Remedies, Single Market and Governance: The importance of effective legal protection

Judge Marc Steiner

(The views expressed are those of the speaker and do not necessarily reflect the views of the Court.)

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Government Procurement Agreement / WTO / Recent Developments

GOVERNMENT PROCUREMENT

13 AND 15 NOVEMBER 2018

WTO hosts first workshop on government procurement and governance

Officials from more than 30 WTO members attended the first Advanced Workshop on Government Procurement and Governance which took place at the WTO headquarters in Geneva on 13-15 November. The workshop allowed capital-based experts responsible for the functioning of public procurement markets to exchange views on effective systems with the aim of promoting good governance practices.

Government Procurement Agreement GPA 1994 / History

- Normally when speaking about dispute resolution in a WTO context this means using the WTO dispute settlement mechanism (Art. XXII GPA 1994 = Art. XX GPA 2012).
- Perhaps the most innovative and far-reaching mechanism introduces by the GPA is the possibility of private bid challenge in the hands of aggrieved tenderers. (Peter Trepte)
- History from a WTO-perspective: Trondheim panel report 1992 was especially weak when it came to the “necessary measures” to bring Norway’s practices into compliance with its obligations under the Agreement.

Art. XX GPA 1994 (Challenge procedures)

7. Challenge procedures shall provide for: (a) rapid interim measures to correct breaches of the Agreement and to preserve commercial opportunities. Such action may result in suspension of the procurement process.

Granting remedies as transaction costs

The view of the economists from the 90ties was that implementation of public procurement regulation (and remedies as well) are transaction costs which need a justification in terms of “best value for money”.

Art. XX GPA 1994 / Swiss perspective

Swiss understanding 1994:
“The Member States are conferred discretion when it comes to the question, whether the remedies should have suspensive effect or no.”
(Swiss Federal Gazette 1994 IV 359)

Effective legal review in Switzerland I

Switzerland has on federal level 1994 basically chosen not to go beyond the minimum of legal review imposed by the Government Procurement Agreement. Meanwhile there has been adopted in the Swiss constitution a guarantee of access to justice (Art. 29a BV). So there is a certain pressure to go for more legal protection than required by the GPA. Lesson learned: The GPA influences legal protection beyond its scope. The same is true concerning the statistics obligations.

Effective legal review in Switzerland II

When it comes to the new Swiss Federal Act on Public Procurment of 21 June 2019 the parliament has voted according to the proposal of the government for a legal remedies system on federal level, that doesn't provide for suspensive effect outside the scope of the WTO Government Procurement.

Lesson leared: If you want to see how committed your country is on effective remedies then you have to look what happens below thresholds.

GPA 1994 (Art. XX)

According to the personal view of the speaker a provision that systematically excludes effective interim measures by national law without giving the judge the possibility to undertake a balance of interests is not compliant with Art. XX GPA 1994 or Art. XVIII GPA 2012.

GPA 2012 (Art. XVIII:7(b))

The GPA 2012 is more precise when it comes to the guiding principle, that interim measures should preserve the right of the potential bidder to participate in a specific procurement procedure.

(Swiss Federal Gazette 2017 2095)

Interim measures and pacta sunt servanda according to the Swiss Federal Administrative Court

The validity of a private law-contract can not be assessed without considering the public procurement regulation. The fact, that the procuring entity has concluded the contract immediately after the award, does not hinder the judge to grant suspensive effect (BVGE 2009/19).

Art. 42 of the new Swiss PPA

(2) In the case of contracts within the scope of international treaties, a contract may be concluded with the selected tenderer after expiry of the deadline for appealing against the award, unless the Federal Administrative Court has granted suspensive effect to an appeal against the award.

The revised GPA 2012 is more than a market access tool

"While benefits of the GPA are often seen in terms of providing market access rights for national suppliers in the other GPA parties' markets, the Agreement can also be seen as a powerful tool for improving **governance** and promoting development."

(Nicholas C. Niggli, former Chairman of the WTO Committee on Government Procure-ment)

Revised Government Procurement Agreement (GPA) 2012 and Corruption I

Preamble:

Recognizing the importance of transparent measures regarding government procurement, of carrying out procurements in a transparent and impartial manner and of avoiding conflicts of interest and corrupt practices, in accordance with applicable international instruments, such as the United Nations Convention Against Corruption; …

Revised GPA 2012 and Corruption II

Art. IV:4c General Principles

A procuring entity shall conduct covered procurement in a transparent and impartial manner that prevents corrupt practices.

Revised GPA 2012 and Corruption III

Art. VIII:4e Conditions for participation

... may exclude on grounds such as: professional misconduct or acts or ommissions that adversely reflect on the commercial integrity of the supplier

New publication (also on GPA 2012)

Elisabeth Lang/Marc Steiner,
Public Procurement Regulation:
Fostering Market Access and Simultaneously
Preventing Corruption – A Swiss Perspective,
The British Journal of White Collar Crime,
Volume III/Number 1, p. 13 ff.

Transparency ex post

Transparency ex post is intrinsically linked to the good governance purpose of public procurement legislation. Judicial review is not possible if the procurement procedure and the key steps from the public call for tenders to the decision on the award are not carefully documented (see on this topic the judgment of the Swiss Federal Administrative Court B-307/2016; 23rd of March 2016).

This is particularly true when it comes to negotiations or if the bid is completed after having been submitted.

The Importance of Judicial Review in Switzerland

In Switzerland there are financial market supervision (FINMA) and the Competition Commission, but there is no specific supervision authority on public procurement on federal level or an administrative review body.
Appeals against decisions of procurement authorities are directly dealt with by the Federal Administrative Court.
A public procurement judge on federal level must therefore be particularly “weatherproof”.

Judicial Review from a EU perspective

Even if it were to be accepted that … the principle *pacta sunt servanda* could be used against the contracting authority by the other party to the contract in the event of rescission, Member States cannot rely thereon to justify the non-implementation of a judgment establishing a failure to fulfil obligations under Article 226 EC … (Judgment of the CJEU C-503/04, para. 36)

EU directives: transparency ex post

"The traceability and transparency of decision-making in procurement procedures is essential for ensuring sound procedures, including efficiently fighting corruption and fraud. Contracting authorities should therefore keep copies of concluded high-value contracts, in order to be able to provide access to those documents … (directive 2014/24/EU, recital 126)

Judicial Review from a EU perspective

Directive 2007/666/EC, recital 34:
"Since […] the objective of this Directive, namely improving the effectiveness of review procedures concerning the award of contracts […] cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, …"

Judicial Review from a EU perspective

EUROPEAN
COMMISSION

Brussels, 24.1.2017
COM(2017) 28 final

REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

ON THE EFFECTIVENESS OF DIRECTIVE 89/665/EEC AND DIRECTIVE 92/13/EEC, AS MODIFIED BY DIRECTIVE 2007/66/EC, CONCERNING REVIEW PROCEDURES IN THE AREA OF PUBLIC PROCUREMENT

Judicial Review from a EU perspective

Report COM(2017)28 final:
"There is currently no EU-wide monitoring and evaluation system of remedies in Member States. Data for remedies actions on public contracts … are not collected in a structured, coherent and systemic manner that would allow analysing the results obtained in an automated and easily comparable way."

Judicial Review from a EU perspective

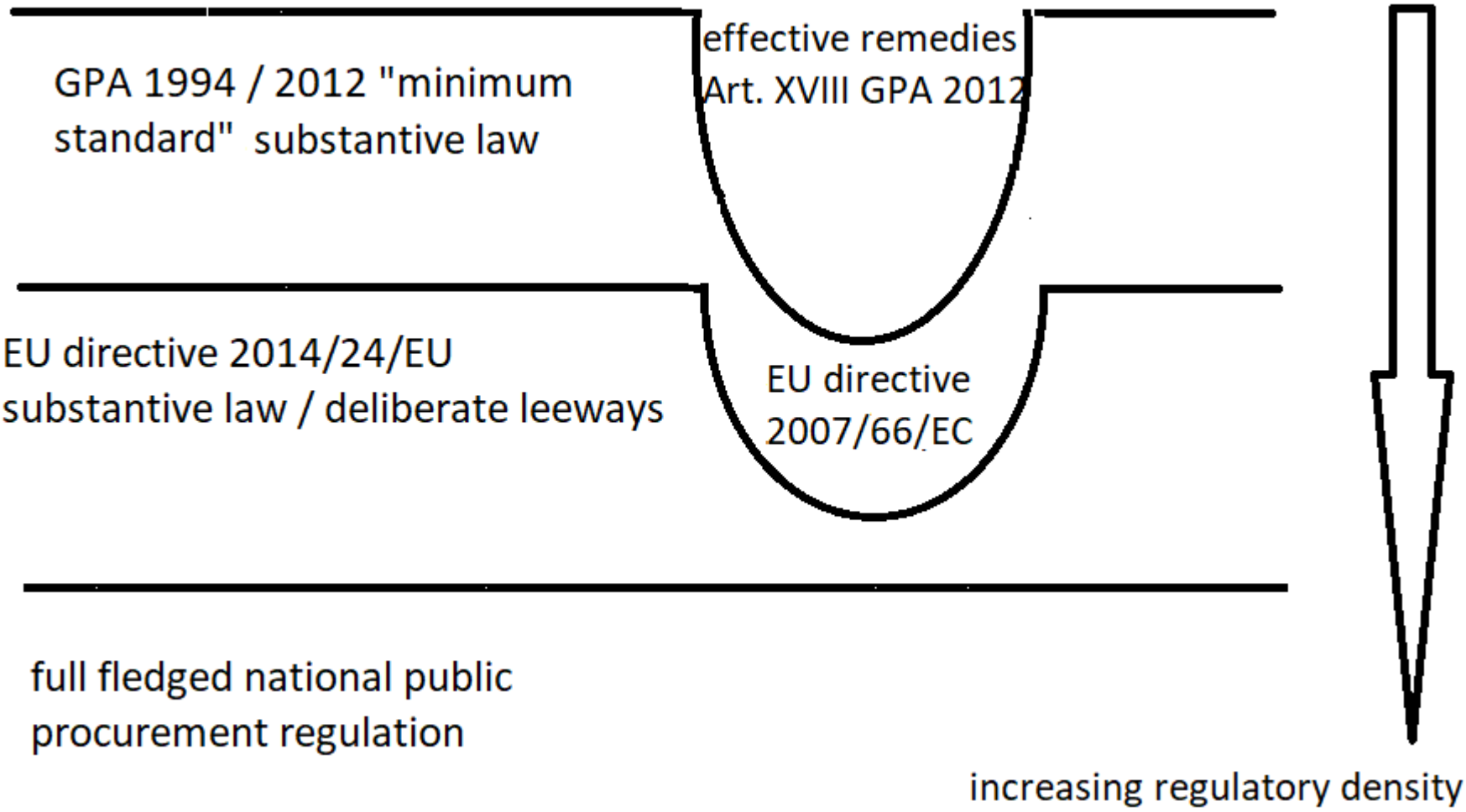
EU network of review bodies helps guarantee effective enforcement of public procurement rules

Published on: 25/04/2019

Since its creation in 2017, the Network of First Instance Review Bodies on Public Procurement has strengthened cooperation between national review bodies in the EU. These bodies help ensure that companies can challenge the award of procurement contracts by public authorities. The Network has received strong support from EU countries and will continue to encourage further exchanges and collaboration to support the efficient functioning of national review bodies.

The network has already met six times, in Brussels, Malta, Sofia, Zagreb and Bucharest. EU countries have used these meetings to engage in productive discussions on public procurement. They have also worked together in the organisation of meetings and the promotion of the network.

Summary: A case study on regulatory density ("Regulierungsdichte")



Granting remedies as transaction costs

The view of the modern lawyers is that implementation of public procurement regulation (and remedies as well) are transaction costs which can be justified not only in terms of “best value for money” but also seen as transaction cost in order to enhance governance and increase the credibility/reputation of the system.

Thank you for your attention!