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**European Public Procurement Law**  
**Part II – Remedies**

The European Public Procurement Remedies Directives  
and 15 years of jurisprudence by the Court of Justice  
of the European Communities

Texts and Analysis

**Constant De Koninck – Peter Flamey**



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# **European Public Procurement Law**

## **Part II – Remedies**

## List of abbreviations

Directive 89/665/EEC	Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts
Directive 92/13/EEC	Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors
Directive 92/50/EEC	Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts
Directive 93/36/EEC	Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts
Directive 93/37/EEC	Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts

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Directive 93/38/EEC	Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors
Directive 2004/17/EC	Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors
Directive 2004/18/EC	Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts
Directive 2007/66/EC	Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts
EC Treaty	Treaty establishing the European Community
Public Sector Directive	<i>see</i> Directive 2004/18/EC
Public Sector Remedies Directive	<i>see</i> Directive 89/665/EEC
Remedies Directives	<i>see</i> Directive 89/665/EEC and Directive 92/13/EEC
Utilities Directive	<i>see</i> Directive 2004/17/EC
Utilities Remedies Directive	<i>see</i> Directive 92/13/EEC

# Introduction

The European directives on public procurement – the Public Sector Directive 2004/18/EC and the Utilities Directive 2004/17/EC – aim to ensure that public contracts are awarded in an open, fair and transparent manner across all the EU Member States. The public procurement directives however do not contain any specific provisions ensuring their effective application. These provisions can be found in two European directives on procurement remedies – the Public Sector Remedies Directive 89/665/EEC and the Utilities Remedies Directive 92/13/EEC – which provide means of redress for tenderers who have been prejudiced by a breach of the EU rules on public procurement.

The Remedies Directives oblige each Member State to take the measures necessary to ensure that, as regards contracts falling within the scope of the public procurement directives, decisions taken by the contracting authorities and entities may be reviewed effectively and, in particular, as rapidly as possible, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law. Member States must ensure that the review procedures are available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

An effective remedies system should provide tenderers with effective means of redress, deter the contracting authorities from breaching the rules in the first place, and build confidence among businesses and the public that public procurement procedures are fair. The Community's objective in regulating this field is to open public procurement to EC-wide competition

and to encourage cross-border procurement, which currently amounts to only a small percentage of total procurement in the EU.<sup>(1)</sup>

The pursuit of remedies for breaches of the EU procurement rules is a topic of high interest to public authorities and their suppliers, contractors and service providers across Europe. The number of procurement actions in national courts appears to be rising year by year. The judgments of the Court of Justice of the European Communities are therefore vital for the interpretation and clarification of the Remedies Directives and thus to fully understand the important rights and obligations which they create.

The book *European Public Procurement Law. 25 Years of Jurisprudence by the Court of Justice of the European Communities. Texts and Analysis*<sup>(2)</sup>, cited and analysed the Court of Justice's case law concerning the substantive EU procurement rules laid down in the Public Sector Directive and the Utilities Directive. However, this publication did not deal with the important subject of remedies for procurement infringements, mainly because the two Remedies Directives 89/665/EEC and 92/13/EEC were in the process of undergoing important amendments.

Given that the amending directive, Directive 2007/66/EC<sup>(3)</sup>, was adopted on 11 December 2007, the authors have thought it opportune to undertake the same exercise but now regarding the ECJ case law concerning the remedies directives, as these directives stand today.

In this book the authors have endeavoured to provide the reader with an easy to use instrument which combines and links the texts of the procurement remedies directives with the still relevant excerpts of 31 judgments rendered by the European Court of Justice in the period 1993-2008 regarding

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- 1 Public procurement in the EU – *i.e.* the purchases of goods, services and public works by governments and public utilities – is a vast market, worth €1800 billion in 2006 and estimated at about 16% of the gross domestic product of the EU. An estimated 16% of the total value of public procurement in the EU is above the thresholds fixed by the EU directives.
  - 2 Constant DE KONINCK and Thierry RONSE (editors), Kluwer Law International, 2008, 785p., ISBN 978-90-411-2576-7.
  - 3 The amending Directive 2007/66/EC deals mainly with two problems – the illegal direct award of public contracts without tendering and the lack of opportunity to bring remedies actions at a time when infringements can still be corrected – and offers two tools to tackle these problems: the sanction of ineffectiveness and the introduction of a standstill period. For the *ratio legis* and major innovations introduced by this directive in Remedies Directives 89/665/EEC and 92/13/EEC, the reader is referred to Chapter I.



remedies in public procurement. By thus combining the theory and ‘reality’ of European procurement law the authors have intended to save readers time and effort, as well as giving them a more profound and practical insight into the Remedies Directives.

The material retained in this book refers to the remedies directives and to the jurisprudence as these stood at February 1, 2009.

Brussels, March 2009

C.D.K.

P.F.

## *Modus operandi*

In this book the relevant excerpts of 31 judgments issued by the Court of Justice of the European Communities in the period 1995-2008 and pertaining to the European public procurement remedies legislation, have been selected and analysed.

The criterion used by the authors for the selection of these judgments was their relevancy to the European remedies legislation now in force: the Public Sector Remedies Directive 89/665/EEC and the Utilities Remedies Directive 92/13/EEC, as these directives have been amended by Directive 2007/66/EC.<sup>(4)</sup>

The book consists of four chapters.

A *first chapter* treats the *ratio legis* of Amending Directive 2007/66/EC and the major innovations introduced by this directive in Remedies Directives 89/665/EEC and 92/13/EEC.

A *second chapter* retains the text of the Public Sector Remedies Directive and the Utilities Remedies Directive.

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4 Not treated in this book are the European public procurement directives 2004/18/EC (the new Public Sector Directive) and 2004/17/EC (the new Utilities Directive) and the jurisprudence of the Court of Justice concerning these directives. The interested reader is referred to the book *European Public Procurement Law. The European Public Procurement Directives and 25 years of jurisprudence by the Court of Justice of the European Communities. Texts and Analysis* by Constant DE KONINCK and Thierry RONSE, which book was also published by Kluwer Law International (2008, 785p.)

When judgments by the Court of Justice have been rendered in connection with subject matter treated by an article of a directive, that article contains a reference to the relevant part of the analysis of the Court of Justice case law, which analysis follows in a *third chapter*.

The essential excerpts of the chronologically ordered judgments by the Court of Justice have been included in a *fourth chapter*. Each judgment is preceded by a summary and an overview of the subject matter and points of law treated in this judgment. When the Court of Justice has answered more than one question of law, the judgement is subdivided in as many parts as there are issues that have been dealt with by the Court. Interesting passages of the opinions of the Advocate General have also been included where pertinent.

The user can of course go directly to the exhaustive subject index at the end of this book. The entries included in this index not only refer to the case law but also to the recitals of the preamble and articles of the Public Sector Remedies Directive and the Utilities Remedies Directive and to the articles of the EC Treaty.

To enhance the user-friendliness and the utility of this book, different appendices (*e.g.* tables of cases and parties, correlation tables, text juxtapositions) have been included.

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## Chapter I

### The Amending Directive 2007/66/EC





## The Amending Directive 2007/66/EC

With the formal adoption on 11 December 2007 of Directive 2007/66/EC amending the Public Sector Remedies Directive 89/665/EEC and the Utilities Remedies Directive 92/13/EEC, the European legal framework for remedies in the field of public procurement has been substantially revised. This legislative process was initiated in May 2006 with the proposal for an amending directive, put forward by the European Commission and aimed at improving the effectiveness of review procedures concerning the award of public contracts. This proposal was based on public consultations and an impact assessment.

In Section 1 the contents of the Impact Assessment Report of 4 May 2006 is summarized<sup>(5)</sup>. Section 2 is devoted to the major innovations introduced by Amending Directive 2007/66/EC.

### **1. Stating the problem – The Impact Assessment Report of 4 May 2006**

The consultations of EU Member States and the economic operators<sup>(6)</sup> and

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5 Appendix 2 (pp. 387-464) retains the text, in its integrality, of the *Impact Assessment Report* of 4 May 2006.

6 Regarding the term ‘economic operator’, Article 1(8) of Directive 2004/18/EC stipulates: “The terms ‘contractor’, ‘supplier’ and ‘service provider’ mean any natural or legal person or public entity or group of such persons and/or bodies which offers on the market, respectively, the execution of works and/or a work, products or services. The term ‘economic operator’ shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interest of simplification. An economic operator who has submitted a tender shall be designated a ‘tenderer’. One