Best practice in the field of access to public procurement review

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The remedies foreseen in secondary law

Three Directive

- 89/665/EEC - concerns remedies in the field of works, supplies and services procurement
- 92/12/EEC - concerns remedies in the utilities sector
- 2007/66/CE- amending Directive
- No further reform envisaged at this stage: COM/2017/028 final

Main remedies in the old Directives

- Interim relief
- Annulment of award decision
- Damages
- **NB: V BASIC RULES**

(grounds/requirements not specified; much room for procedural autonomy & its limit)

Additional remedies in the new Directive amending the old ones

- Standstill
- Automatic suspension
- (In)Effectiveness

An often puzzling case law

Exibit A: High Court Fees (Order in C-495/14 -*Tita and Others*)

- Article 1 Dir 89/665/EEC and the principles of equivalence and effectiveness must be interpreted as not precluding national legislation requiring the payment of court fees.

Exibit B: Guarantee to bring Action (Joined Cases C-439/14 and C-488/14, *SC Star Storage SA*)

- Article 1(1) to (3) Dir 89/665, read in the light of Article 47 Charter, do not preclude national legislation making the admissibility of any action subject to the obligation for the applicant to constitute a good conduct guarantee that it provides to the CA, if that guarantee must be refunded to the applicant <u>whatever</u> the outcome of the action.

Exibit C: effective remedies as interpretative tool (VEAT: C-19/13 – *Fastweb*)

- Effective remedy under Art. 1 Dir. 89/665 requires effcetive review as to whether CA was justified in believing ground for direct award was justified
- VEAT not inconsistent with right to an effective remedy under Art. 47 Charter

Exibit D: Procedural Mistakes (C-518/17 *Rudigier*)

- EU legislation on the award of public contracts does not lay down a general rule that the unlawfulness of an act or omission at a given stage of the procedure renders unlawful all subsequent acts in that procedure and justifies their annulment. Only in specific well-defined situations does that legislation provide for such a consequence

Exibit E: (MSB in damages) *cont.*

- damages constitute a procedural alternative to annulment
- Not more dependent than other legal remedies on fault (even presumed)

(C-314/09 - *Strabag and Others*

- Directive 89/665 gives concrete expression to the principle of MS liability subject to 3 *Brasserie du Pêcheur* conditions (incl MSB)

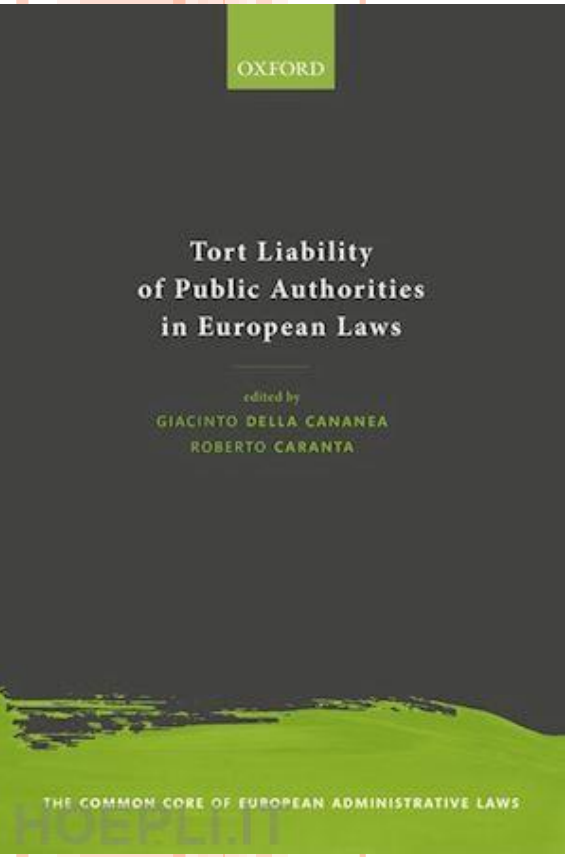
(C-568/08 - *Combinatie Spijker Infrabouw)*

Exibit E: (MSB in damages) *cont.*

EFTA Court:

- no need for MSB, based on effectiveness and *Strabag (*Case E-16/16 - *Fosen-Linjen AS)*
- MSB required if loss of profit is sought (Case E-7/18, - *Fosen-Linjen AS II)*

Exibit : (MSB in damages)
Divergences in the MS (and beyond)



- UK/England: SC followed *Spijker in Nuclear Decommissioning Authority* v *ATK Energy EU Ltd (formerly Energy Solutions EU Ltd)* [2017 UKSC 34]
- IT: no need for fault or MSB, based on *Strabag,* domestic provision cast over Art. 2(6)Dir. 89/665/EEC and strong preference for ineffectiveness (e.g. Cons. Stato Sez. V, 31-10-2016, n. 4562, *Arcobaleno Costruzioni;* Cons. Stato Sez. V, 31-12-2014, n. 6450, *Soc. Strabag*

Exibit F: Transparency
C-927/19 - Klaipėdos regiono

Confidential info in docs submitted by the competitor to which the contract has been awarded

Need to weigh the applicant's right to an effective remedy against its competitor's right to protection of its confidential info and trade secrets

Court must have at its disposal the information required, including confidential information and trade secrets, in order to be able to determine whether that info can be disclosed

May raise of its own motion issues as to legality of the award procedure only if nat. law so allows

Some good practice in the MSs

Specialisation Required!

- Administrative Courts (eg France, Belgium, Italy)
- Special review boards (eg Croatia, Slovenia, Spain)

FAST TRACK PROCEDURES: Italy

- 30 days for bringing a challenge
- First instance final decision is taken whenever possible when hearing application on interim measures

  If not, within 45 days (+30 if further docs are necessary)

  Shorter deadlines for appeal procedures

SPAIN: LOS RECURSOS ESPECIALES EN MATERIA DE CONTRATACIÓN

- A special and independent review body
- Standing incl. eg trade unions
- Decision has immediate effects
- Decision may be challenged in (adm) courts

Référé précontractuel: France

- In case in which transparency and competition rules are breached to the detriment of one competitor
- One judge
- Automatic suspension
- Judge may give order to the CA
- First instance is last instance

Liability: France

"I wish we hadn't learned probability 'cause I don't think our odds are good."

- NO chances: no damages
- Some chances: compensation for participation costs
- chances sérieuses: lost profit is fully compensated

NB no liability/MSB required

SPP litigation?

- The Green Deal: “Public authorities, including the EU institutions, should lead by example and ensure their procurement is green”.
- The European Green Deal Investment Plan “The Commission will propose minimum mandatory green criteria or targets for public procurements in sectoral initiatives, EU funding or product-specific legislation”.

Děkuji!