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1 Introduction

Establishing the review system in the public procurement, the remedies directives¹ have been in force since 1989 and 1992 respectively, and were subject to review for the last time in 2007.² Meanwhile, the substantial EU law on public and utilities procurement, besides being subject to constant development through the EU case law, has undergone extensive reforms by way of introducing new directives first in 2004³ and then recently in 2014.⁴ In addition to these legal changes, the public procurement situation is undergoing modernisation in the way of digitalisation. However, only some of the developments have found their way into the provisions of the remedies system. With these circumstances in mind, procurement experts have regarded the possibility of an upcoming review of the Remedies Directives as a probability.

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¹ Council Directive 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 (89/665/EEC) (OJ L 395, 30.12.1989, p. 33), amended by Council Directive 92/50/EEC of 18 June 1992 L 209 and Directive 2007/66/EC of the European Parliament and of the Council; 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, amended by Council Directive 2006/97/EC of 20 November 2006 and Directive 2007/66/EC of the European Parliament and of the Council, hereafter the remedies directives.

² 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, OJ L 335, pp. 31–46.

³ 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 sectors, OJ L 134, 30.4.2004, p. 1–113 and Directive 2004/18 of the European Parliament and of the Council of March 31, 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, p. 114–240.

⁴ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 9, 4, 28/03/2014, pp. 1–64, art. 43-44; 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 OJ L 94, 28/03/2014, pp. 65–242, art. 72-73; 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, OJ L 94, 28/03/2014, pp. 243–374, art. 89-90.

In 2017, the European Commission issued the Report on the Effectiveness of the Public Procurement Remedies Directives that, in light of the above mentioned developments, was expected to answer the obvious question: is there going to be a clarification or a review of the public procurement remedies system?⁵ The Report addresses this issue, albeit somewhat disappointingly reaching the conclusion that as *neither major nor urgent needs to amend the Remedies Directives* were identified, it was *decided to maintain them in their current form, without any further modification at this stage*. Instead, the Report indicates alternative ways to cure the *weaknesses identified*, such as promotion of transparency via collection and publication of data regarding the performance of national remedy systems; promotion of cooperation between first instance national review bodies; guidance to be published by the Commission itself on certain aspects of the remedies directives and measures to tackle the national practices by the Member States.⁶

Following, I will look at some of the issues that in my mind have a near-fundamental significance and call for either a review or some clarification of certain issues of the remedies directives currently in force. In addition to some long-standing issues such as the regulation of damages and the rules of disclosure, new gaps between the material law and the review system surfaced with the implementation of the 2014 directives.

I also submit that the decision to not update the review system can be regarded as a lost opportunity to promote modernisation and digitalization of the procurement system. Related to the move to e-procurement, some issues of review procedures - even though not necessarily in conflict with the current remedies system - would benefit from analysis already now in order to better facilitate innovation and modernisation within the EU procurement law system. These examples demonstrate the need to consider review or supplementation of certain parts of the remedies directives.

⁵ 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, Brussels, 24.1.2017, available <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0028&from=EN> (Dec 17, 2017). Hereinafter the Report.

⁶ Report, p. 9–10. On critical approach to the Report, see also: A. Sanchez-Graells. Some Initial Comments On The Commission's Report On The Effectiveness Of The Public Procurement Remedies Directives. Feb 7, 2017. Available <http://www.howtocrackanut.com/blog/2017/2/7/some-initial-comments-to-the-commissions-2017-report-on-the-effectiveness-of-the-public-procurement-remedies-directives> (Dec 19, 2017).

2. Gaps between the new material law and the review system

While the 2004 public and utilities directives did not regulate issues pertaining to the performance phase of a public contract, the situation has considerably changed: the 2014 directives contain both mandatory rules on contract management and termination as well as the choice to regulate the performance of subcontractors by Member States.⁷ The terms of applying these rules and the concerned parties possibility to enforce their rights lacks legal clarity.⁸

2.1 Review of contract modification decisions

In the case of contract modification, the remedies directives certainly provide the option of declaring an unlawfully modified contract ineffective. However, several related issues are left open by the directives, such as: (i) the possibility to use other remedies provided under the remedies directives, for instance to claim damages or prevent enforcement of the modification via interim remedies;⁹ (ii) the extent of ineffectiveness: does the resulting ineffectiveness concern the whole of the contract or only the modified part of it?¹⁰ (iii) the right of interested parties to information about modifications to public contracts.¹¹

With regard to using other remedies, the remedies directives refer to any decision by a contracting authority (entity) as reviewable, the term ‘decision’ to be interpreted to include any act of a contracting authority adopted in relation to a contract within the material scope of the procurement directives, if capable of producing legal effects.¹² No other restrictions apply with regard to the nature and content of a decision made by a contracting authority (entity) in order for that decision to be reviewable.¹³ Thus, a decision by a contracting authority to not to undertake a new award procedure and instead to enter into a modification of a

⁷ Directive 2014/23/EU, art. 42-44; Directive 2014/24/EU, art. 71-73; Directive 2014/25/EU, art. 88-90.

⁸ On the same topic: M. Simovart. Enforcement of Ineffectiveness of Unlawfully Modified Public Contracts. *Juridica International* 2016 No 1, <http://www.juridicainternational.eu/index.php?id=15643>, pp. 43–54; M. Simovart. Old remedies for new violations? The deficit of remedies for enforcing public contract modification rules, *UrT* 2015 p. 33, https://www.urt.cc/sites/default/files/UrT%202015-1_Simovart.pdf *passim*; M. Simovart. Hankelepingu lubatud ja keelatud muudatused uute riigihankedirektiivide ülevõtmise järel. *Juridica i* 2016, lk 52–60.

⁹ M. Simovart, *Old remedies ...*, pp. 42–44.

¹⁰ M. Simovart, *Hankelepingu lubatud ja keelatud muudatused ...*, lk 58.

¹¹ M. Simovart, *Old remedies ...*, p. 39.

¹² Directive 89/665/EEC, art. 1 (1); Directive 92/13/EEC, art. 1 (1).

¹³ Judgment of 28 October 1999, Case C-81/98, Alcatel Austria AG and Others, ECLI:EU:C:1999:534, p. 35.

public contract, is clearly among decisions subject to review.¹⁴ The answer seems to be subject to the Member States choices as under Article 2 (7) of Directive 1989/665 Member States may choose to end the use of any remedies except damages and ineffectiveness after the public contract has been concluded. However, the clause dates back to the time when contract modification was not subject to the procurement directives. Justification of this approach to contract modification cases therefore creates some doubt. In this light, legal clarity and harmonisation would be better served if the remedies directives established clearly what remedies should be available to interested parties in cases of unlawful modification, besides the contract ineffectiveness.

In the case of ineffectiveness following an unlawful modification, the directives does not provide answers with regard to the extent of the ineffectiveness: can the ineffectiveness concern the whole of the modified contract or only the modification? For instance, when the contacting parties wrongly agree that instead of one house, the contractor builds three, is the contract for the first house unlawful as well? It is naturally possible to find solutions for such situations based on the applicable national laws, e.g. based on the established rules of general private or public law. For instance, it is possible to argue that when a contract can be divided into parts and when other parts of the contract could reasonably be made without the part subject to ineffectiveness, such other parts could continue to be legally valid. However, the opposite conclusion can be argued equally successfully.¹⁵ With the view to the significant differences between the Member States laws applicable to public contracts¹⁶ and the resulting diversity of regulation of public contract performance phase, some guidance as to the result or as to the freedom of Member States to decide the issue would benefit a uniform approach. Publication or disclosure of information with regard to the performance phase of public contracts is subject to particular difficulties due to the obvious conflict between the need to protect commercial secrets on the one hand and the supply of information as a precondition for peer review on the other. Even though the principle of transparency can be argued to support the competitor's right to obtain information,

¹⁴ Judgment of 11 January 2005, Case C-26/03, Stadt Halle and RPL Lochau, ECLI:EU:C:2005:5, pp. 36–37; judgment of 19 June 2008, Case C-454/06, presstext Nachrichtenagentur, ECLI:EU:C:2008:351.

¹⁵ M. Simovart, *Hankelepingute lubatud ja keelatud muudatud ...*, lk 58. See also: K. Hartlev, M. W. Liljenbøl. Changes to Existing Contracts under the EU Public Procurement Rules and the Drafting of Review Clauses to Avoid the Need for a New Tender. – *Public Procurement Law Review* 2013/2, pp 51, 54; S. T. Poulsen. The Possibilities of Amending a Public Contract without a New Competitive Tendering Procedure under EU Law. – *Public Procurement Law Review* 2012/5, p 167, 168, 170; S. Treumer. Regulation of Contract Changes Leading to a Duty to Retender the Contract: The European Commission's proposals of December 2011. – *Public Procurement Law Review* 2012/5, pp. 154, 155, 165.

¹⁶ On the diversity of legal approaches to public contract regulation see M. Comba, "Loyalty" in termination of public contracts in Italy, *UrT* 2017 p. 95.

the actual approach to such right seems to be divers in Members States.¹⁷ While the 2014 directives impose some obligation upon the contracting authorities to publicly report contract modifications,¹⁸ that does not apply in all cases and do not guarantee timely knowledge of public contract modifications. Without the guaranteed possibility to learn about possibly breaches, the peer review system cannot however effectively function, raising the question of the suitability of the system for cases concerning contract performance overall.

2.2 Public contract termination

The newly introduced option of contract termination¹⁹ creates challenges for the remedies system. The conditions for applying the right of termination are to be determined by the Member States without any guidelines or restrictions from the Directive. In contractual relations, termination as an instrument seems to function to the exact same effect as ineffectiveness: the rights and obligations of the parties under the contract cease to be enforced and performed.²⁰ While there is nothing to be said of having the right of termination available should the national legislator so desire, introduction of termination as a mandatory tool by the EU legislator raises an obvious question: is there an actual need for such?²¹ What are the desired terms of application of the right of termination, in particular next to the already existing tool of ineffectiveness?

At present, the Directives seem to present two ways to end the legal force of a wrongfully modified public contract. First, economic operators have the option of ending the contract *via* ineffectiveness. That option is subject to a strict time limit of 6 months and a decision or confirmation by a review body. Second, a

¹⁷ On the same topic: C. Ginter; N. Parrest, M. Simovart, Access to the Content of Public Procurement Contracts: The case for a general EU-law duty of disclosure. – Public Procurement Law Review 2013/4, pp. 156–164, passim.

¹⁸ Directive 2014/23/EU, art. 43 (2); Directive 2014/24/EU art. 72 (2); Directive 2014/25/EU, art. 89 (2).

¹⁹ Directive 2014/23/EU, art. 44; Directive 2014/24/EU art. 73; Directive 2014/25/EU, art. 90.

²⁰ Directive 2007/66/EC, Preamble p. 21.

²¹ Neither is there any help from reports documenting the stakeholders' attitudes during the legislative process. For example, in response to the question about the need for an explicit obligation or right of contracting authorities to change the supplier/ terminate the contract in certain circumstances, *a majority of respondents propose to provide the right for the contracting authority to change the contractor or terminate the contract in certain circumstances, such as major changes relating to the contractor.* – Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market. Synthesis of replies, providing the results of consultations with stakeholder from 27.01.2011 to 18.04.2011. – available http://ec.europa.eu/internal_market/consultations/2011/public_procurement_en.htm (accessed June 7, 2017). The outcoming Art 73 of the Directive obviously provides grounds of termination differently from the suggested *major changes relating to the contractor*. In fact, it is difficult to find any justification for the legislative solution in the shape of Art 73 from the publicly accessible stakeholder comments – <https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp>.

contracting authority can end a modified contract *via* termination, taking into account such considerations that the authority itself or the national law deems justified. No time limit or confirmation by an independent authority is required. Furthermore, even though the text of the directives refers to the *right* to terminate, this can actually evolve into a *duty* to terminate in national practice. Namely, while termination of a contract belongs to the private law sphere of legal relations, the decision of a contracting authority to do so can be regarded as a decision within a public law sphere.²² Any discretion that the contracting authority has within making its decisions, is normally subject to inspection and review and may – depending on the national law – entail the possibility to challenge lawfulness of the decision or of not making the decision. For instance, it has been argued that under Estonian law, a contracting authority's decision not to terminate a public contract despite it having been unlawfully modified, could be subject to challenge by an interested party – an economic operator interested in the new contract – and possibly leading into the obligation to terminate.²³ Should such developments take place, there is an even greater need for fair and uniform conditions for applying termination.

2.3 The review of steps aimed at protection of subcontractors in the performance of public contracts

For the purpose of SMEs in public procurement, the 2014 directives refer to the Member States' right to introduce certain measures for the benefit of subcontractors in works contracts. For instance, under art. 71 section 2, Member States may provide that at the request of the subcontractor, the contracting authority shall transfer payments directly to the subcontractor instead to the main contractor. In order to do so, appropriate arrangements concerning that mode of payment must be set out in the procurement documents. While such direct payments to subcontractors are subject to the law of the Member States, the fact that the right itself derives from the directives and the terms of payment are indicated in the concerned procurement documents, leads to inquire if some legal protection under the remedies directives should be available for exercising this option. Should either the subcontractor or the main contractor find its rights violated due to the contracting authority (not) making direct payments, should they be entitled to protection under the remedies directives? Again, the choice is subject to the

²² As in other aspects concerning public contract performance phase, different solutions can apply under national laws.

²³ E. Fels Euroopa Liidu riigihankeõiguse normide rikkumise mõju hankelepingu kehtivusele. Juhendaja M. Simovart. Tallinn 2015, http://dspace.ut.ee/bitstream/handle/10062/46839/fels_ma_2015.pdf, lk 40.

Member States.²⁴ In order to provide more efficient, clearer and equal opportunities for the market participants (contractor and subcontractors) to participate in public procurement, a common approach on the EU level would be justified.

3 Impact of e-procurement upon the remedies system

The importance of electronic public procurement has been emphasised by the European Commission since 2010.²⁵ Under the 2014 Public Procurement Directives, transfer to a fully electronic procurement is imminent in the very near future.²⁶ Taking into account that the remedies directives were adopted at a time where neither e-procurement systems nor electronic means of communication were known, the approach to remedies at the time could benefit from some updating under the light of current move to 100 per cent e-procurement.

Estonia is one of the countries that today have transferred to an almost fully electronic public procurement: with an electronic procurement environment established in 2001, over 90 per cent of procurement procedures were conducted electronically in 2016.²⁷ Following, I will look at some of the examples where the access to remedies can depend on peculiarities of an electronic procurement environment. These issues came to attention during the legislative procedure of the new Estonian Public Procurement Act²⁸ implementing the 2014 Public Procurement Directives and concern provision of review in the times of electronic procurement.

3.1 The case of calculating deadlines and other procedural issues

One of the debated issues concerns the calculation of limitation periods in cases where the claim concerns electronically published contract documents. According to the remedies directives the time period for submitting a claim concerning contract documents must be at least 10 calendar days from the date of the publication of the contract documents. At the same time, a limitation period may not start until the concerned party *knows or ought to know* of the alleged breach of

²⁴ Directive 1989/665, art. 2 (7).

²⁵ Euroopa Digitaalne tegevuskava. Euroopa Komisjoni teatis. Brüssel 26.08.2010 KOM (2010) 245, lk 33-34. Arvutivõrgus (09.03.2017): [http://eur-lex.europa.eu/legal-content/ET/TXT/PDF/?uri=CELEX:52010DC0245R\(01\)&from=ET](http://eur-lex.europa.eu/legal-content/ET/TXT/PDF/?uri=CELEX:52010DC0245R(01)&from=ET).

²⁶ Directive 2014/23/EU, art. 34; Directive 2014/24/EU art. 22, 90; Directive 2014/25/EU art. 40, 73, 106.

²⁷ Rahandusministeerium. 2016. aasta riigihangete kokkuvõte. Avaldatud 17.03.2017. Available (05.12.2017), https://www.rahandusministeerium.ee/et/system/files_force/document_files/riigihankemaastiku_esmane_kokkuvote_2016_1.pdf?download=1, lk 1.

²⁸ Riigihangete seadus (RHS) RT I, 01.07.2017, 1, in force since September 1, 2017, hereinafter RHS.

procurement law.²⁹ In order to provide effective protection, the methods for the application of limitation periods under national law *must not render impossible or excessively difficult the exercise of any rights, which the person concerned derives from Community law*.³⁰

Electronic public procurement registers can be established in two ways for the purpose of obtaining contract documents: either an interested party accessing the register has to be verified or not. In the first case, it is possible to later establish when exactly did a particular party obtain the concerned (challenged) contract documents. That used to be the case in Estonian earlier, until the adoption of the new law in force since September 2017. Therefore, the case law used to establish the moment when a complainant actually downloaded the contract documents or registered with the particular procurement and regarded that moment as the beginning moment of the deadline for challenging the discriminatory or otherwise unlawful clauses that allegedly violated the complainant's rights.³¹ This approach of determining the deadline for submitting a claim on contract documents provided efficient protection of tenderers' rights, even though it could occasionally reduce the legal certainty for the contracting authority and other competitors.

The second option of providing access to contract documents includes publishing the documents and making them openly accessible without a prior step registration or verification by the interested parties (potential tenderers). Therefore, there would be no possibility to establish when a particular prospective tenderer actually accessed or downloaded the contract documents. This is the case with the new Estonian e-procurement system which brought up a discussion during the legislative process: from what moment is it justified to regard that the limitation period starts in cases challenging the terms of a published contract documents?

If the limitation period starts to run from the moment of publishing the contract documents as was initially proposed in the bill for the RHS, the law favours legal certainty: following a certain date the review of contract documents would no longer be possible, as a rule. There is no conflict with the requirement of equal treatment as well. However, this rule can in fact somewhat limit the access to effective review options based on purely formal rules, with little or no room for considering specific situations. Moreover, restricting the review of award

²⁹ S.-J. Otto 2014, pp. 211 – 212.

³⁰ Uniplex (UK) Ltd v NHS Business Services Authority C-406/08, ECLI:EU:C:2010:45, para 40.

³¹ This is established for instance in the following cases of the Complaints Board: Vaidlustuskomisjoni otsus 08.07.2016 nr 153-16/174535 p. 7-8; Vaidlustuskomisjoni otsus 11.04.2014 nr 82-14/150647 p. 5; Vaidlustuskomisjoni otsus 11.07.2014 nr 161/152349 p. 4.2-4-3. All cases of the Complaints Board are accessible here: <https://riigihanked.riik.ee/register/RegisterVaidlustusedOtsing.html> (Nov 17, 2017).

conditions can in fact harm the entire process of the particular procurement and reduce the chances of efficient protection.³²

In light of these considerations, the new Estonian Public Procurement Act actually establishes a “compromise” version: the deadline for submitting a complaint on contract documents is tied to the deadline of submitting tenders instead of the moment of publishing or accessing the contract documents. As a rule, a complaint has to be submitted no later than two or five workdays before the deadline for submitting tenders.

3.2 The changing burden of proof in the times of e-procurement

An even wider implication that a fully electronic procurement system can have upon the system of review concerns the burden of proof. A fully electronic procurement procedure takes place in an environment that performs and contains most of the crucial steps: publication of contract notices; submission of requests or tenders, exchange of information related to a public procurement,³³ control of qualification of tenderers and evaluation of tenders etc. Therefore, most of the information that can be relevant for deciding a complaint submitted for review is already present and can be obtained from the electronic procurement environment.

In the case of Estonia, all steps taken in the in e-procurement register within a procurement procedure are logged and later verifiable.³⁴ Members of the Complaints Board (the review body in public procurement matters³⁵) have special access rights and when a complaint is submitted, they can access the e-procurement register in order to look up relevant information. For instance, the Complaints Board can cross-check any information submitted by tenderers, verify delivery of decisions etc.³⁶ Thus, if a claim submitted to the Complaints Board concerns allegedly unlawful decision made in the course of a procurement procedure, the complaint by an interested party can often have no accompanying paper documents or even electronic copies supporting its claim. Instead, the Complaints Board can look up and verify all the relevant information in the e-Register.

There are exceptions to this of course, depending on the nature of the claim.

³² Seletuskiri riigihangete seaduse eelnõu juurde, <https://m.riigikogu.ee/tegevus/eelnoud/eelnou/d8709d7d-cf5c-45c6-8576-1b7e86c80a8a/Riigihangete%20seadus>, lk 128.

³³ RHS § 45 lg 1, § 238 lg 3.

³⁴ <https://riigihanked.riik.ee/register/#> (Nov 17, 2017). The Register provides the environment for conducting a fully electronic procurement. - RHS § 181 lg 1, § 183 - 184.

³⁵ RHS § 185 lg 1, § 187 lg 13; Riigihangete vaidlustuskomisjoni põhimäärus. Rahandusministri määrus. Vastu võetud 17.07.2017 nr 60, RT I, 20.07.2017, 1.

³⁶ Täieliku e-hangete võimekuse loomine. Eelanalüüs. AS Datel 2016. Available (Nov 17, 2017) https://www.rahandusministeerium.ee/sites/default/files/Riigihangete_politika/register/rhr_eelanaluus_1.0.pdf, lk 20.

For instance, any damage claim must be accompanied by evidence proving the extent of damage. Similarly, a dispute concerning possibly abnormally low tender needs additional proof pertaining to the cost of the tender.

However, often the electronic access rights reduce the burden of submitting evidence and so somewhat ease the access to review. Needless to say, a totally or even nearly paper-free review-system is in harmony with both the idea of environmentally friendly and innovative procurement.

4 Conclusions

Cumulatively, the above examples indicate that there in fact is a rather substantial need to review or update the current remedies directives. Moreover, while the measures mentioned in the 2017 Report of the Commission can successfully uphold or increase the efficiency of national practices with regard to some parts of the remedies directives, the measures cannot make the regulatory gaps disappear. The issues that do need attention – e.g. the very diverse national practices of damage awards or the possibility to review certain breaches taking place during the contract performance phase – cannot be effectively improved by either data collection or monitoring efforts, neither can guidance by the Commission or international cooperation substitute EU legislation.

Moreover, efficiency of the remedies system could very much benefit from a clear vision of how to take advantage of the modernisation and digitalisation efforts that can be made through out the remedies system.