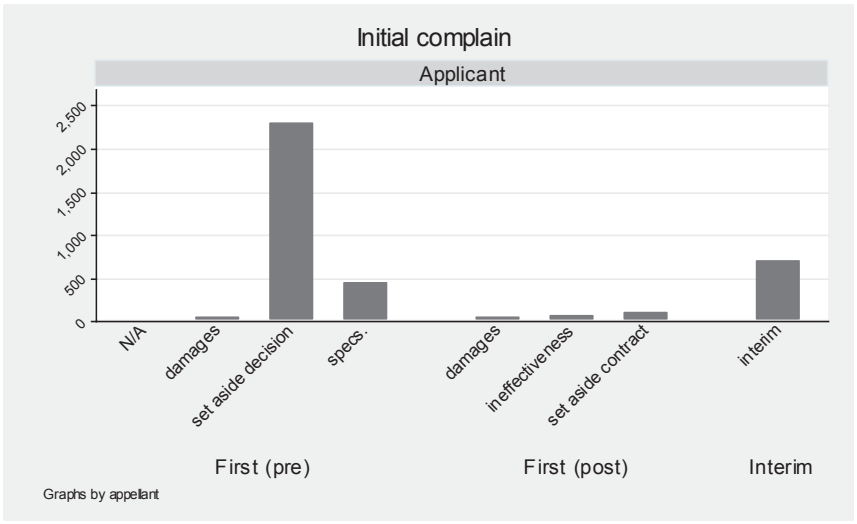
Source: Study, Table 6.3 (page 84)

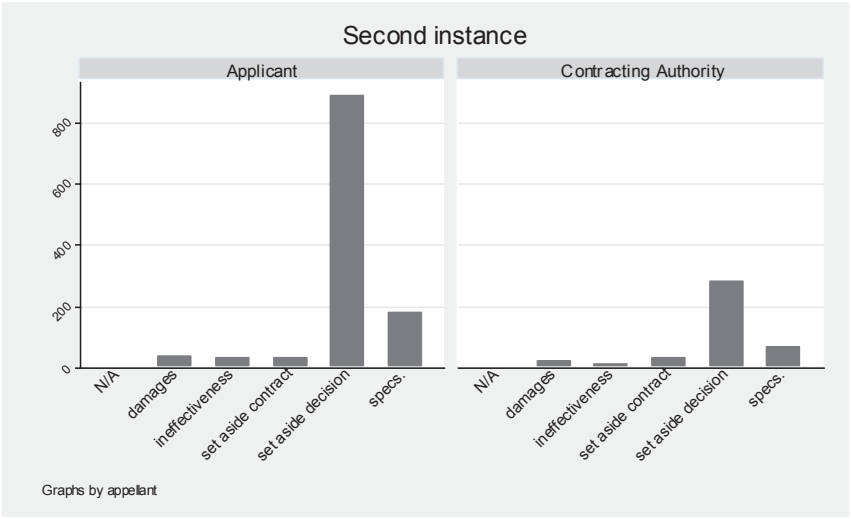
ANNEX 13 — THE NUMBER OF THIRD INSTANCE DECISIONS IN 2009-2012

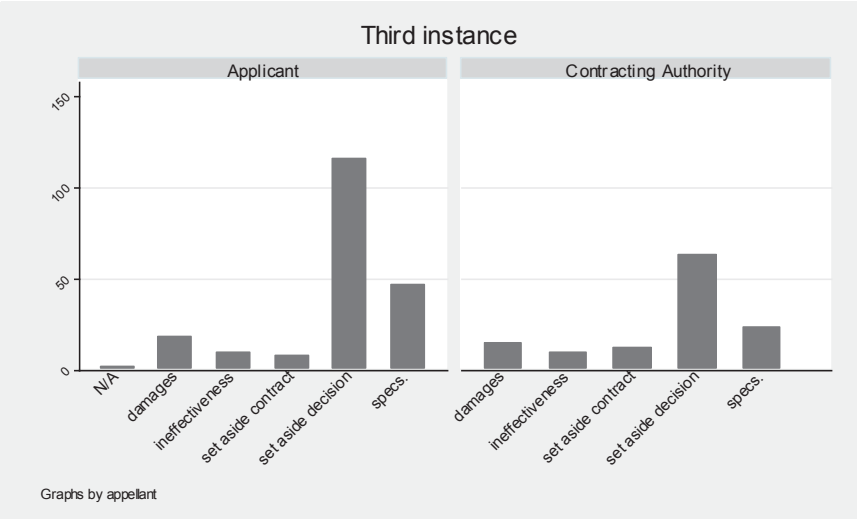
MS	2009	2010	2011	2012	Total
EE	12	13	12	16	**53**
LT	8	10	23	20	**61**
SE	129	108	234	216	**686**
Total	**149**	**131**	**269**	**252**	**800**

Review of case-law
Source: Study, Table 6.4 (page 84)

ANNEX 14 — FREQUENCY OF REMEDIES SOUGHT IN 2009-2012







Source: Study, Figure 6.10 (page 92)

ANNEX 15 — GLOSSARY

Contracting authorities:	Contracting authorities and entities as defined in Article 1, paragraph 9, of Directive 2004/18/EC and Article 2 of Directive 2004/17/EC;
The Court:	The Court of Justice of the European Union;
DPS:	Dynamic Purchasing System;
EC public consultation:	Public consultation launched by the services of the Commission, open from 24 April to 20 July 2014;
EEA countries:	EU Member States and Iceland (IC), Liechtenstein (LI), and Norway (NO);
Member States:	Belgium (BE), Bulgaria (BG), the Czech Republic (CZ), Denmark (DK), Germany (DE), Estonia (EE), Ireland (IE), Greece (EL), Spain (ES), France (FR), Croatia (HR), Italy (IT), Cyprus (CY), Latvia (LV), Lithuania (LT), Luxembourg (LU), Hungary (HU), Malta (MT), Netherlands (NL), Austria (AT), Poland (PL), Portugal (PT), Romania (RO), Slovenia (SI), Slovakia (SK), Finland (FI), Sweden (SE), the United Kingdom (UK);
OJEU/TED:	TED (Tenders Electronic Daily) — the online version of the 'Supplement to the Official Journal' of the EU, dedicated to European public procurement (http://ted.europa.eu/);
Procurement Directives:	Directives laying down substantive rules on public procurement i.e. Directives 2004/17/EC and 2004/18/EC (replaced by Directive 2014/23/EU, Directive 2014/24/EU and Directive 2014/25/EU);
Contracts:	Public contracts and concession contracts;
REFIT:	Regulatory fitness and performance programme;
Remedies Directives:	Directives 89/665/EEC and 92/13/EC, as amended by Directive 2007/666/EC;
Study:	'Economic efficiency and legal effectiveness of review and remedies procedures for public contracts' written by Europe Economics and Milieu, April 2015;
TFEU:	The Treaty on the Functioning of the European Union.