2 Remedies Directives: one in the Classical sector and the other one in the Utilities (may be private entities thus need for flexibility and adaptation of the remedies when there is no administrative decision to be annulled)

WHAT CONTRACTS ARE COVERED BY SUCH REMEDIES?

Principle of equivalence and judicial protection (see C-92/00 Krankenhaustechnik) which means that remedies must be available for contracts outside the scope of the Public Procurement Directives, such as service concession contracts and contracts below thresholds. For works concessions and Annex IB services which fall within the scope of the Public Procurement Directives, remedies as strictly provided for in the Remedies Directives must be available.

COMMON FEATURES IN BOTH REMEDIES DIRECTIVES

Interest to act: Remedies open to any person having or having had an interest in obtaining a particular contract falling within the scope of the Directive and who has been or risks being harmed by an alleged infringement.

Prior information as an option: the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.

One common remedy in the two Directives: award **damages** to persons harmed by an infringement. Practical difficulty: proof of the damage (tender costs+ loss of the chance to win the contract) and the causal link (likelihood to win the contract if there was no breach of PP rules). Not the most effective remedy as it is a long procedure on the merits and the difficulty of proof deters aggrieved bidders to bring an action. Often Civil Courts have jurisdiction as opposed to specialised administrative bodies responsible for the review procedures.

PRE-CONTRACTUAL REMEDIES

Effective remedy in the classical sector and as an option in the utilities: **interim measures in interlocutory procedures**, e.g. suspension of the procedure for the award of the contract; injunction to communicate documents, injunction to re-tender or to amend some conditions in the tender documents.

Member States cannot add restrictive conditions for the access to this remedy.

Second effective remedy in the classical sector and as an option in the utilities: setting aside of unlawful decisions including the removal of discriminatory specifications in the tender documents

However, to be fully effective, Alcatel Austria (Aff. C-81/98) and more recently Commission v. Austria (24.6.04 in C-212/02) should apply:

Complete legal protection presupposes, first, an obligation to inform tenderers of the award decision. 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.

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Complete legal protection also requires that it be possible for the unsuccessful tenderer to examine in sufficient time the validity of the award decision. Given the requirement that the Directive have practical effect, a reasonable period must elapse between the time when the award decision is communicated to unsuccessful tenderers and the conclusion of the contract in order, in particular, to allow an application to be made for interim measures prior to the conclusion of the contract. "

Otherwise, contracting authorities would run for the signature of the contract, would inform unsuccessful tenderers after the signature of the contract where Member States may limit remedies to awarding damages (see paragraph 6).

SPECIFIC REMEDIES IN THE UTILITIES AS AN OPTION

- Measures with the aim of correcting any infringements and preventing injury to the interest concerned, in particular an order for the payment of a daily fine in cases where the infringement has not been corrected or prevented

- Conciliation through the intervention of the Commission ;

- Attestation that at a particular time procedures and practices of a contracting entity is in conformity with community law concerning the award of contracts.

WHO IS THE NATIONAL BODY RESPONSIBLE FOR REVIEW PROCEDURES?

- Judicial or administrative body but subject to judicial review or review by another body which is a court or a tribunal and independent of the contracting authority and the review body

OBLIGATION FOR MS TO PROVIDE THE COMMISSION WITH INFORMATION ON THE OPERATION OF NATIONAL REVIEW PROCEDURES EACH YEAR

Difference between Member States depending on Alcatel, the body responsible for review procedures (Court vs. specialised body), availability of interlocutory procedures and confidence in the system.

REVISION OF THE REMEDIES DIRECTIVES

The revision of the remedies directives is on the Commission 2006 Work Programme. An extended impact assessment and probably a legislative proposal is expected to be adopted by the Commission at the end of March 2006.

In order to ensure the proper enforcement of the 'legislative package' modernising and simplifying the EU Public Procurement rules (Directives 2004/17/EC and 2004/18/EC), we have launched a general revision of the effectiveness of the review procedures and mechanisms provided for in the Remedies Directives. DG Internal Market has consulted Member States, contracting authorities, economic operators, lawyers, professional associations and non-governmental organisations since 2003.

Consultations of economic operators and their representatives have revealed that the operation of national review procedures does not always make it possible to correct failures to respect the EU public procurement rules effectively and quickly. It has also become apparent that the effectiveness of remedies in the public procurement area varies considerably from one Member State to another.

The first problem to be tackled at EU level is the need for improving the effectiveness of pre-contractual remedies provided in the existing Directives (i.e. interim measures before the public contract is signed) which are the most adequate types of "formal" remedies for public procurement procedures. Compared to other types of remedies such as damages, they are quicker, more effective as they enable correction of the breach before it is too late and are less costly for the parties involved as well as for society as a whole.

In order to enable aggrieved tenders to bring such a pre-contractual remedy before it is too late to have effective redress (i.e. before the contract is signed and performed), national review procedures should provide for a standstill period which is a short period of time - 10 days in the majority of cases - running from the notification of the award decision to tenderers until the signature of the contract.

The requirement of a standstill period originally results from ECJ case law (*Alcatel*, Case C-81/98 and *Commission v. Austria*, Case C-212/02). However, this case law does not address important issues such as the duration and scope of the "standstill". The attempt to implement this case law in Member States has not produced fully satisfactory results. Some practical problems have not been resolved by case law. The *status quo* would not remedy the inadequate enforcement of the rules and would increase legal uncertainty both for public authorities and economic operators. That is the reason why it is likely that DG MARKT will propose to insert into a Directive, a regulated standstill period, including its consequences on the award procedure and on the operation of the pre-contractual remedy. A consensus with Member States has emerged on the need to provide for a standstill period in a new Directive. However, all the details and more particularly the possible exemptions, adjustments and consequences of the standstill period, are still being discussed.

The second problem which is not dealt with specifically by the existing Directives is the need for effective remedies against the illegal practice of direct award of public contracts. Since it is the most serious the most serious breach of Community law in the field of public procurement on the part of a contracting authority (see paragraph 37 of Case C-26/03 – *Stadt*

Halle), stakeholders support an EU initiative in this area. Illegal direct award occurs when a contract is signed between a public authority and an economic operator in a non-transparent (no publication of a prior notice) and non-competitive manner. This illegal practice has generally the effect of favouring local players to the detriment of EU competitive businesses providing goods or services at best value for money.