CURRENT ISSUES IN PUBLIC PROCUREMENT: A VIEW FROM LUXEMBOURG

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It is a great pleasure to address the Centre of European Law of King’s College and to give this Annual Lecture on current issues in public procurement. It is a subject of huge practical and legal importance. The annual value of public procurement contracts in the EU is estimated to account for approximately 17% of the GDP of the EU. From the legal perspective, there is detailed EU legislation both on substantive and procedural issues (remedies), voluminous case law of the CJEU and even more so in the national courts, particularly within the UK, which never reach us in the CJEU. One of the issues the CJEU (and indeed national courts) have to grapple with is the interrelationship between legislation and general principles of EU law derived from the treaties. There are now two new Directives 2014/23 and 2014/24 which, in some respects, codify the existing case law of the CJEU but, in other respects, take a different approach. It is also an area of EU law in which I have a particular interest and, since my arrival at the CJEU in 2012, I have had the privilege of sitting in a significant number of public procurement cases, including the majority of such cases decided over the past year.

In my talk I will touch both on a few substantive issues that arise in public procurement case-law, which I will look at with particular reference to remedies also.

I THE APPLICATION OF FUNDAMENTAL PRINCIPLES OUTSIDE THE SCOPE OF THE DIRECTIVES

The first question concerns the application of Treaty fundamental principles – in particular those of transparency and equal treatment – in cases falling outside the scope of the public procurement directives. I would like to provide a little background to this area in order to put recent developments into context.

The directives contain a series of positive obligations, relating to all aspects of the tender procedure, including technical specifications, advertising requirements and award criteria. However, you will

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1Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, COM(2010) 608 final/2, p.15.
recall that positive obligations were never intended to provide uniform and exhaustive regulation of the field.

**First category: service concessions**

It is in this context that I would like to begin by mentioning the landmark 2000 judgment in *Telaustria* \(^2\). The public tender procedure in issue in that case related to a service concession for the production and publication of telephone directories in Austria. At that time, service concessions were excluded from the scope of public procurement directives. The Court nonetheless found that contracting authorities concluding such contracts had to respect the fundamental rules of the treaties, in general, and the principle of non-discrimination on the ground of nationality, in particular. It stated that this principle implies for the contracting authority an obligation of transparency which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.

In my view, the real interest of the *Telaustria* judgment lies in the fact that, whereas previous case-law applying treaty principles highlighted negative obligations – such as the prohibition of discrimination – a positive obligation of advertisement, deriving from a transparency requirement, was identified in respect of contracts falling outside the scope of the procurement directives. This treaty obligation for such contracts mirrored the detailed advertising requirements set out in those directives, albeit in a manner far less defined.

A recent 2014 case serves, among many others, to illustrate the transparency requirement identified in *Telaustria*. In *Cartiera dell’Adda*, \(^3\) it was uncertain on the facts whether the contract in question fell within Directive 2004/18, or whether it essentially concerned a concession subject to general principles only. The Court addressed both hypotheses in its answer. At issue was the exclusion of a tenderer for failure to comply with a requirement, stipulated in the contract documents on pain of exclusion, to submit a declaration that a director had not been subject to criminal proceedings or convictions, even though that omission was subsequently rectified. Drawing on earlier case-law, the Court found that a contracting authority must comply strictly with the criteria which it has itself established, and thus must exclude the tenderer under such conditions. This obligation was rooted in the principle of equal treatment and its derivative, the obligation of transparency. Since those imperatives were not only general principles of EU law but also the foundation stones of the

\(^2\) Case C-324/98 *Telaustria and Telefonadress* EU:C:2000:669.

\(^3\) Case C-42/13 *Cartiera dell’Adda* EU:C:2014:2345.
directive, the exclusion was considered lawful whether or not the contract in question fell within the ambit of the directive.

Over the years since Telaustria, there have been a series of important judgments applying Treaty principles to service concession contracts. There is now Directive 2014/23/UE, which for the first time brings service concessions within the ambit of EU legislation. A threshold of just over 5 million euros has been set for the application of this directive. According to the preamble, concessions at or above this level should be of manifest transnational interest. It remains to be seen what the Court’s approach will be to concessions whose value falls below this threshold. I will return to this when I look at the question of ‘cross-border’ interest.

**Second category: contracts falling below the threshold set in the directives**

That brings me neatly to the second category of contracts to which the Court has applied Treaty principles, namely those falling below the relevant thresholds set in the public procurement directives. Such was the case with the public contract at issue in Vestergaard which swiftly followed Telaustria. The Court had no hesitation in applying Telaustria to this case, in particular the treaty obligation of transparency.

However, it is submitted that in Vestergaard the Court took a significant step forward. It is one thing to apply treaty principles to service concessions. Although their exclusion from the scope of the procurement directives at the time no doubt reflected a political choice, and there can be little doubt, if important enough, that they could be of cross-border interest. But, on the other hand, it may be assumed, as the Court has indeed indicated, that the setting of value thresholds for the application of the directives reflects, at least in part, a view that contracts below a certain value are unlikely to attract interest from tenderers in other Member States. Absent such interest, the fundamental freedoms guaranteed by the treaties do not apply. It therefore does not automatically follow that general rules and fundamental principles to which concessions are subject should also apply to public contracts below the thresholds set in the Directive.

In many cases, the Court is able to adopt a pragmatic approach to below-threshold contracts. Essentially, it has examined whether the circumstances at issue would be permissible under the directives. If so, it concludes that they are *a fortiori* not precluded by treaty obligations such as

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4 For example C-231/03 Coname, C-458/03 Parking Brixen, C-91/08 Wall.
7 Case C-59/00 Vestergaard EU:C:2001:654.
8 Case C-16/98 Commission v France EU:C:2000:541, paragraph 44.
transparency. This is an entirely logical position. It is predicated upon the presumption that the directives themselves are in conformity with the treaties – and therefore valid – and takes into account that those directives lay down “strict special procedures” to which contracts falling outside their scope are not subject. Thus, in the recent case Generali-Providencia Biztosító, which concerned an insurance contract falling below the relevant value threshold, a tenderer was excluded because it had previously been fined for infringements of competition law. The Court first found that such exclusion was permitted under the relevant directive provision and concluded that it must a fortiori be justified in the case of the contract in question. Moreover, the Court pointed out, in an obiter, that such an exclusion was also in conformity with Directive 2014/24, not yet in force at the material time.

This reflects a more general approach of the Court in dealing with contracts outside the scope of the directives. While emphasizing the twin imperatives of equal treatment and transparency, the Court is mindful of the margin of discretion left to Member States in areas not covered by detailed EU regulation. When, on occasion, the Court has to examine the proportionality of a national measure in its application outside the scope of the public procurement directives, its degree of control is restrained. Thus, in Consorzio Stabile Libor Lavori Pubblici, in respect of a procurement that also fell below the threshold in the Directive, when asked to rule on the proportionality of a national measure excluding tenderers who had not met their social security payments if the shortfall was more than 100 euros and 5% of the sums due, while the relevant shortfall for arrears of tax was €10,000, the Court rejected arguments relating to the internal coherence of that measure and, instead, referred to the discretion which Member States enjoyed in drawing up causes for exclusion of tenderers in cases outside the mandatory ones provided for in Article 45(1) of Directive 2004/18.

Third category: “Type B” contracts

The third general category of public tender procedures to which the Court has applied general treaty rules and principles relates to so-called “type B” contracts, of which I have already made mention with regards to the applicable value thresholds. They include, for example, certain transport services, hotel and leisure services, security and legal services. In Directives 92/50 and 2004/18, these services were exempted from a large number of requirements applicable to other contracts, in particular the obligation of advance publicity by means of a tender notice. In Commission v Ireland

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9 Case C-470/13 Generali-Providencia Biztosító EU:C:2014:2469, paragraphs 34 to 36.
10 Case C-358/12 Consorzio Stabile Libor Lavori Pubblici EU:C:2014:2063.
the Court held that the Community legislature based itself on the presumption that contracts for such services are not, in the light of their specific nature, of cross-border interest such as to justify their award being subject to the conclusion of a tendering procedure intended to enable undertakings from other Member States to examine the contract notice and submit a tender. For that reason, Directive 92/50 merely imposed a requirement of publicity after the award for that category of services.

However, this presumption of lack of cross-border interest in the case of Type B services was rebuttable. The Court went on to say that the special and reduced advertising arrangement, introduced by the Community legislature for contracts relating to services coming within the ambit of Annex I B, cannot be interpreted as precluding application of the principle of transparency resulting from Articles 43 EC and 49 EC, in the event that such contracts nevertheless are of certain cross-border interest. Nevertheless, the Court stated that there could be a derogation from the application of such principle where it was objectively justified.

In An Post, the Court rejected the action on the ground that the Commission had not demonstrated the necessary “certain cross-border interest”. Nevertheless, the judgment suggested a tension between the procurement directives and the treaties as regards Type B services. These services, unlike service concessions and low value contracts, fall within the scope of the directives, which expressly exonerate them from the obligation of advance publicity of tender procedures. Nonetheless, were they to be of certain cross-border interest, Treaty principles would apply and, in particular, the Telaustria obligation of a sufficient degree of advertising.

This tension is illustrated in the recent case Azienda sanitaria locale n.5 ‘Spezzino’ (‘ASL’). The case concerned the provision of emergency ambulance services, which, according to the relevant Italian legislation, was to be awarded preferentially to voluntary organisations and approved public bodies, without prior advertising. On the assumption that the value of the medical element of the contract exceeded that of the transportation element, which was not clear from the order for reference, this was to be considered a Type B service. Having noted that Directive 2004/18 imposes no prior advertising requirement for such services, the Court however went on to state that the lack of any transparency amounts to a difference in treatment to the detriment of undertakings situated in another Member State, prohibited under Articles 49 TFEU and 59 TFEU unless justified. In the circumstances of the case the Court found that there was a justification for this difference in

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12 Case C-507/03 Commission v Ireland EU:C:2007:676.
13 Case C-113/13 San Lorenzo and Croce Verde Cogema EU:C:2014:2440. See in particular paras 41 and 52.
treatment, essentially that there was a public interest justification in giving preferential treatment to voluntary organisations such as the organisation of its public health system.

Directive 2014/24 now imposes prior advertising for services analogous to Type B services. 14 In principle, this should ensure that the tension between the legislator’s and the Treaty’s advertising requirements for this type of service, as it first came to light in An Post, should not recur.

II OF CERTAIN CROSS-BORDER INTEREST

Still on the subject of public contracts falling (at least partially) outside the directives, I now turn to the issue, which I have already touched upon, of the necessity that such contracts are of “certain cross-border interest”. The existence of such interest is a pre-requisite for EU law to apply and, as a corollary, it defines the limits of the Court’s jurisdiction in interpreting and applying EU law.

It is fair to say that the Court has generally adopted an accommodating approach to the existence of certain cross-border interest in preliminary ruling cases where the determination of this interest lies in the hands of the national courts. In Coname, 15 the Court for the first time made explicit reference to the possibility that a contract would be of interest to an undertaking located in a Member State other than that of the contracting authority as a condition for the application of the treaty requirements of transparency and equality of treatment. The contract in question was a service concession for the running of a methane gas network in the commune of Cingia de’ Botti in Italy. The Court provided some guidance as to the existence of cross-border interest by noting an absence of “special circumstances, such as a very modest economic interest at stake”, on account of which it could reasonably be maintained that an undertaking from another Member State would have no interest in the concession and that the effects on the fundamental freedoms concerned should therefore be regarded as too uncertain and indirect to warrant the conclusion that they may have been infringed.

In recent preliminary reference cases, the Court has indicated that it would take a stricter line in requiring the national court to provide concrete indications of the existence of certain cross-border interest. This reflects partly the increased workload of the Court with the concomitant necessity to enforce admissibility criteria strictly, and partly the requirements as regards the content of a preliminary reference, as set out in Article 94 of the Court’s rules of procedure dating from 2012.

14 Such services are listed in Annex XIV to Directive 2014/24 and are governed by Article 74. According to Article 75, tenders involving such services require either a contract notice or a prior information notice.
15 Case C-231/03 Coname EU:C:2005:487. However, the Court has taken a stricter approach in direct actions where certain cross-border interest has to be proved before the CJEU, see Commission v Ireland, footnote 12 above, and case C-160/08 Commission v Germany.
Article 94 provides the Order for reference must contain either relevant findings of fact or, at least a description of the relevant facts on which the questions are based. Explicit reference to this provision has been made in a number of recent cases, including ASL and *Generali-Providencia Biztosító.* \(^{16}\)

**ASL** was the first occasion where the Court referred to Article 94 as the relevant order for reference said nothing on the issue of cross-border interest \(^{17}\). It nevertheless went on to mention the “spirit of cooperation” between it and the national court and proceeded to examine the case on the proviso that certain cross-border interest existed. It made reference to criteria drawn from its case-law which indicates such interest – such as the value of the contract, place of execution, technical characteristics, the existence of complaints from operators in other Member States – without however applying these criteria explicitly to the facts of the case at hand.

In *Enterprise Focused Solutions,* \(^ {18}\) the Court arguably went further. The contract in question was for the supply of computing systems and equipment to a hospital in central Romania. The referring court assumed Directive 2004/18 was applicable and made no reference to any cross-border interest. However, the value of the contract was little more than one quarter of the relevant threshold, so the directive clearly did not apply. Having repeated the principles and criteria set out in **ASL,** the Court made reference to the specific facts of the case, holding that, despite its low value, the contract in question “could have certain cross-border interest” given that the case concerned the supply of computing systems and equipment with the reference processor being that of an international brand (Intel). Despite this seemingly liberal approach, it cannot be ruled out that the Court will in the future declare references inadmissible for lack of concrete indication of cross-border interest.

The legislator has now sought to provide a steer, at least in respect of certain services. Recitals 114 to 117 of the new Directive 2014/24 state out the categories of services which are deemed by their very nature to have a ‘limited cross-border dimension’, namely services that are known as services to the person, such as certain social, health and educational services, \(^ {19}\) but also hotel and restaurant services, \(^ {20}\) certain legal services which concern exclusively issues of purely national law \(^ {21}\) and a few other services such as rescue services, firefighting services and prison services \(^ {22}\). The threshold for

\(^{16}\) At paragraphs 47 and 28 of the respective judgments.

\(^{17}\) At paragraph 47.

\(^{18}\) Case C-278/14 SC Enterprise Focused Solutions EU:C:2015:228.

\(^{19}\) Recital 114 of Directive 2014/24.


such services which are listed in Annex XIV of Directive 2014/24 has been set in Article 4(d) at € 750,000, a higher threshold than that which applies to other services. Any contract below that value is therefore deemed to be of ‘limited cross-border dimension’. To my mind, such a presumption goes a long way to providing legal certainty without precluding the possibility of rebutting that presumption in a particular case.

III DISTORTION OF COMPETITION BETWEEN PUBLIC AND PRIVATE PROVIDERS

Another issue that has arisen recently is the question of potential distortion of competition between public and private providers, given the financial conditions under which the former may operate. The fourth recital to Directive 2004/18 exhorts Member States to ensure that the participation of public providers does not distort competition. Article 55 permits the rejection of abnormally low offers on the ground of state aid provided the contracting authority first consults with the tenderer and the latter is unable to prove that the aid in question was granted legally.

The issue came to the fore in Data Medical Service. The applicant challenged the award of a contract for processing data for quality control of medicinal products on the ground that the winning tenderer was a public entity that had submitted an abnormally low price. The referring court had raised doubts as to whether the sole provisions on abnormally low offers in the directive were sufficient to prevent distortions of competition between public and private bodies and asked about other possible “corrective mechanisms” to prevent such distortions. The Court however rejected the idea that there could be “corrective mechanisms” other than the provision on abnormally low offers. It pointed out that the EU legislator, while clearly aware of the issue of competition distortion, had not provided any other mechanisms.

It is worth emphasising that Article 55 of Directive 2004/18, and its equivalent in previous and subsequent directives, permits but does not require the contracting authority to take into account the existence of illegal State aid. That there is a discretion and no obligation is particularly clear from the new directive 2014/24, which introduces a limited number of circumstances in which an abnormally low offer must be rejected, namely non-compliance in the field of EU environmental, social or labour law. Illegal State aid is not present on this list. I would add that, in my view, it would be impractical to expect a contracting authority to undertake a state aid analysis involving, for example, complex issues as to whether the private investment test was satisfied, where the Commission itself would normally require at least many months to decide.

IV AWARD CRITERIA

Some of you will be familiar with the case of *Lianakis*, a case decided under Directive 92/50 where the Court held that a contracting authority was not allowed to use as “award criteria” the tenderer’s experience and qualifications, as those criteria related rather to the ability of the tenderer to perform the contract and so were permissible only at the earlier selection stage. It is fair to say that this judgment has caused difficulties in that it is often not easy to draw a ‘bright line’ between criteria which are relevant to the award of a contract and that which are relevant to the ability of a tenderer to perform the contract (‘the qualitative selection criteria’). This is particularly true in the case of contracts which depend on the professional experience of the particular team.

Earlier this year, the Supreme Administrative Court in Portugal gave the CJEU an opportunity to reconsider this issue in *Ambisig*. The facts were simple. The contract notice stated that the contract would be awarded to the economically most advantageous tender based, inter alia, (as to 40% weighing) on ‘the composition of the team, its proven experience and an analysis of the academic and professional background of its members’. The contracting authority stated that this provision was an intrinsic characteristic of the tender and not a characteristic of the tenderer. *Ambisig* did not win the contract and challenged the contract notice on the basis of *Lianakis*. The Court rejected this challenge for essentially two reasons. First, it distinguished *Lianakis* on the facts. The unlawful provision in *Lianakis* related to the general experience of the tenderer and not the staff and experience of the people making up the team that would perform the contract. Secondly, the Court pointed out that the legislation was now different in that Directive 92/50 had been replaced by Directive 2004/18 which provides the contracting authority with greater discretion in determining which tender was most economically advantageous, including determining the quality of bids. The Court recognized that many contracts may depend decisively on the professional merit of the persons entrusted with its performance. One of the reasons the Portuguese court made the reference was that it detected a conflict between *Lianakis*, Directive 2004/18 and indeed the Commission’s proposal for a new directive replacing Directive 2004/18. Both the Court and Advocate General were careful to answer the question by reference to the directive currently in force, although the Advocate General had the luxury to add a post-script stating that the conclusion he reached (with which the Court agreed) was fully consistent with the new directive which had, I quote “the intention to clarify the rules at issue”.

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24 Case C-532/06 *Lianakis and Others*, EU:C:2008:40
26 Paragraph 90 of the Advocate General’s Opinion.
The final area I wish to cover today is remedies. It is rather unusual for the EU to legislate on remedies, as it does in the public procurement ‘remedies’ directives. The normal position is that remedies for breach of EU law are left up to national legislation, subject to compliance with general principles, in particular those of equivalence and effectiveness. This is still the case for matters that lie outside the current EU legislative code for remedies which is set out in the Remedies Directive 89/665, as amended by Directive 2007/66, and covers specific situations of breach of the public procurement rules.

The problem in the field of public procurement is how to balance sanctioning breaches of the Directives (to ensure that Directives are obeyed), while at the same time ensuring legal certainty for the successful tenderer who is awarded the contract and may be unaware of why there has been a breach of the Directive by the contracting authority and who has spent money pursuant to the award of the contract. This tension is reflected in the Preamble of Directive 2007/66. Recital (14) provides that “ineffectiveness is the most effective way to restore competition and to create new business opportunities for those economic operators which have been deprived illegally of their opportunity to compete” but, at the same time, Recital (24) indicates that, in exceptional circumstances, ineffectiveness could lead to disproportionate consequences, and Recital (26) makes explicit reference to the legal uncertainty which may result from ineffectiveness.

Already in its original version, Directive 89/665 provided that national review procedures should allow the possibility to annul illegal decisions, to order interlocutory measures and to award damages. However, even with successive amendments, the directive’s provisions were not considered entirely adequate in creating an effective judicial review system. The original version permitted Member States to provide that annulment of a public works contract which was awarded in violation of EU law could be ordered only in the period before the conclusion of the contract, and that thereafter only damages could be awarded. What is more, Member States did not provide for a minimum period between the award decision and the conclusion of the contract which would have been necessary for an effective review procedure.

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27 Case C-33/76 Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland EU:C:1976:188.
It fell to the Court to attempt to fill in the gaps in effective judicial protection. Noting in 1999 that the system allowed the contracting authority to escape review on the award decision, especially if the contract was signed on the same day as that decision, the Court declared that Member States were required to provide procedures allowing all interested parties to have that decision annulled, regardless of the possibility to obtain damages. In this first landmark case, another problem was that the other tenderers had only learned of the contract concluded between the contracting authority and the successful tenderer through the press, but the Court did not elaborate on this point as it was not directly relevant to the question of whether an award decision should be open to review, regardless of the possibility to obtain damages. However, in *Commission v Austria* the Court then decided that complete judicial protection required an obligation for the contracting authority to inform all tenderers of the adjudication decision and that the unsuccessful tenderers must have sufficient time to examine the validity of that decision. This implied that a reasonable period must elapse between the time when the award decision is communicated 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.

This case-law prompted the EU legislator to modernise the rules relating to review procedures, in particular through the adoption of Directive 2007/66, amending Directive 89/665. It provided a minimum standstill period of 10 days between notification of the award decision to the unsuccessful tenderers and contract signature.

The amended directive increases judicial protection also by obliging Member States to ensure that public contracts are declared ineffective in three circumstances. This is provided for by Article 2d(i) of the directive and is designed, in particular, to combat the practice of awarding contracts without prior publication of a contract notice in the Official Journal, where such publication is required by the public procurement directives. Paragraph 4 of Article 2(d) stipulates, however, that the obligation of ineffectiveness should be inapplicable where three cumulative conditions are met. These are that 1) the contracting authority considers that the award of a contract without prior publication of a contract notice is permitted under 2004/18; 2) that authority has published in the Official Journal a notice expressing its intention to conclude the contract, and 3) the contract has not been concluded before the expiry of a 10-day period following the publication of this notice.

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28 Case C-81/98 *Alcatel Austria* EU:C:1999:534.
29 Case C-212/02 *Commission v Austria* EU:C:2004:386.
The exception contained in Article 2d(4), which seeks to strike a balance between sanctioning breaches and ensuring legal certainty, was recently examined by the Court in *Fastweb (N°2)*. In this case, the applicant disputed the re-awarding by the Italian Ministry of the Interior of a telecoms services contract to Telecom Italia upon the expiry of its previous contract with this company, using the negotiated procedure without prior publication of a contract notice. Although the award decision was annulled, the regional administrative court decided it could not declare the new contract ineffective since the conditions contained in the Italian legal provision transposing Article 2d(4) of Directive 89/665, as amended, were fulfilled. The referring court, the Consiglio di Stato, asked whether that provision precluded a declaration of ineffectiveness even where it was established that the conditions laid down in Directive 2004/18 for awarding without prior publication were not in fact met. The Court held that, even though Article 2d(4) constituted an exception which must be interpreted strictly, its terms should not be interpreted in a manner that would deprive it of its intended effect. Rather than being governed by national law, the national measures which could be taken were determined only according to the rules of the directive. It would therefore be contrary to the wording and aims of Article 2d(4), as well as to legal certainty, to declare a contract ineffective if the three conditions it contained were fulfilled. However, it was important that the reviewing body carried out an effective review of the satisfaction of those conditions. In order to do that, it needed to examine the reasons set out in the notice in the OJ for proceeding without prior publication.

The national court also asked as to the compatibility of Article 2d(4) of Directive 89/665 with the right to an effective remedy enshrined in Article 47 of the Charter, but the Court replied that the applicable time-limits, albeit short, did not in practice make the exercise of the rights conferred by the EU legal order impossible or excessively difficult, and that, by the exception laid down in Article 2d(4), the EU legislature was seeking to accommodate divergent interests. It also pointed out that, after the expiry of the 10 day time limit, an action for damages was still possible. Thus, in looking at the effectiveness of a particular remedy, regard has to be had to the overall system of remedies.

*Fastweb (N°2)* therefore illustrates how the EU legislative code changes the normal position on remedies in cases of breach of EU law since, if the consequences of breach of the obligation in that

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30 Case C- 19/13 *Ministero dell'Interno v Fastweb SpA* EU:C:2014:2194
31 In *Fastweb*, the contracting authority had decided to proceed via a negotiated procedure without prior publication of a contract notice.
32 At paragraph 58.
33 At paragraph 63.
case were a matter of national law, EU law will not have precluded the Italian courts from declaring the contract ineffective.

VI CONCLUSION

In conclusion, I hope that this brief survey of some of the recent case-law has illustrated the role of the Court not only in examining public contract awards which fall outside the scope of the public procurement directives but also some key issues arising under the Directive and the EU remedies Directive. However, it is equally true that the EU legislator has not remained idle but, particularly with the new directives adopted in 2014, has codified some of the Court’s case-law while in some areas going further than the Court had ventured. In the field of remedies, the Court’s rulings have both served to push the legislator to review Directive 89/665 and helped to clarify the content of the amended directive. Thus, I hope that this canter through recent public procurement case law has illustrated the respective roles of the legislator and the Court in developing the law.