

# THE EU LEGALITY PRINCIPLE IN PUBLIC PROCUREMENT CONTRACTS: ADHERENCE TO PROCEDURALISATION AS A DIRECT CONSEQUENCE

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*The early interest that EU law has demonstrated for public procurement contracts has gradually been molded into a sector-specific paradigm of European administrative law. Despite the constant movement of the sector counting already four generations of substantive and two generations of procedural EU law, its qualification as administrative law provides some pillars of stability; as an expression of a sui generis principle of legality, the award of public contracts is organized via formalistic, yet sometimes rigid and time-consuming procedures, due process emerging as a common principle among national and supranational administrative systems. Even though due process constitutes the gateway to accountability, the aim of the paper is limited to underlining the indicators of administrative procedure in the award of public contracts.*

## 1 INTRODUCTION

The regulation of procurement contracts at an EU level constituted the first positive EU intervention imposing the reorganization of activities of national administrations, considering that the obligation to respect the primary Community law provisions was still rather vague and primarily a negative one. The taxonomy and the divergences of national procuring methods combined with the extremely early intervention in the field practically reversed the stages of emergence of European administrative law in the sector;<sup>1</sup> instead of reliance to the general principles of EU law and negative integration through the adjudicating powers of the ECJ, positive integration was the only road ahead for the approximation of national legislations on procurement contracts. This necessity emerged because to the exception of France, the rest of the six founding Member States regulated the contracting activity of their administrations through exclusively civil law principles and given that in order to do so, the contracting authorities were *ad hoc* exempted from their classic constitutional obligations, administrative law was completely extraneous to these scenarios.<sup>2</sup> As a consequence, the public origin of the contracting activities was far from being self-explanatory and given the hesitance of the Commission in the early integration days, the ‘buying national’ attitude had to be struck down through positive measures.<sup>3</sup>

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<sup>1</sup> Jürgen Schwarze, *European Administrative law* (Sweet & Maxwell, London, 1992); Carol Harlow, ‘Three phases in the evolution of EU administrative law’, in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU law* (OUP 2011) 439-464.

<sup>2</sup> On the state of the art of national procurement strategies at the time of the Treaty of Rome see Maurice-André Flamme, *Traité Théorique et Pratique des Marchés Publics* (Bruylant, Brussels, 1969).

<sup>3</sup> Even though a number of scholars have argued in favor of the direct applicability of the EEC Treaty in procurement scenarios (see for instance Maurice-André Flamme, Philippe Flamme, *Vers l’Europe des marchés*

The interference of EU law in the field of public procurement contracts has cast a multi-layered effect on national administrations. Against the conceptual differences of the Member States, the Europeanization led to a conceptual harmonization, at times even unification.<sup>4</sup> Nevertheless, the process of public contracting needed more intricate, yet pervasive approximation. Another formula had to be found. This variety of contracting methods combined with the objective of tackling against national bias and considering the then limited administrative capacity of the Community reshaped the regulation; the solution was none other than the establishment of specific rules for the award of the contracts: depending on the previous national tradition on the issue this legal framework has either enriched the national administrative scheme (this is the case of France, Spain, Portugal, Greece) or emerged as the first presence of administrative law obligations in the field (the case of the majority of the Member States such as Germany, Austria, Italy etc.).

## 2 THE EU PRINCIPLE OF LEGALITY

Taking into account that the adoption of this specific framework will be applied by national administrations (the term being used in a functional fashion) and considering furthermore the omnipresent objective to protect the economic rights of economic operators, the impact of the EU framework is multiple; for the Member States that used to regulate the award phase through administrative circulars as well as for the bodies governed by public law that were previously exempted from any obligation concerning their buying activity, the EU law framework has had an attributive function, in the sense that it essentially transformed the State buying activity into a *stricto sensu* government function, substituting the previous freedom of contract with public law obligations.<sup>5</sup> For all the public authorities that are governed by the framework, EU procurement law also serves as the basic regulatory instrument that sets limits to the exercise of an already acknowledged authority, preventing phenomena of arbitrariness through legal certainty and transparency. Fulfilling the aforementioned tasks, the specific EU framework is being transformed into a proper principle of legality.

The choice of the principle of legality as the quintessence of EU procurement law and as the defining criterion of its administrative dimension echoes national administrative archetypes. In national administrative systems, the principle of legality acts both as a prerequisite and a consequence of the existence of an administrative authority or an administrative act. However, the components of the principle that act as a prerequisite, for instance, the definition of the critical terms, such as public authority, public service, right or obligation - are of higher normative – usually constitutional – value compared to the rules

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*publics? À propos de la directive Fournitures du 22 mars 1988* (RMC, 1988) 456; José M. Fernández Martín, *The EC Public Procurement Rules: A Critical Analysis* (Clarendon Press, Oxford, 1996); the first direct application of the Treaty provisions in *Dundalk* case (Case 45/87 *Commission of the European Communities v Ireland* [1988] ECR 04929) did not pave the way but was subsequent to the first generation of procurement directives in the early 70s.

<sup>4</sup> For instance, the different understanding of terms such as contracting authority, administrative contract, public service obligation has gradually been replaced by autonomous concepts, such as body governed by public law, public contract, public work etc.

<sup>5</sup> Gerdy Jurgens, Maartje Verhoeven, Paulien Willemsen, 'Administrative Powers in German and English law' in Leonard Besselink, Frans Pennings, Sacha Prechal (eds), *The Eclipse of the legality principle in the European Union* (Kluwer, 2011) 37-53.

that define their tasks and procedures. On the contrary, the normative value of the rules acting as prerequisite and as consequence of the existence of the EU principle of legality are contained in the same legal instrument, the directives.

## 2.1 THE ORIGINS OF THE EU PRINCIPLE OF LEGALITY

Taking into account on the one hand the supranational origin of this principle of legality and on the other hand, the logical proximity, fruit of national law, between the terms ‘rule of law’ and ‘principle of legality’, debating the existence of such a principle, necessarily implies a discussion on rule of law. To begin with, the complete lack of references to EU primary law to the rule of law until the mid-80s wasn’t but a logical consequence of the Community’s functional and organizational proximity to a *sui generis* international organization rather than a federate state. As a result, the lack of references wasn’t but a symptom of an overall absent public law narrative.<sup>6</sup> However, Walter Hallstein, first president of the European Commission and undeterred by the lacking references famously proclaimed Community as a community of law, a proper *Rechtsgemeinschaft*.<sup>7</sup> In spite of the proliferation of similar references resulting to Community being naturally portrayed as a community of law, a polity ‘based on the rule of law’,<sup>8</sup> whose founding Treaty ‘albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law’,<sup>9</sup> it was only Article 2 of the Treaty on European Union that dressed the principle with a constitutional veil holding that: ‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’.

On that note, adopting a rather ‘thin’ definition of the principle of legality, detached from the democratic legitimacy of the State, Schwarze had considered *Snupat*<sup>10</sup> as the birth case of the principle of administrative legality.<sup>11</sup> On the contrary, Pescatore had argued that it was the Treaty of Rome that firstly established the principle arguing that the Community ‘conceived as a body governed by public law subject to the principles of legality and responsibility which apply to the State, is an international organization’.<sup>12</sup>

Nonetheless, despite doctrinal debate, the first Community reference to the principle of administrative legality was rather belated and got lost in translation. In particular, in *Granaria*, a case relevant to the legality of a Community regulation, the Court provided,

<sup>6</sup> On the evolution of the nature of the EU and its impact on European administrative law see Carol Harlow, Richard Rawlings, ‘A fragmented framework’ in Carol Harlow and Richard Rawlings (eds), *Process and Procedure in EU Administration* (London, Hart Publishing 2014) 9-37.

<sup>7</sup> The term was first used by Walter Hallstein, cf Walter Hallstein, *Die EWG – Eine Rechtsgemeinschaft*, 1962, published as Walter Hallstein, ‘Europäische Reden’ in Thomas Oppermann and Joachim Kohler (eds), *Stuttgart: Deutsche Verlags-Anstalt* (Deutsche Verlags-Anstalt, 1979) 343; see also Joel Rideau, ‘Communauté de droit et Etats de droit’ in Mélanges Rend-Jean Dupuy (ed), *Humanité et droit international* (Paris, Pédone, 1991) 249.

<sup>8</sup> Case C-294/83 *Parti écologiste "Les Verts" v European Parliament* [1986], ECR - 01339, para 23, Case C-50/00 *P Unión de Pequeños Agricultores v Council of the European Union* [2002], ECR I-6677, para 38.

<sup>9</sup> Opinion 1/91, pursuant to the second subparagraph of Article 228 (1) of the Treaty [1991], ECR I-06079, para 21.

<sup>10</sup> Joined Cases 42/59 and 49/59 *Société nouvelle des usines de Pontliene - Acières du Temple (S.N.U.P.A.T.) v High Authority of the European Coal and Steel Community* [1961] ECR 53, 87.

<sup>11</sup> Juergen Schwarze, *Droit administratif européen*, vol 1 (Bruylant, 1994) 10.

<sup>12</sup> Pierre Pescatore, *Les travaux du « groupe juridique » dans la négociation des Traités de Rome*, vol. XXXIV (Studia Diplomatica, 1981) 175-176.

unwillingly, a perfect illustration of the linguistic difficulties relevant to sensitive constitutional notions. The English translation of the case contains the term ‘the principle of the rule of law within the Community context’,<sup>13</sup> the French one refers to ‘*le principe de la légalité Communautaire*’, while the German one includes the term ‘*Rechtstaatlichkeit*’. While a first reading of the case reveals a simple translation of the critical term, it was the reception reserved by the national doctrine that revealed the terminological asymmetry; the semantic proximity between principle of legality and the rule of law has led the German doctrine to interpret this case as the first reference to the rule of law,<sup>14</sup> while the other ones did not adopt such a reading. On the contrary, *Hoechst* is generally perceived as providing a first definition of the EU principle of legality.<sup>15</sup> The case provided that:

‘Nonetheless, in all the legal systems of the Member States, any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, those systems provide, albeit in different forms, protection against arbitrary or disproportionate intervention’.<sup>16</sup>

## 2.2 THE STATUS OF THE EU PRINCIPLE OF LEGALITY

This first case relating to the EU principle of legality demanded an explicit legal basis for public actions and as such, they seemed to transpose the Anglo-American conceptualization of the term demanding the acts of public authority being based on an act of parliament. Notwithstanding that the principle of legality figured frequently in opinions of Advocates Generals,<sup>17</sup> and despite being qualified as a ‘value’,<sup>18</sup> ‘an inherent principle of every legal system’ and as ‘one of the fundamental pillars in the historical process of the assertion of the rule of law’,<sup>19</sup> the principle still does not figure among the general principles of EU law.<sup>20</sup>

Yet, this lack of consolidation should not be surprising. In light of the conceptualization of the principle of legality as by-product of the rule of law, the discourse of thin and thick rule of law can be easily transposed to the principle. Consequently, the thin (formal) and the thick (substantive) emerge as the dominant conceptualizations of the

<sup>13</sup> Case C-101/78 *Granaria BV v Hoofdprodukschap voor Akkerbouwprodukten* [1979] ECR 38, para 5.

<sup>14</sup> Rainer Hoffmann, ‘Rechtstaatsprinzip und Europäisches Gemeinschaftsrecht’ in Rainer Hoffmann et al (eds), *Rechtstaatlichkeit in Europa* (Heidelberg, Müller 1996) 323.

<sup>15</sup> Case C-46/87, *Hoechst v. Commission* [1989] ECR I-02859.

<sup>16</sup> *ibid*, para 19.

<sup>17</sup> Joined Cases C-182/03 and C-217/03 *Belgium v Commission* [2006] ECR I-05479, Opinion of AG Kokott, para 69; Case C-533/10 *Compagnie internationale pour la vente à distance (CIVAD) SA v Receveur des douanes de Roubaix and Others* [2012] ECLI:EU:C:2012:347, Opinion of AG Cruz Villalón, para 56 (it is thus in the very nature of European Union law that the rules of which it is comprised are capable of being declared invalid); Case C-309/06 *Marks & Spencer plc v Commissioners of Customs & Excise* [2008] ECR I-02283, Opinion of AG Kokott, para 40 (the AG refers to the ‘principle of lawfulness of administrative action’).

<sup>18</sup> Franz Merli, ‘Principle of Legality and the Hierarchy of Norms’ in Werner Schroeder (ed) *Strengthening the Rule of Law in Europe: From a common concept to mechanisms of implementation* (Oxford, Hart Publishing 2016) 38.

<sup>19</sup> Case C-135/11 P *IFAW Internationaler Tierschutz-Fonds v Commission* ECLI :EU :C :2012 :118, Opinion of AG Cruz Villalón, para 67.

<sup>20</sup> Thomas Von Danwitz, ‘The Rule of Law in the Recent Jurisprudence of the ECJ’ (2014) 37(5) *Fordham International Law Journal* 1311.

principle of legality.<sup>21</sup> At the one end of the spectrum, a thin reading of the principle exhausts its content in compliance with the normative spectrum, while at the other end of the spectrum the thick definition views the law as a democratic expression demanding democratic legitimacy. As Merli has summarized the two opposing concepts as ‘one can have legality without fundamental rights, but one cannot have fundamental rights without legality’.<sup>22</sup> The *ex post* principle of legality referred to by the AGs falls into the first category. Nevertheless, regarding direct EU administration and their acts, the acceptance even of a thick definition of an autonomous principle of legality is not unthinkable under the concept of general interest embedded in the objectives listed in the Treaties.<sup>23</sup> On the contrary, the acceptance of a principle of legality is trickier with regard to indirect administration due to the natural subjection of national authorities to domestic constitutions. This explains why, as far as indirect administration is concerned the principle of legality is frequently confused as the principle of primacy of EU law<sup>24</sup> and the right of effective judicial protection.<sup>25</sup>

To state that the emergence of a new rule of law had an impact on administrative law would be an understatement. The symbiotic, yet archetypical relationship that the rule of law develops with the principle of legality resulted in a silent, yet omnipresent revolution marked by the adaptation of administrative law to the emerging norm. Notwithstanding the divergent impact on national administrations, the relocation of the center of gravity of administrative law is universally the common ground. The detachment of administrative law from ‘its *raison d’être*, the State’, its *destatisation* has not been unanimously welcomed by administrative law scholars.<sup>26</sup> The reception of the Europeanization of administrative law depends primarily on the objectives that preexistent domestic administrative law used to serve; in that sense, the deforestation of public authorities from their almost royal prerogatives, as well as the weakening of the exorbitant status of administrative law is constantly viewed as a crisis of its legitimacy, since the very *ratio* of administrative law was the protection of the State interests.<sup>27</sup> On the other hand, the more optimistic approach of German scholars is justified taking into account that the objectives of the emerging EU administrative law coincide with the objectives of German administrative law, none other than the protection of the rights of private parties.<sup>28</sup>

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<sup>21</sup> The distinction between formal and substantive conceptualization of the principle of the rule of law is fully developed in the work of Fuller, see Lon L. Fuller, *The Morality of Law* (New Haven, Yale University Press 1969).

<sup>22</sup> Merli (n 18).

<sup>23</sup> Loïc Azoulay and Laure Clément-Wilz, ‘Le principe de légalité’ in Jean-Bernard Auby and Jacqueline Dutheil de la Rochère (eds), *Traité de droit Administratif Européen* (Bruylant 2014) 1044-1089; on primary law as source of European administrative law see Herwig C.H. Hofmann, Gerard C. Rowe, Alexander H. Turk, ‘Sources of European Union Administrative Law’, in Herwig C.H. Hofmann, Gerard C. Rowe, Alexander H. Turk (eds), *Administrative Law and Policy of the European Union* (OUP 2011) 67; at the other end of the spectrum rejecting any idea of a principle of legality within the EU see Alexander Somek, ‘Is legality a principle of EU law?’ in Stefan Vogenauer, Stephen Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Oxford, Hart Publishing 2017) 53-76.

<sup>24</sup> Azoulay, Clément-Wilz (n 23) 22.

<sup>25</sup> Eric Caprano, *Etat de droit et droits européens* (Paris, L’Harmattan 2005).

<sup>26</sup> Sabino Cassese, New paths for administrative law: A manifesto, (2012), 10(3), *International Journal of Constitutional Law* 603.

<sup>27</sup> Jean-Bernard Auby, *La bataille de San Romano. Réflexions sur les évolutions récentes du droit administratif* (AJDA 2001) 912-926.

<sup>28</sup> Matthias Ruffert, *The Transformation of Administrative law In Europe* (Munich, European Law Publishers 2007); Wolfgang Hoffman Riem, *Zwischenschritte zur Modernisierung der Rechtswissenschaft*, (2007) 62 *Juristenzeitung* 645;

In an attempt to define the two ends of the community principle of legality, the proclamation of the rule of law as foundation of the Community binds not only the direct administration, but on the contrary every authority acting within the competences of the community law.<sup>29</sup> Indirect administration is, according to the principle of primacy and the principle of effectiveness of Community law, recognized in *Costa v Enel*, bound by the Community rule of law. Therefore, within the procurement context, all contracting authorities are bound by the Community concept of the rule of law. Considering that part of the national diversity in administrative contracting originates from the relationship that the contracting authorities develop with the principle of legality, the interaction between two principles of legality is a phenomenon to observe.

The applied to the procurement contracts principle of legality presents both dynamic and static characteristics. Taking into account that the directive 71/305 was only eleven pages long and contained 44 articles (regulating only the category of public works contracts),<sup>30</sup> while directive 2014/24 is 178 pages long with 138 recitals, 94 articles and 15 annexes,<sup>31</sup> it is safe to say that there is an intensification of the principle of legality. The ever-evolving principle of legality owes its expansion to its dependency from the ever-evolving and ever-expanding European Constitution, to the activist stance of the ECJ, which expanded the coverage of secondary law and to the maturity of certain concepts of EU law, such as the general principle of effectiveness, leading to the adoption of the remedies directives and resulting in a complete system of EU administrative law. Nonetheless, among the static characteristics of the principle, the obligation to organize a procurement procedure remains astonishingly stable and seems immune to the resurgence of administrative discretion.

### 3 PROCEDURALISATION AS AN EXPRESSION OF THE PRINCIPLE OF LEGALITY

Notwithstanding the different intensities of administrative obligations and the dynamics between discretion and obligation, as every autonomous legal order, the allegiance of the EU legal order to an autonomous concept of rule of law has been translated into an autonomous concept of principle of legality.

Yet, despite its autonomy, following in the footsteps of continental administrative archetypes, administrative law and administrative procedure are jointly shaped. Administrative procedure should be defined as a series of actions conducted in a manner that lead to the adoption of an administrative decision. To begin with, administrative procedures have long been considered as synonymous to the rule of law considering their protective to the individual rights function. Schwarze viewed the subjection of the European

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Eberhard Schmidt-Assmann, *Principes de base d'une réforme du droit administratif. Partie 1.*, (2008) 24(3) RFDA 427 ; Schmidt-Assmann, *Principes de base d'une réforme du droit administratif. Parties 2 et 3.*, (2008) 28(4) RFDA 667.

<sup>29</sup> At least within the spectrum of human rights, article 51.1 EU charter of Fundamental Rights.

<sup>30</sup> Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts, *OJ L 185/5*.

<sup>31</sup> 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 Text with EEA relevance, *OJ L 94/65*.

Community to the rule of law as an obligation to also provide administrative procedures that reflect this meta-principle.<sup>32</sup>

As an obligation of substantive administrative law, administrative procedure describes a concept ‘at the heart of administrative law’,<sup>33</sup> the process of administrative decision-making as an obligation of administrative authorities to perform a certain course of action that includes a plethora of successive, yet distinct steps in order to achieve a single purpose. In other words, procedure is the obligation of the meticulous respect of a sequence of steps.<sup>34</sup> In the words of Galligan, it is ‘a commitment to procedural formality, to openness and transparency, to the disclosure of information, and to the need for explanation and justification of the course chosen’.<sup>35</sup> ‘Administrative procedure is the formal path, established in legislation, which an administrative action should follow’.<sup>36</sup>

According to this linear definition, administrative procedure, dismantles the principle of legality into a web of pre-settled steps that have to be thoroughly followed. Proceduralisation or proceduralism should consequently be defined as the phenomenon describing generalized and inflexible adherence to procedure.<sup>37</sup> Negatively, in an effort to avoid confusions, proceduralisation as a phenomenon depicting the symbiotic relationship between EU administrative law and procedure should not be confused with the homonymous phenomenon describing the tendency of the ever-expanding regulation of national procedural rules in order to guarantee the effectiveness of EU law.<sup>38</sup>

Taking into account the ‘natural and logical supremacy’<sup>39</sup> of administration over all the other functions of the State, it is understandable why the conceptualization of administrative procedure constituted a major step for the consolidation of the rule of law in continental legal traditions.<sup>40</sup> Procedures acting as the very embodiment of the vertical relationship developed between the citizen and the administration, since they are the primary ‘conveyor belt’ of the constitutional values and guarantees set forth by the principles of the rule of law, democracy, and efficacy in the interactions of the Administration and the citizen.<sup>41</sup> Despite that administrative procedures constitute common heritage of European administrative law,

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<sup>32</sup> Schwarze, Judicial review of European Administrative Procedure [2004] *Public Law* 146, 156.

<sup>33</sup> Neil Walker, Book Review of Dennis J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures*, (1999) 62 *Modern L Rev* 962.

<sup>34</sup> Giacinto Della Cananea, ‘The Requirement to Carry Out a Procedure’, in Della Cananea, *Due Process of Law Beyond the State*, (Oxford OUP 2016) 17-34.

<sup>35</sup> Dennis J Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures*, (Oxford. Clarendon Press 1996) 482.

<sup>36</sup> Wolfgang Rusch, ‘Administrative procedures in EU Member States’ (Conference on Public Administration Reform and European Integration, Budva, 26-27 March 2009) <<http://www.sigmaxweb.org/publications/42754772.pdf>> accessed 1 July 2020.

<sup>37</sup> Harlow, Rawlings, ‘Proceduralism and automation, Challenges to the values of administrative law’ n Elizabeth Fisher, Jeff King, and Alison Young (eds), *Foundations and Future of Public Law: Essays in honour of Paul Craig* (OUP 2020) 275-298.

<sup>38</sup> Olivier Dubos, ‘The Origins of the Proceduralisation of EU Law: A Grey Area of European Federalism’ (2015) 8 *Review of European Administrative Law* 7; Rorberto Caranta, ‘Remedies in EU Public Contract Law: The Proceduralisation of EU Public Procurement Legislation’ (2015) 8 *Review of European Administrative Law* 75.

<sup>39</sup> Michel D. Stassinopoulos, *Traité des actes administratifs* (Athens, Institut français d’Athènes 1954) 2.

<sup>40</sup> Schmidt-Aßmann, ‘Der Rechtsstaat’ in Josef Isensee, Paul Kirchhof (eds), *Handbuch des Staatsrechts* (3rd edition, C.F. Müller 2004) 541-612.

<sup>41</sup> Javier Barnes (ed), *Transforming Administrative Procedure* (Global Law Press 2008) 16.

familiar to every jurisdiction, the application of civil law or soft law for the award of public contracts has excluded, in some jurisdiction, any application of administrative procedures.

### 3.1 PROCEDURALISATION AS AN EXPRESSION OF THE EU PRINCIPLE OF LEGALITY

Proceduralisation in European administrative decision-making is symbiotic to the objectives of EU law. The all-encompassing objective of the creation of the internal market aiming primarily at creating and protecting ‘individual rights that become part of their legal heritage’<sup>42</sup> is being translated as the protection of procedural rights of private parties against arbitrariness of contracting administration in the field of public procurement contracts. The obligation of the plethora of steps has therefore emerged as a protecting shield for individual rights in the context of administrative decisions, since each steps of the way bears the necessary legal space for the incorporation of the rights. Galligan views the emergence of complex procedures as the result of the incorporation of social values and fairness ‘which add to the richness and complexity of legal processes’.<sup>43</sup> From that point of view, the successive obligations of the precontractual procedure that take the form of rigid, distinctive steps susceptible to engage the administration’s accountability should be contrasted to civil law contracts, which are basically instantaneous decisions, lacking any procedure and consequently any space for procedural fairness. The protection of individual rights does is being transformed to the obligation to respect the step that primarily aims at guaranteeing this right.

The procedural rights that have been explicitly recognized in the field of European administrative law are the rights to information access, the right to access documents, the rights of defense, the principle of legitimate expectations, all of which form the so-called participation rights. The need to incorporate all those procedural rights into procurement decision-making, the regulatory attention is monopolized with the detailed description of procedures, rather than their outcome or their result, since the legitimacy (the protection of procedural rights) unfolds gradually at the different stages of the procedure.<sup>44</sup> In the words of Gonzalez,

‘This sequence allows different parameters to be identified which determine administrative action and which affect different stages of the process of forming and adopting decisions with implications well beyond the formal termination of the procedure. Some of these elements are related to the procedure in itself (information gathering and public-private collaboration, deliberation); others have to do with the outcome of the procedure (lawfulness of decisions); and finally, others are related to the execution of the decision (effectiveness). This sequence

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<sup>42</sup> Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963], ECR 1.

<sup>43</sup> Galligan, *Due Process and Fair Procedures* (OUP 1996) 7.

<sup>44</sup> Hermann Pünder, ‘German Administrative Procedure in a Comparative Perspective: Observations on the Path to a Transnational *Ius Commune Proceduralis* in Administrative Law’ (2013) 11 *INT’L J CONST L* 940.

highlights a gradual optimization of the legitimacy of the actions of the administration that manifests itself during the administrative procedure'.<sup>45</sup>

At the other end of EU legislative intervention, the judicial activism of the Court in the field is equally measured via the lens of formalism as the addition of new steps – in the form of new administrative obligations, functioning as ‘catalysts for a more deliberative and/or reflexive administrative style’.<sup>46</sup>

The recognition of procedural rights of private parties as the legitimacy factor of administrative action results in the distinction of the latter not only externally, from contracts of private law but also internally, from previous administrative narratives. According to the taxonomy established by Barnes, the evolutionary observation of administrative procedures results in the distinction of three generations, that reflect divergent types of governance.<sup>47</sup> The first generation contains primarily individual decisions, while the administration is restricted to a ‘mouth of the law’ function.<sup>48</sup> Administrative procedures that belong to the second generation represent the ‘command and control’ function of governance, reflecting a gradual enrichment of decision-making processes and enhanced guarantees of citizens’ rights.<sup>49</sup> Last but not least, administrative procedures belonging in the third generation constitute a hybrid between vertical and horizontal relationships, since the enhanced collaborative mechanisms erode the archetypical image of administrative interventions as expressions of *imperium*. In the words of Barnes, ‘[t]he old image of hierarchical public administration single-handedly implementing well defined policy goals set down in legislation must today compete with a vision of the administrative process as open-ended, collaborative and networked’.<sup>50</sup> During this third generation ‘the law’s function consists of providing rules on procedures to be followed rather than directly prescribing substantive behavior. [...] the procedure itself is given the role of a solution-finding and norm-generating mechanism’.<sup>51</sup>

### 3.2 PROCEDURALISATION IN EU PUBLIC PROCUREMENT LAW

The emergence of proceduralisation as a general, functional, principle of European administrative law has particularly marked the field of procurement contracts. The transition from a ‘command and order’ administration to what Schmidt-Aßmann has described as steering administrative archetype is particularly evident with procurement contracts, since

<sup>45</sup> Jorge Agudo Gonzalez, ‘The Evolution of Administrative Procedure Theory in New Governance Key Point’ (2013) 6, 73 *Review of European Administrative Law* 102.

<sup>46</sup> Joanne Scott, Susan. P. Sturm, ‘Courts as Catalysts; Rethinking the Judicial Role in New Governance’ (2007) 13 *Columbia Journal of European Law* 565; this is particularly evident in cases such as *Telaustria* and *Alcatel*, see Case C-324/98, *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG, joined party: Herold Business Data AG* [2000] ECR I-10745, Case C-81/98, *Alcatel Austria and Others v. Bundesministerium für Wissenschaft und Verkehr* [1999] ECR I-07671.

<sup>47</sup> Barnes, ‘Three generations of administrative procedures’, in Susan Rose-Ackerman, Henry R. Luce, Peter L. Lindseth, Blake Emerson (eds) *Comparative Administrative Law*, (Elgar 2017) 302-318; see also, Anne Meuwese, Ymre Schuurmans, Wim Voermans, ‘Towards a European Administrative Procedure Act’ (2009) 2(2) *REAL* 3-35.

<sup>48</sup> *ibid* 310.

<sup>49</sup> *ibid* 312.

<sup>50</sup> Francesca Bignami, ‘From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law’ (2011) 59 *Am. J. Comp. L.* 859, 869.

<sup>51</sup> Barnes (n 47) 311.

the award phase of the contract is regulated through ‘the pathways model’,<sup>52</sup> in the sense that the award of the contracts is statutorily depicted as a plethora of possible routes to follow, in the Commission’s words as a ‘menu of common procedures’.<sup>53</sup> The exhaustive nature of the available procurement procedures should be regarded as the first step towards the enforcement of proceduralism, taking into account that the pressing need to guarantee the necessary works, supplies and services is being transformed into a series of obligations (as opposed to the private law freedom of contract).<sup>54</sup> The identification and the description of the needs of a contracting authority are internal to the administration steps and thus irrelevant to procedures. Proceduralisation is being thus activated once the contracting activity has chosen the type of the procedure; therefore, against the relative administrative discretion with regard to the choice of the type of the procedures, once a choice of the procedure is completed, the authority has to meticulously apply all the steps applicable to the type of procedure chosen. As the Court stressed in *Wallon buses*:

[...] although under Article 15(1) of the Directive contracting entities obliged to apply the procedures in the Directive do indeed have a degree of choice regarding the procedure to be applied to a contract, once they have issued an invitation to tender under one particular procedure, they are required to observe the rules applicable to it, until the contract has been finally awarded’.<sup>55</sup>

This holistic approach of the award procedure is the most frequently met in the case-law. The recognition of the procedure as a plethora of consecutive, distinct, yet mandatory steps almost never sees the surface of the Court’s case-law. However, in a rare acknowledgement the Court held that:

[...] the decision by a contracting entity concerning the type of procedure to be followed and whether it is necessary for a prior call for competition to be issued for the award of a public contract constitutes a distinct stage in the procedure (emphasis added), a stage during which the essential characteristics of the execution of the procedure are defined and which may, as a rule, take place only at the point when that procedure is initiated’.<sup>56</sup>

Despite the Court turning a blind eye in the dismantling of the procedure into smaller steps, proceduralisation has emerged through a joint effort of both the legislator and the judge. The first one set the scenery by describing the fundamental steps that safeguard the access

<sup>52</sup> Harlow, ‘The pathways model and steering: Public Procurement’ in Harlow, Rawlings (eds) *Process and Procedure in EU Administration* (London, Hart Publishing 2014) 142-169.

<sup>53</sup> Commission staff working Paper, Evaluation report: Impact and effectiveness of EU Public Procurement Legislation, (2011), SEC 853 final

<<https://ec.europa.eu/docsroom/documents/15468/attachments/1/translations/en/renditions/native>> accessed 1 July 2020.

<sup>54</sup> Case C-299/08, *Commission v France* [2009] ECR I-11587; This case should be considered as a follow-up of *CEI and Bellini*, considering that France had claimed that this case provides a margin of discretion to the Member States, see *Joined Cases C-27/86 to C-29/86, SA Constructions et entreprises industrielles (CEI) and others v Société coopérative "Association intercommunale pour les autoroutes des Ardennes" and others* [1987] ECR 3347.

<sup>55</sup> Case C-87/94, *Commission v Belgium* 1996] ECR I-02043, para 35.

<sup>56</sup> Case C-337/98, *Commission v France* [2000] ECR I-08377, para 36. Considering that the case was relevant to the *rationae temporis* applicability of Directive 93/38/EC, the opinion of AG Jacobs equally underlined the different stages of the procedure.

to the market, while the judge clarified the field of the ‘exit’ (or relevant to the rejection of tenderers) obligations through sectoral consolidation of the rights of defense. Nevertheless, the obligations set by the European instances concern distinctively the obligation to respect each step.<sup>57</sup> On the contrary, the holistic obligation to respect a whole procedure emerges implicitly as a silent general principle. In addition to that and in spite of the interpretative asymmetries concerning the different concepts relevant to each step, the obligation to respect the procedure emerges as a rather abstract one, immune to divergent understandings of concepts. Furthermore, unifying the partial obligations on this issue, the obligation to respect a multi-step procedure constitutes an issue of maximum harmonization as *Commission v France* has suggested.

Archetypically, the endgame of administrative procedures is the adoption of individual administrative acts. Notwithstanding the major differences between individual administrative acts and contracts, the award phase of procurement and concession contracts navigate harmoniously between the two concepts, since on the one hand their endgame is the conclusion of a contract, but on the other hand the future contractor of the administration emerges as the result of the administrative procedure of the award. From that point of view and as a reminder of the embedded administrative roots of the regulation of contracts, the administrative authority has to adopt an individual administrative act. The ‘individual’ dimension of the decision is not a quantitative one, in the sense of the addressee of the decision being a single interested party, but a qualitative one, in the sense of a legal relationship that ties the interested parties in a homogenous way.

Following the previous analysis, unsurprisingly, the result towards which the award procedure of the contract aims at has been embedded in the meticulous respect of all the steps of the procedure. Considering the nuclear role of subjective public rights as well as the importance of the decision being justified on objective grounds, the absence of contract-specific award criteria disqualify the procedure from the qualification of a ‘public contract’, since from an administrative perspective there is no proper act or decision of the administrative authority. In particular, the ECJ has recently held that the lack of award criteria and therefore the lack of choice of tenders disqualifies framework agreements from the concept of ‘public contract’. In *Falk Pharma* and *Maria Tirkonnen*, the contracting authorities entered into framework agreements with all the advisors that had applied and met with the selection criteria.<sup>58</sup> Nevertheless, in both cases, the invitations to tender did not contain any award criteria that allowed the comparison of the preselected tenders. Being questioned on the nature of these agreements on different bases, the Court stressed the objective of the procurement directives as the avoidance of national preference, which according to the Court is most acute at the selection of admissible tenders. Therefore, the lack of choice of a tender annihilates the objective of the regulation<sup>59</sup> and disqualifies framework agreements from the

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<sup>57</sup> The extensive case-law on infringement proceedings concern primarily the non-respect of procedural steps by contracting authorities.

<sup>58</sup> Case C-410/14, *Dr. Falk Pharma GmbH v DAK-Gesundheit* [2016] ECLI:EU:C:2016:399 ; Case C-9/17, *Tirkonnen*, [2018] ECLI:EU:C:2018:142.

<sup>59</sup> See *Falk Pharma*. Consequently, where a public entity seeks to conclude supply contracts with all the economic operators wishing to supply the goods concerned in accordance with the conditions specified by that entity, the fact that the contracting authority does not designate an economic operator to whom contractual exclusivity is to be awarded means that there is no need to control, through the detailed rules of Directive 2004/18, the action of that contracting authority so as to prevent it from awarding a contract in

concept of ‘public contracts’.<sup>60</sup> Even though both cases have been criticized for expanding the scope of the exceptions to public contracts,<sup>61</sup> they nevertheless demonstrate proceduralisation as a genetic step of the procurement regulation.

### 3.3 ENHANCED PARTICIPATION AS A RECENT EXPRESSION OF PROCEDURALISATION

The transition from *administrés* to collaborators of public administration, from addressees of the public legal order to co-drafters of the new emerging administration emerges clearly in the field through the negotiated and the competitive dialogue award procedures. To begin with, the competitive procedures with negotiation as well as the participation of the interested undertakings in the competitive dialogue procedure is not simply an expression of administrative rationality, but on the contrary the ability of the administration to buy beyond the off-the-shelves products depends absolutely on the participation of the interested economic operators. Nevertheless, before being recognized as a procedure of common law alongside open and restricted award procedures, the negotiated procedures constituted an exceptional procedure, available only in extreme scenarios.<sup>62</sup> The need to constrain contracting authorities through obligations combined with the tradition to conclude contracts using negotiated procedures led to a need to root out this natural tendency. As Mattered has commented:

[T]he directive has brought about a radical reversal of the situation in Member States, in that the single tendering procedure, which was the normal procedure chosen by national awarding authorities, has become under the Directive an exceptional procedure, permitted only under the special circumstances set out in the Article’.<sup>63</sup>

In addition to that, the possibility of technical dialogue prior to the publication of the tender notice was adopted in 2004/18 directive following the alignment of the directives with the GPA agreement.<sup>64</sup> Prior to that, perceived by the legislator as a constant threat to the principles of non-discrimination and transparency, any contact with the potential candidates was eliminated during the first decades of the European procurement edifice.<sup>65</sup> Nevertheless, the discrimination concerns succumbed before the increased effectiveness of those

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favor of national operators. It is therefore apparent that the choice of a tender and, thus, of a successful tenderer, is intrinsically linked to the regulation of public contracts by that directive and, consequently, to the concept of ‘public contract’ within the meaning of Article 1(2) of that directive, paras 37-38.

<sup>60</sup> The conclusion of the ECJ is unsurprising considering that already directive 2004/17 had not qualified framework agreements as award procedures, a conceptualization repeated in the 2014 directives.

<sup>61</sup> David McGowan, ‘The importance of award criteria and choice to the existence of a public contract, Case C-9/17 Maria Tirkkonen’ (2018) 4 PPLR 111- 114.

<sup>62</sup> The Court even made sure that the exceptions for the exceptions opening the recourse to negotiated procedures were interpreted narrowly, see Case 199/85, *Commission v. Italy* [1987] ECR 1039; Case C-71/92, *Commission v. Spain* [1993] ECR I-5923; Case C-328/92, *Commission v. Spain* [1994] ECR I-1569; Case C-57/94, *Commission v. Italy* [1995] ECR I-1249; Case C-318/94, *Commission v. Germany* [1996] ECR I-1949.

<sup>63</sup> Alfonso Mattered, *Le Marché Unique Européen. Ses Règles, son Fonctionnement* (Paris, Jupiter 1988) 321.

<sup>64</sup> Recital 10 of Directive 97/52 of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively, OJ L 328/1.

<sup>65</sup> Sue Arrowsmith, ‘The problem of discussions with tenderers under the EC procurement directives: the current law and the case for reform’ (1998) 3 PPLR 65-82.

procedures compared to the classic ones.<sup>66</sup> The path of the adversarial principle in administrative contracting has certainly been an adventurous one, since from an outsider, the participatory mechanisms do not simply offer alternative award procedures, but even alternative contract proceedings, the public private partnership being the most characteristic example.

Another element of enhanced participation to the procurement procedure transcends all the categories of award procedures and concerns the provision of information. Notwithstanding that the contracting authority bears the responsibility of the organization of the award procedure, the interested operators do not simply manifest their interest, but they provide the Administration with all the necessary information allowing it to reach the correct decisions. From an abstract perspective, the provision of detailed information from the citizens, weakens the interrogatory aspect of administration, making it compatible with the definition of administrative procedure of Schmidt-Aßmann as an ‘intertwined process carried out by public bodies designed to gather, manage and analyze information’.<sup>67</sup> In other words, as Barnes has stressed, the Administration:

[n]eed only verify the integrity, reliability, and quality of the information generated, processed, and submitted by the applicant [...]. This privatization is borne of a new regulatory strategy – the transference of transaction costs to the private sector and a shared responsibility between state and society in the promotion of the public interest, while the ultimate control of the final result remains in the hands of the administration’.<sup>68</sup>

Therefore, participation is being transformed to ‘a sort of duty’.<sup>69</sup>

### 3.4 FRAGMENTED PROCEDURALISATION AS AN EXPRESSION OF THE EU PRINCIPLE OF LEGALITY

Proceduralisation is construed as synonymous to the right-oriented objectives of EU administrative edifice. Yet, as an integral part of the EU administrative construction, public procurement law has equally inherited the genes of the same disease, procedural

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<sup>66</sup> Recitals 42-43 of Directive 2014/24 on public procurement and repealing Directive 2004/18/EC OJ L 94/65 ‘A greater use of those procedures is also likely to increase cross-border trade, as the evaluation has shown that contracts awarded by negotiated procedure with prior publication have a particularly high success rate of cross-border tenders. Member States should be able to provide for the use of the competitive procedure with negotiation or the competitive dialogue, in various situations where open or restricted procedures without negotiations are not likely to lead to satisfactory procurement outcomes. For works contracts, such situations include works that are not standard buildings or where works includes design or innovative solutions. For services or supplies that require adaptation or design efforts, the use of a competitive procedure with negotiation or competitive dialogue is likely to be of value. Such adaptation or design efforts are particularly necessary in the case of complex purchases such as sophisticated products, intellectual services, for example some consultancy services, architectural services or engineering services, or major information and communications technology (ICT) projects. In those cases, negotiations may be necessary to guarantee that the supply or service in question corresponds to the needs of the contracting authority’.

<sup>67</sup> Schmidt-Aßmann, ‘Structures and Function of Administrative Procedures in German, European and International Law’, in Barnes (ed), *Transforming Administrative Procedure*, (Global Law Press 2008) 47-74

<sup>68</sup> Barnes (n 68) 47.

<sup>69</sup> Anna Simonati, ‘The Principles of Administrative Procedure and the EU Courts: and Evolution in Progress’ (2011) 4 *Review of European Administrative Law* 50.

fragmentation, which is further exacerbated by the specific characteristics of the field. As Lenaerts and Vanhamme have described the phenomenon:

‘The European Community has no comprehensive legislation on the procedural rights of private parties to be respected throughout the administrative process that precedes the adoption of decisions which might adversely affect the interests of such parties. Rather it has a variety of ad hoc legislative enactments applicable to specific fields of substantive law supplemented with unwritten general principles of law whose observance conditions the legality of administrative proceedings and thus the legality of the decision adopted as a result of these proceedings’.<sup>70</sup>

Proceduralisation and its effective implementation in the field of public procurement should be regarded as synonymous to detailed regulation, for a number of factors but not simply because the latter guarantees the effectiveness of the former. To begin with, detailed regulation in the European administrative law space should be regarded as the panacea against the ‘weak administrative capacity of the Union’.<sup>71</sup> Unable to observe the correct application of European policies by national administrations and being slightly prejudiced against the latter, the European legislator’s contribution in the field of European administrative law has been correctly labelled as ‘imposed uniformity’ since EU laws craft extremely detailed legislation.<sup>72</sup> The lack of administrative capacity which acts as a catalyst for the enhancement of the enforceability through the creation of detailed rules bears also another characteristic; the lack of vision of administrative decision-making in the EU law context contributes additionally to the detailed regulation of each field.

Moreover, the increasing complexity of the administrative apparatus constitutes an impediment to the codification of an *administrative ius commune*, since EU, lacks competence for the codification of administrative procedures not only before the European institutions, but more importantly before national administrations.<sup>73</sup> In order to remedy against the unconvincing - among doctrine - potential competence awarded by article 100A, article 298 was added in the Treaty of Lisbon.<sup>74</sup> Nevertheless, despite the debate on the existence of competence to regulate the EU civil service, the codification of administrative procedure lacks political desirability.<sup>75</sup> In addition to that, in the absence of a comprehensive legislation

<sup>70</sup> Koen Lenaerts, Jan Vanhamme, ‘Procedural rights of private parties in the Community Administrative Process’, (1997) 34 CMLR 531.

<sup>71</sup> R. Daniel Kelemen, *Eurolegalism: The transformation of Law and Regulation in the European Union* (HUP, 2011).

<sup>72</sup> Rob J G M Widdershoven, ‘Developing Administrative Law in Europe: Natural Convergence or Imposed Uniformity’, (2014) 7 Review of European Administrative Law 5.

<sup>73</sup> Päivi Leino Sandberg, ‘Efficiency, Citizens and Administrative Culture. The Politics of Good Administration in the EU’, (2014) 20(4) EPL 681; Melanie Smith, ‘Developing Administrative Principles in the EU: A foundational Model of Legitimacy?’ (2012) 18(2) European Law Journal 269; Christoph Vedder, ‘(Teil)Kodifikation des Verwaltungsverfahrensrechts der EG’ in J. Schwarze, C. Starck (eds), *Vereinheitlichung des Verwaltungsverfahrensrechts in der EG* 98.

<sup>74</sup> Nevertheless, Schwarze remained unconvinced of the legal basis provided by 298 TFEU, Juergen Schwarze, ‘European Administrative Law in the Light of the Treaty of Lisbon’ (2012) 18(2) *European Public Law* 285; following the same line of reasoning Craig has equally expressed his doubts that even post-Lisbon the legal competence to enact such a law is lacking, see Paul Craig, ‘A general law on administrative procedure, legislative competence and judicial competence’, *European Public Law*, (2013) 19(3), 503.

<sup>75</sup> On the 15<sup>th</sup> January 2013, the European Parliament adopted a resolution requesting from the European Commission the submission of a proposal for the codification of Administrative Procedure of the EU. According to the resolution, nine general principles governing the direct EU administration would be codified, including principle of transparency, fairness, efficiency, legitimate expectations constituting a code

of individual rights in administrative decision-making can't be simply replaced by article 41 ECHR, since that does not cover the economic rights stemming directly from the fundamental freedoms. Therefore, this results to a fragmented 'public administration without a common law on administrative procedure'.<sup>76</sup> In order to tackle the abstractive character of the general principles of EU law that necessarily regulate the field transforming case-law into a quasi-primary legal source, the European legislator imposes sector-specific legislation that consequently result in extreme fragmentation.

Perhaps the scourge of excessive fragmentation is endemic to the field. Fragmentation should also be regarded as the direct consequence of the complexity of administrative procedures – the procedures of award of procurement contracts naturally belong in this category,<sup>77</sup> since the impossibility of convergence through negative integration obliges the European legislator to adopt positive, yet sector-specific procedures, which results in a 'mixed bag', a 'heterogenous and unsystematic amalgam of procedures'.<sup>78</sup>

As external aspect of fragmentation should be regarded not only the distinction of the sector-specific measures from other positive interventions of the EU, but also the isolation of the specific administrative procedures from the general ones and the impact the former cast on the latter. On top of the external fragmentation which distinguishes the sector of public contracts from the other EU policies implemented via indirect administration, the sector presents extreme internal fragmentation. A factor for identifying the internal fragmentation is that the specific regimes of award function as *lex specialis* compared to the *lex generalis*, none other than the regime described in the classic sector directive. Notwithstanding that the three types of contracts of the so-called classic sector were at last consolidated with directive 2004/18, sources of divergence continue to exist. To begin with, the utilities contracts remain subjected to another regime, a lighter one that is adapted to the specific characteristics of the relevant markets and has parallelly a sector-specific remedies directive. The specific regime of Annex II B services that are subject to very limited procedural requirements.<sup>79</sup> Furthermore, in an effort to codify the chaotic situation that emerged in the aftermath of the relevant to the concession contracts case-law, acknowledging that the two interpretative communications of the Commission worsened instead of

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of practice under Article 298 TFEU. Nevertheless, the Baroso Commission was not convinced of the benefits of such a legislative initiative. The European Parliament reiterated, on the occasion of a resolution on the monitoring of EU law of the 26<sup>th</sup> October 2017, the necessity of such a codification. The Commission has since remained silent, see <[http://www.europarl.europa.eu/doceo/document/TA-8-2017-0421\\_EN.html?redirect](http://www.europarl.europa.eu/doceo/document/TA-8-2017-0421_EN.html?redirect)> accessed on 1 July 2020.

<sup>76</sup> Eva Nieto-Garrido, Isaac Martin Delgado. 'Towards a Law on Administrative Procedure' in *European Administrative Law in the Constitutional Treaty* (London, Hart Publishing 2007) 107–138; see also Herwig C.H. Hofmann, Gerard C. Rowe, Alexander H. Turk, 'The present and future condition of European Union Administrative Law where the authors focus on the personal fragmentation of the integrated administration as the source of the legal one', in Herwig C.H. Hofmann, Gerard C. Rowe, Alexander H. Turk (eds), *Administrative Law and Policy of the European Union* (OUP 2011).

<sup>77</sup> Gonzalez (n 45) has described complex administrative procedures as defined by the exercise of discretionary powers, regulatory strategies based on goal-oriented programs, since the goals and interests at stake are not one dimensional, in the same way that it is possible that the administrations involved may not be either; all of which contributes to the fact that the recipients of these procedures are not singularisable (approval of general provisions and plans), giving rise to complex legal relationships, which may be triangular or multilateral.

<sup>78</sup> *ibid* 85.

<sup>79</sup> They are only subject to technical specifications and the publication of contract award notices (Arts. 74-77 Directive 2014/24).

ameliorating the situation, another specific regime emerged from the adoption of the Concessions Directive.<sup>80</sup> A fifth regime covers the public-private partnerships and a last one includes all the contracts that fall outside the *rationae materiae* of the directives and are thus regulated by ‘a periphery of floating principles’ of EU primary law.<sup>81</sup>

#### 4 THE IDENTIFICATION OF THE STEPS IN THE AWARD PROCEDURE

The award of a contract as a procedure is mostly evident via two distinctive elements; on the one hand the obligation to respect certain time limits between each step of the way, and on the other hand regulation of steps by completely different rules. Explicit time limits between the different phases of the award of contracts have been imposed for the first time by the generation of directives of 2004. In particular, once the contract notice is published, articles 38 of the public sector directive and article 45 of the utilities directive set different time limits for the reception depending on the type of the award procedure. Yet, the different time limits allow for the effectiveness of fundamental freedoms, since they allow the expression of a cross-border interest. The importance of time-limits is revealed by the maximum harmonization of the minimum time limits leaving no room for maneuver to the Member States.<sup>82</sup> The possibility of shortening the time limits in the directives of 2014 as a response to the financial crisis underlines rather than threatens their importance.<sup>83</sup> The detailed presentation of an award procedure is of minimum added value for the purposes of this paper. On the contrary, the presentation of the clearly separate steps of the administrative procedure contribute to the objective of the analysis.

##### 4.1 THE DISTINCTION BETWEEN SELECTION AND AWARD PHASES

To begin with, the clear-cut dichotomy between the selection and the award phases of the award of contract, and therefore the difference between suitability of the candidate and most economically advantageous tender have emerged as the first indicators of this administrative sequence. The different rules governing the two steps of the procedure were raised for the first time in *Beentjes*.<sup>84</sup> In *Beentjes*, the referring court asked, among others, whether Directive 71/305/EEC precluded the rejection of a tender for lack of professional experience. In its reply, the ECJ set for the first time the principle of rigid dichotomy between selection and award criteria by stating that ‘even though the directive [...] does not rule out the possibility that examination of the tenderer’s suitability and the award of the contract may take place simultaneously, the two procedures are governed by different rules’,<sup>85</sup> adding that ‘their

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<sup>80</sup> Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance, OJ L 94/1.

<sup>81</sup> Dacian Dragos, Roberto Caranta (eds), *Outside the procurement directives – inside the Treaty?*, (Copenhagen, Djof Publishing 2012).

<sup>82</sup> Article 38, now article 66 of both Directives 2014/24 and 2014/25, which sets as minimum time limits the ones defined in each award procedure.

<sup>83</sup> Glenn Fletcher, ‘Minimum time limits under the new Public Procurement Directive’, (2014) 3 PPLR 94-102.

<sup>84</sup> Case 31/87, *Gebroeders Beentjes BV v State of the Netherlands* [1988] ECR 04635.

<sup>85</sup> *ibid*, para 16.

choice [the choice of contracting authorities] is limited to criteria aimed at identifying the offer which is economically most advantageous'.<sup>86</sup> This case-law is far from isolated. On the contrary, the dichotomy was clarified in *GAT*, where the referring court asked whether references relating to the products offered by the tenderers to other customers can be used not as a criterion establishing their suitability but as an award criterion.<sup>87</sup> The Court held that directive 93/36/EEC precludes a list of references being listed as an award criterion.

The waterproof distinction between the two was strengthened in the aftermath of the *Lianakis* ruling.<sup>88</sup> In *Lianakis*, the Municipal Council of Alexandroupolis published a call for tenders and the contract notice specified the award criteria in order of priority. Among the award criteria, the contracting authority had used the tenderer's experience and qualifications. The Court held that the contracting authority had wrongfully applied the aforementioned criterion as an award criterion, since the tenderer's ability to perform the contract was a selection criterion and could only be taken into account at the previous phase. Notwithstanding that 'Directive 92/50 does not in theory preclude the examination of the tenderers' suitability and the award of the contract from taking place simultaneously, the two procedures are nevertheless distinct and are governed by different rules'.<sup>89</sup> The *Lianakis* ruling established a fundamental distinction between selection and award criteria and the impossibility of potential spillover from the one to the other. To sum up, the *acquis* of *Lianakis* is that in the selection phase it is the tenderer that is evaluated, while in the award phase it is the tender that is under assessment.<sup>90</sup>

The rigid distinction between the two phases was not well received by practitioners, since the tendency was in favor of the flexible approach.<sup>91</sup> The *acquis* of the *Lianakis* ruling was also reiterated in the utilities context, even though the utilities directive did not set out specific criteria of qualitative selection.<sup>92</sup> In particular, on the occasion of the award of a design and consultancy contract by ERGA OSE, the contracting authority set different qualifications for Greek and foreign firms, excluding the firms that had submitted an expression of interest in the six months preceding the date of that competition. In addition to that, among the award criteria the contracting authority had listed 'specific and general

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<sup>86</sup> *ibid*, para 19; see also Case 31/87, *Gebroeders Beentjes BV v State of the Netherlands* [1988] ECR 0463, Opinion of AG Darmon, paras 35-37 'In simpler terms, it may be said that the criteria for the award "to the most economically advantageous tender" concern the "product" and not the "producer", the quality of the "work" and not that of the contractor. The directive thus draws a clear distinction between the criteria for checking the suitability of a contractor, which concern the qualities of the contractor as such, and those for awarding the contract, which relate to the qualities of the service which he offers, of the work which he proposes to carry out. In those circumstances, compliance with the provisions of the directive requires that the criteria should not be confused and that criteria relating to the contractor's suitability should not be taken into account in connection with the award of the contract'.

<sup>87</sup> Case C-315/01, *GAT v ÖSAG* [2003] ECR I-6351.

<sup>88</sup> Case C-532/06, *Emm. G. Lianakis AE v. Alexandroupolis* [2008] ECR I-251, I-269.

<sup>89</sup> *ibid*, para 26.

<sup>90</sup> The conclusions of the judgment were not favorably received by the doctrine, see for instance, Philip Lee, Implications of the *Lianakis* decision (2010) 19 PPLR 47; Chris Bovis, Giacomo Calzolari, 'Dialogue', in Gustavo Piga, Steen Treumer (eds), *The Applied Law and Economics of Public Procurement* (Routledge 2013) 69-81.

<sup>91</sup> Steen Treumer, 'The distinction between selection and award criteria in EC procurement law – a rule without exception?', (2009) 3 PPLR 103-111.

<sup>92</sup> Council Directive 93/38 only contained Article 34, which described the award criteria for the identification of the most economically advantageous tender. On the contrary, a good indication of the complexification of the procedure is the number and the sophistication of the articles that describe the selection as well as the award criteria in the 2014 Directives. More specifically, Articles 78-84 of the 2014/24 Directive describe both selection and award criteria, as well as the procedure of the exclusion in every phase of the procedure.

experience'. The Commission claimed that, by setting different requirements for foreign companies, the contracting authority breached the principle of equal treatment and confused, in an unacceptable way the selection and the award phases of the contract. The Hellenic Republic claimed that the clause at stake was always applied not as an irrebuttable presumption, but the parties could provide clarifications in order not to be rejected. Nevertheless, the Court rejected the argument by holding that Greece was in breach of the relevant to award criteria article 34 of the directive.<sup>93</sup> The absolute character of the prohibition of the meddling between the two was again reiterated on the occasion of the next generation of directives in *Spain v Commission*, the Court rejecting the use of previous experience as award criterion.<sup>94</sup>

The clear distinction established in *Lianakis* continues to remain the principle even in the aftermath of *Ambisig*,<sup>95</sup> despite interpretations of the latter as an overruling of the former. The procurement contract at stake was a contract for services of an intellectual nature awarded on the basis of the most advantageous economic offer. Among the award criteria laid down by the contracting authority figured the criterion of the evaluation of the team, which included 'its proven experience and an analysis of the academic and professional background of its members'.<sup>96</sup> On the contrary, among the award criteria listed in article 53(1)(a) the academic or relevant to the performance criteria weren't listed, since the list is only indicative. *Ambisig*, who had been ranked second after the selection phase of the contract challenged the inclusion of a selection criterion in the award phase. The selection board dismissed *Ambisig*'s argument stating that 'the experience of the proposed technical team is, in the specific case, an intrinsic characteristic of the tender and not a characteristic of the tenderer'.<sup>97</sup> AG Wathelet was of the opinion that the critical criterion was admissible for the evaluation of the tenders, since it was a specific and not a generic one. Nevertheless, he underlined that this distinctive line is not an overruling, but a confirmation of the *Lianakis* ruling: 'I even think that this distinction between an abstract and a specific analysis of manpower is not incompatible with the judgments in *Lianakis* and *Others* and *Commission v Greece*'.<sup>98</sup>

Since the Court was convinced by the opinion of the AG, the *acquis* of *Lianakis* has not been relativized.<sup>99</sup> The *Lianakis* *acquis* has been further enhanced by the principle of legal and substantive identity between the operators being preselected and the ones submitting tenders.<sup>100</sup> Even though the requirement of identity has been interpreted extensively by the Court, it has nevertheless been admitted that this requirement is applicable even in restricted procedures, enhancing the distinction between the two steps.<sup>101</sup>

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<sup>93</sup> Case C-199/07, *Commission v Greece* [2009] ECR I-10669.

<sup>94</sup> Case C-641/13 P, *Commission v Spain* [2014] ECLI:EU:C:2014:2264.

<sup>95</sup> Case C-601/13, *Ambisig* [2015] ECLI:EU:C:2015:204.

<sup>96</sup> *ibid*, para 10.

<sup>97</sup> *ibid*, para 13.

<sup>98</sup> Case C-601/13, *Ambisig* [2015] ECLI:EU:C:2014:2474, Opinion of AG Wathelet, para 45.

<sup>99</sup> As is often the case, for judgments that are issued right after the adoption of a new, sector-specific legislation, but fall outside the *rationae temporis* of their applicability, the relevant provisions of the new directives act as interpretative guides for the cases, as an expression of the good administration of the justice, see AG Wathelet (n 99) part V, *post scriptum*.

<sup>100</sup> Case C-396/14, *MT Højgaard A/S and Züblin A/S v Banedanmark* [2016] ECLI:EU:C:2016:347.

<sup>101</sup> Case C-697/17, *Telecom Italia v Infratel Italia SpA* [2019] ECLI:EU:C:2019:599.

To sum up, considering that the dichotomy of the two phases remains untouched, the verification processes can't be confused, since the object of each's phase evaluation is not identical.<sup>102</sup> Subsequently, considering the difference in data, the obligation to state reasons for the rejection at each phase is satisfied by different criteria. Nevertheless, from a chronological perspective, neither *Lianakis* nor the directives exclude a simultaneous assessment of the two.

#### 4.2 THE SUSPENSION OF THE AWARD PROCEDURE AT THE SELECTION PHASE

At the selection phase of the contract, the rejection of undertakings could only be an administrative decision and not a regulatory one, since the latter does not satisfy the hearing principle. A neighboring to the hearing principle obligation at the selection phase of the contract concerns the rejection of economic operators bearing a CE mark. In particular, the Court explicitly deprived the contracting authorities from the competence to reject economic operators whenever the presumption of compliance with European standards was at stake contributing to the emergence of an additional step in the procedure.

In *Medipac-Kazantzidis*, the overlapping of the Medical Devices Directive with the principle of rule of law and general principles of EU law governing the procurement procedures resulted in two new, distinctive administrative obligations.<sup>103</sup> In that ruling, the activist contribution of the Court did not consist in the 'discovery' of new obligations, but rather it clarified the process of interaction of the two sector-specific mentalities. The *acquis* of *Medipac-Kazantzidis* is that the principles of equal treatment and transparency, combined with rule of law attributes oblige the contracting authorities to inform the national competent authority whenever a case of non-conformity with CE marking arises and to suspend the award procedure while waiting for the authority's decision concerning the validity of a CE mark.

The case was relative to the supply of surgical sutures. In particular, the general hospital of Heraklion (a body governed by public law) launched an award procedure for the supply of surgical sutures with a below-thresholds value. The contract would be awarded on the basis of the lowest prices and the sutures had to bear the CE marking, pursuant to Directive 93/42. Medipac was one of the tenderers offering medical supplies that bore the CE marking, according to the technical specifications of the contract. Nevertheless, the administrative board of the hospital decided that Medipac's tender had to be excluded following the doubts expressed by surgeons of the hospital concerning the technical reliability of its proposed contracts. Therefore, on the basis of the complaints of the surgeons, the contracting authority unilaterally decided to reject the tender. Medipac appealed against the decision of the procurement committee before the Greek Council of State, and the national supreme administrative court referred the question of the unilateral rejection to the Court of Justice, which, since the contract was falling outside the scope of the directives, used the *acquis* of the medical devices directive in order to resolve this question. In particular, according to the

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<sup>102</sup> This waterproof distinction is also reflected in the directives, which continue to regulate the phases via different sections.

<sup>103</sup> Case C-6/05, *Medipac-Kazantzidis v (PE.S.Y. KRITIS)* [2007] ECR I-04557.

technical specifications laid down in the notice of award, the contracting authority did not go beyond the CE marking, requesting only compliance with that.

According to article 5 of Directive 93/42/EEC relative to the free movement of medical devices ‘Member States shall presume compliance with essential requirements referred to in article 3 in respect of devices which are in conformity with the relevant national standards adopted pursuant to the harmonized standards’. This presumption of compliance was rebuttable, since the directive set out in Article 8(1) the safeguard and withdrawal procedure:

‘[W]hen a Member State ascertains that the devices referred to in Article 4() [...], when correctly installed, maintained and used for their intended purpose, may compromise the health and/or the safety of patients, users or, where applicable, other persons, it shall take all appropriate interim measures to withdraw such devices from the market or prohibit or restrict their being placed on the market or put into service’.

In particular, the competent authority to carry out the safeguard procedure in Greece was the Ministry of Health, Welfare and Social security acting through the directorate for Biomedical Technology. Nevertheless, as was stressed by AG Sharpston ‘it is common ground that Greece initiated neither the safeguard procedure under Article 8 nor the procedure for dealing with wrongly affixed marking under Article 18 of the Medical Devices Directive’.<sup>104</sup> On the contrary, even though the contracting authority had informed the National Drug Association, the administrative committee did not wait for the reply of the former but decided to take matters at its own hands and when the competent authority replied that the products were effectively compliant with the CE marking, the tender remained rejected.

Compared to other rejections at the selection phase, *Medipac-Kazantzidis* illustrates a reverse process of rejection; when issues of public health and safety are raised for products that bear CE marking, they can’t simply be excluded from the procurement contract at stake but they have to be withdrawn from the national market. Considering the threat for the free movement of medical devices that the withdrawal from a national market constitutes, the directive contains a specific process as well as a competent to carry it out authority. Notwithstanding the serious doubts of a public authority, considering the consequences of the safeguard procedure, the rebuttal of the presumption of compliance with CE mark needs thorough examination and motivation. The non-respect of the procedure set out in the directive leads necessarily to an infringement of the free movement of the relevant devices. As was held by AG Sharpston, ‘[t]he legitimate desire – indeed, the duty – of a hospital that is a contracting authority to protect public health must find expression in a way that does not cut right across the principles of free movement, equality of tenders, transparency and proportionality arising from the EC Treaty’.<sup>105</sup>

Therefore, in an effort to find a compromise between the two directives, the Court adopted AG’s opinion, according to which the discretion of rejection with regards to

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<sup>104</sup> Case C-6/05, *Medipac-Kazantzidis v (PE.S.Y. KRITIS)* [2007] ECR I-04557, Opinion of AG Sharpston, para 74

<sup>105</sup> *ibid*, para 82.

technical standard has to be restricted due to the lack of competence awarded by the Member State. As a consequence, AG Sharpston recognized that contracting authorities ‘must suspend the award procedure and inform the competent national authority of its concerns. If the competent national authority rejects those concerns as unfounded, the suspension of the award procedure must be lifted and the tender in question treated as technically acceptable’.<sup>106</sup>

*Mutatis mutandis*, later on, the infringement proceeding initiated against Greece concerned the rejection on grounds of non-conformity by hospital procurement committees of numerous medical devices certified with CE marking, bypassing the mandatory prior examination by the national competent authority.<sup>107</sup> In *Commission v Greece*, the infringement proceeding was based on multiple complaints that were identical to the issues raised in *Medipac-Kazantzidis*. Nevertheless, in the context of this case, and despite any lack of references to the value of the contracts, the departure from the safeguard procedure was not based on the general principles applicable to procurement procedures but the Court based the breach on constituted article 8(2) of Directive 93/36.

#### 4.3 THE STANDSTILL STEP OF THE AWARD PROCEDURE

The revolution of the Remedies scenery resulted from the addition of a new step in the procedure, none other than the standstill. According to the formula developed in *Rewe and Comet*, Community law acts as a forum of creation of individual rights, while their enforcement lies in the discretion of the national legislator.<sup>108</sup> In an effort to fight against the natural flaws that emerge from this deferential approach of procedural rules, the EU legislator has relativized this general premise in the public procurement field, where we observe the phenomenon of ‘internal market law made better’,<sup>109</sup> since the EU chose to additionally restrict national’s legislator autonomy by regulating the remedies in the field.<sup>110</sup>

However, the legislator chose a much less interventionist approach. From a quantitative perspective, the Remedies directive aim at the coordination of the remedies. As the Court held:

‘Directive 89/665 does no more than coordinate existing mechanisms in Member States in order to ensure the full and effective application of the directives laying down substantive rules concerning public contracts, it does not expressly define the scope of the remedies which the Member States must establish for that purpose’.<sup>111</sup>

In other words, the European legislator, respecting the divergent legal traditions in the field, designed the mechanisms of redress as pathways, leaving excessive regulatory discretion to

<sup>106</sup> *ibid*, para 98.

<sup>107</sup> Case C-489/06, *Commission v Greece* [2009] ECR I-01797.

<sup>108</sup> Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 188.

<sup>109</sup> Stephen Weatherill, ‘EU law on Public Procurement: Internal market law made better’, in Sanja Bogojevic, Xavier Groussot, Jörgen Hettne (eds), *Discretion in EU Public Procurement Law* (Hart Publishing 2018) 21-50.

<sup>110</sup> On the evolutionary approach of remedies in EC law, see Thomas Eilmansberger, ‘The relationship between rights and remedies in EC law: in search of the missing link’, (2004) 41 CMLR 1199-1246.

<sup>111</sup> Case C-92/00 *Hospital Ingenieure*, [2002] ECR I-05553, para 58.

the national legislator.<sup>112</sup> In addition to that, from a qualitative perspective, the EU legislator did not explicitly prioritize any type of remedies, since article 2(6) of Directive 89/665/EEC explicitly stated that:

‘[E]xcept where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement’.<sup>113</sup>

Allowing explicitly the replacement of interim relief by damages after the conclusion of the contract, the obligation of correct transposition would be satisfied even in terms of alternativeness, the Member States having to provide either a set aside and interim relief or the award of damages. The regulatory approach of absolute equivalence among the available remedies, was compatible with the taxonomy of national regimes of public procurement. Nevertheless, this principle of absolute equivalence was relativized in the aftermath of the *Alcatel* ruling.<sup>114</sup> The issue at stake was essentially the reasonable limitation period for set aside and interim relief remedies. Considering that the Remedies directives remained silent on national limitation’s period and that furthermore, the award of damages was open after the conclusion of the contract, one of the remedies provided for in the directive was always available. A reaffirmation of the sufficiency of the award of damages as well as the deferential approach on the setting of time-limits was provided in both in *Universale-Bau* and *Santex*.<sup>115</sup> Summarizing the approach of the Court, Eliantonio commented that ‘the ECJ’s approach seems to be that a national limitation period is in breach of the principle of effective judicial protection whenever it deprives the parties concerned of any remedies before the national courts’.<sup>116</sup>

If the Court had continued to follow the *Universale-Bau* and *Santex* approach, the availability only of damages would be sufficient. In addition to that, the equivalence of the available remedies is compliant with the deferential approach of *Rewe/Comet*. Nevertheless, the virtue (or the activist contribution of *Alcatel*) is that it raised the standard of effectiveness in the field from a deferential one, to a *Simmenthal*-like principle of effectiveness that the ‘full force and effect’ requirement of national procedural rules should be tested against every remedy available.<sup>117</sup> From the perspective of administrative law, *Alcatel* is an activist ruling because, through the vehicle of the general principle of effectiveness of EU law, it has created

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<sup>112</sup> Case C-258/97, *Hospital Ingenieure* [1999] ECR I-1405, paras 21 *et seq.*, in particular para 28; Case C-54/96, *Dorsch Consult* [1997] E.C.R. I-4961, paras 40 *et seq.*; and Case C-76/97, *Tögel* [1998] ECR I-5357, paras 2 *et seq.*

<sup>113</sup> The reluctance of the European legislator to intervene against national procedural law should be contrasted with the previous to the adoption of the Remedies directive regime, when the Court, in light of application of article 169 TFEU, accepted the award of interim relief even after the conclusion of the contract, ie the *Lottomatica* case, Case C-272/91 R, *Commission v Italy* [1994] ECR I-01409.

<sup>114</sup> Case C-81/98, *Alcatel Austria and Others* [1999] ECR I-07671.

<sup>115</sup> In both cases, the permissibility of national time-limits was reaffirmed, and the national frameworks were not found in breach of the principle of effectiveness of EU law, Case C-470/99, *Universale-Bau* [2002] ECR I-11617, Case C-327/00, *Santex* [2003] ECR I-01877.

<sup>116</sup> Mariolina Eliantonio, ‘The influence of the ECJ’s Case law on Time limits in the Italian, German and English Administrative Legal Systems: A comparative analysis’, (2009) 15(4) *European Public Law* 616.

<sup>117</sup> Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, [1978] ECR – 00629.

new administrative obligations, adding a new step in the award procedure interpreting almost *contra legem* the Remedies directive.

In 1996, the Austrian Ministry of Economy and Traffic published an invitation to tender for the supply of components of the electronic system for automatic data transmission. The applicable Directive was the Public Supply Directive 93/36. The contract was awarded to Kapsch AG. The conclusion occurred on the same date with the award decision. The unsuccessful tenderers applied to the *Bundesvergabeamt* requiring the annulment of the award decision and interim measures for the suspension of the performance of the contract. According to the applicable Austrian law, the interim relief measures were applicable until the conclusion of the contract. After the conclusion, the Federal Public Procurement Agency could only confirm the potential unlawfulness of the award decision opening the floor to the claim of damages. Under the application of national law, the Federal Public Procurement Agency dismissed the interim relief claims. However, the dismissal decision was challenged before the Constitutional Court on the grounds of incompatibility of national provision to Directive 89/665/EEC. Essentially, the Court was asked whether the Remedies Directive obliged Member States to always provide set aside and interim relief remedies against the award decision. Austria argued that the transposition was compliant with the aforementioned article 2(6) of the Remedies Directive.

However, the Court was faced with a problem of legal realism; theoretically and according to the formal character of the award procedure, the award decision and the conclusion/signature of the contract were different decisions, thereby leaving, prior to the signature, the necessary time and place for the set aside and the interim relief of the award decision. However, two major tendencies were practically depriving the interim relief of any effectiveness. On the one hand, the ‘race to signature’ phenomenon which describes the overwhelming tendency of contracting authorities to conclude the contract as soon as possible, even on the same day with the award decision, making any interim relief inapplicable. Supplementing the destructive effect of the race to signature, the employment of rules and methods of civil law in a great number of jurisdictions was resulting in the publication only of the conclusion of the contract and subsequently the unsuccessful tenderers were never notified of the award decision.<sup>118</sup>

In order to safeguard the effectiveness of the set aside and interim relief damages, the Court explicitly prioritized set aside and interim relief by holding that the award decision does not fall under article 2(6), but instead under article 2(1)(b), as a potential unlawful decision which a party may ask to set aside. In particular, the Court underlined their importance for ensuring effective application of the Directives by holding that remedies should be provided ‘in particular at the stage where infringements can still be rectified’.<sup>119</sup> The Court concluded that the award decision should always be open to challenge and that the exception of article 2(6) only refers to cases after the award of the contract. The shift from *Universale-Bau*, where the Court ruled, among others, on the compatibility of the absence of suspensory effect of national review proceedings.

Essentially, the *acquis* of Alcatel is that the time between the award and the conclusion of the contract cannot be a consequence of mere procedural formalism, but a guarantee of

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<sup>118</sup> *ibid*, para 48.

<sup>119</sup> *Alcatel* (n 114) para 33.

the effectiveness of EU law. As Pachnou rightfully observed, in *Alcatel* the Court ‘defined the result, but not the means’ for its enforcement.<sup>120</sup> However, this only proved to be half-true, since *Alcatel* proved to be a catalyst to the redesign of national procurement remedies.<sup>121</sup> The AG had sufficiently demonstrated the path to be followed by stating that ‘procedural effectiveness and economy therefore require that there should be a separate procedure for reviewing, in sufficient time, the validity of the decision awarding the contract’.<sup>122</sup> Therefore, an indication of the means to be followed was after all included in *Alcatel*.

In particular, the means to the correct implementation of the *Alcatel* *acquis* is the enforcement of the principle of legality through the emergence of administrative obligations. To begin with, in the aftermath of *Alcatel*, Austria adopted a Federal circular intended to ensure compliance until the adoption of provisions. Since the Federal circular was not binding, the unsatisfied and determined to implement the ruling Commission initiated an infringement proceeding proving that in the absence of binding rules, some *Länder* were not obliged to communicate the award decision. In particular, from the *Alcatel* ruling emerged not one but two administrative obligations; the obligation to communicate the award decision to all the unsuccessful tenderers and the requirement to attend a reasonable time between the award and the conclusion. *Alcatel* essentially transformed the award decision of the contract from an internal to the administration decision, communicable only to the interested party to an administrative decision that affects adversely the unsuccessful tenderers making it for that reason duly communicated and motivated. Or as the Court held in *Commission v Austria*:

‘Legislation relating to access to administrative documents which merely requires that tenderers be informed only as regards decisions which directly affect them cannot offset the failure to require that all tenderers be informed of the contract award decision prior to conclusion of the contract, so that a genuine possibility to bring an action is available to them’.<sup>123</sup>

The *acquis* of *Alcatel* ruling is the establishment of reasonable time that allows access to justice against the decision to award the contract. Notwithstanding that the judge did not cross the Rubicon by establishing a minimum of reasonable time for the Member States, the Commission did not refrain from enforcing the new standards of effectiveness against national laws that would, prior to *Alcatel*, be considered compatible with the Remedies directive. The lack of provision of a mandatory standstill period between the award and the conclusion of the contract is Spain didn’t successfully pass the standard of remedies.<sup>124</sup> *Mutatis mutandis*, inflicting the double obligation of notification of the award decision and the

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<sup>120</sup> Despina Pachnou, ‘Enforcement of the EC procurement rules: the standards required of national review systems under EC law in the context of the principle of effectiveness’, (2000) 9 PPLR 73.

<sup>121</sup> See in particular, Aris Georgopoulos, ‘The system of remedies for enforcing the public procurement rules in Greece: a critical overview’, (2000) PPLR 75-93; Cecily Davis, ‘The European Court of Justice decision in *Alcatel* – the implications in the United Kingdom for procurement remedies and PFI’, (2002) PPLR 282-287; Joël Arnould, ‘The consequences of the *Alcatel Austria* case under French law: the Sodisfom judgment of the Administrative Court of Paris’, (2003) PPLR 148-150; William Timmermans, Mike Gelders, Standstill obligations in European and Belgian public procurement law (2005) 6 PPLR 265-290.

<sup>122</sup> Case C-81/98, *Alcatel Austria and Others*, Opinion of AG Mischo [1999] ECR I-07671, para 47.

<sup>123</sup> Case C-212/02, *Commission v Austria* [2004] ECLI:EU:C:2004 :386, para 23.

<sup>124</sup> Case C-444/06, *Commission v Spain* [2008] ECR I-02045.

suspension of the procedure, the non-suspensive character of the notification of both Irish and French law was sufficient for their incompatibility with the Directive.<sup>125</sup> The obligations entailed in the *Alcatel* ruling were, alongside with the sanction of ineffectiveness, the biggest novelty of the new Remedies Directive.<sup>126</sup>

## 5 CONCLUSION

Administrative law, whether national or supranational, does not adhere to formalistic procedures in vain; a multi-step procedure creates the necessary legal space for the ‘fitting’ of the *ratio* of the legislation while at the same time leaving the necessary traces allowing for accountability. As such, EU procurement law has adhered to the same unwritten principle of administrative law. Reversing the argument, the dismantling of the procurement directives into procedures and of the procedures into steps constitutes an undeniable argument of the administrativisation of the field. However, as was demonstrated, this due process narrative was initially only abstractly depicted in the directives. It was primarily the jurisprudential *acquis* of the sector that raised bulkheads between the different stages of the procedures, followed by the legislator who seized the chance and codified these significant contributions of the Court. The gradual emergence of proceduralization has also resulted in its autonomy from similar national narratives, in the sense that once consolidated, their specific traits echo the EU legal order from which they came resurfaced. As fruits of the European administrative law tree, in light of the absence of an administrative procedure act, the procurement procedures have shown symptoms the same fragmentation disease. In addition to that, the tendency of EU law towards enhancement of procedural instead of substantive rights is equally reflected in the procurement procedures, in the sense that judicial activism has lately concentrated on the guarantee of the effectiveness of EU law, rather than access to the procurement market. Last but not least, the resilience of the procurement procedures is also evident from their capacity to adapt to new governance models which essentially transform the addressees of the administrative legal order to its co-drafters. Procurement procedures constitute the most important *acquis* of the EU interference with public contracts.

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<sup>125</sup> Case C-455/08, *Commission v Ireland*, [2009] ECR I-00225; Case C-327/08, *Commission v France* [2009] ECR I-00102.

<sup>126</sup> To state that the standstill obligation has been codified by the legislator would be an understatement. Directive 2007/66 was adopted in order to codify the aforementioned jurisprudential *acquis*, taking into account that standstill obligation and ineffectiveness of the contract redefined the remedies scenery, in particular Article 2(6) of Directive 2007 ‘furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement’.

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