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**EC Competition Rules in Public Procurement Cases:
A Ground for Judicial Review?¹**

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I. Introduction.

It is well established that domestic courts' jurisdiction and remedies fall within the scope of the principle of Member State's procedural autonomy² and, in consequence, they are *prima facie* untouchable by Community law. However, according to the principle of effectiveness, in so far as rights are derived from Community law, Member States have to guarantee their effective protection³.

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² See Joined Cases C-87-89/90, *Verholen*, (1991) ECR I-3757, at [24]; Case 222/86, *Heylens*, (1987) ECR 4095; Case 222/84, *Johnston*, (1986) ECR 1651.

³ See Joined Cases C-87-89/90, *Verholen*, *op.cit.*, at [26]; Case C-81/98, *Alcatel*, [1999] ECR I-7671, at [34].

In 2006, the UK enacted the Public Procurement Regulations (henceforward the Regulations)⁴ which implement the Directive 2004/18/EC *on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts*⁵. Since then, there has been a comprehensive, but peculiar, public procurement regime in the country.

Unlike the majority of the EC Member States, most of which have been influenced by the French system⁶, public procurement disputes in the UK could not be addressed by way of judicial review⁷. They can only be brought as a tort claim for breach of statutory duty⁸ in private law proceedings by affected economic operators⁹.

An application for judicial review is mainly an application for annulment of unlawful 'administrative acts', addressed to the 'administrative' section of the British High Court¹⁰. On the contrary, 'ordinary' sections, which deal, at the moment, with public procurement cases, have the power either to order *only as an interim measure* injunction/ setting-aside of unlawful contracting authorities' decisions¹¹ or, in the absence of fraud or bad faith, only to award damages¹².

As UK Ombudsmen have limited jurisdiction over public procurement matters¹³ and no specific administrative tribunal¹⁴ for public procurement claims exists, the extent of the

⁴ SI 2006 No 5. See *Lightways (Contractors) Ltd v North Ayrshire Council* [2008] SLT 690 at [2]. Before the Regulations, procurement procedures of central government authorities were regulated almost entirely through non-enforceable circulars and other guidelines. See C. Turpin, *Government procurement and contract*, (1989).

⁵ Directive of the European Parliament and of the Council of 31 March 2004, OJ L 134, 30.4.2004, p. 114–240.

⁶ Like Greece, Spain, Italy.

⁷ See High Court decision of 13 February 2009 in the case of *Gillian Chandler v The London Borough of Camden and The Secretary of State for Children, Schools and Families* [2009] EWHC 219 (Admin).

⁸ See *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons* (1999) 67 Con LR 1; Court of Appeal, *London Borough of Newham*, 2008: the Court confirmed that the questions to consider in such applications under the Regulations are the same as those which arise in the hearing of ordinary applications: is there a serious issue to be found to have occurred?; would damages be an adequate remedy for any interference with either party's rights which may later be found to have occurred?; and does the balance of convenience favour maintaining the *status quo*?

⁹ See s. 47 (6) of the Regulations: breaches of the Regulations are "actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage"; High Court decision of 13 February 2009 in the case of *Gillian Chandler v The London Borough of Camden and The Secretary of State for Children, Schools and Families*, *op. cit.*; *Letting International Ltd v London Borough of Newham* [2007] EWCA Civ 1522.

¹⁰ The so-called Administrative Court, since October 2000. See A. W. Bradley and K. D. Ewing, *Constitutional and administrative law*, (2003), p. 94.

¹¹ An application for review does not have an automatic suspensive effect on the procedure.

¹² See s. 47 (8) & (9) of the Regulations.

¹³ See e.g. local government Ombudsman under Heath Act 2007; S. Arrowsmith, J. Linarelli & D. Wallace, *Regulating public procurement*, (2000), p. 288. For the general issue of the relationship between judicial review and ombudsmen (e.g. overlapping jurisdiction), see H. Woolf, J. Jowell & A. Le Sueur, *De Smith's judicial review*, (2007), p. 48 *et seq.*

power that the judiciary is granted over public procurement cases seems to be crucial. The more radical remedies are available, the more effective enforcement of and thereby compliance with Community law can be guaranteed¹⁵.

Since there are no proposals to change UK law, of which the author is aware, this paper will address the question of the effectiveness of economic operators' judicial protection in the UK, in the light of developments at the EC level and their subsequent effect in national legal orders, mainly in the French judicial system. For doing so, it will limit its scope to the public procurement of public authorities¹⁶, so that the term 'awarding/contracting authorities' will henceforward be restricted to the public authorities which launch tender processes and conclude contracts with economic operators. The analysis will be divided into three parts. The first two will deal with the *prima facie* distinct public procurement stages¹⁷, i.e. the tender process and the execution of the concluded public contract stage¹⁸. The third will try to articulate with the aid of domestic administrative law and EC competition law.

II. The tender process.

The tender process includes all the decisions which the awarding authority takes from the invitation to tender to the decision awarding the contract¹⁹. S. 47(1) of the

¹⁴ See *R v Civil Service Appeal Board ex parte Bruce* [1988] 3 All ER 686; *R v Liverpool County Corporation ex parte Ferguson and Ferguson* [1985] IRLR 501; *R v Hertfordshire County Council ex parte NUPE* [1985] IRLR 259 CA: the public law nature of a tribunal has been offered as a determining ground for susceptibility to judicial review, regardless of the fact that there was a contractual relationship between the parties. This tends to be justified by reference to the respondent's public law powers, or to the general public law nature of the authority's decision-making power. For the general issue of the intersection between judicial review and the tribunal system, see H. Woolf, J. Jowell & A. Le Sueur, *op. cit.*, p. 50 *et seq.*

¹⁵ See Case 26/62, *van Gend en Loos*, (1963) ECR 1; D. Curtin, *The decentralised enforcement of Community law Rights. Judicial snakes and ladders*, in: D. Curtin & D. O' Keefe (eds.), *Constitutional adjudication in European Community and national law*, (1992), pp. 33, 34 & 35; G. Tesauro, *The effectiveness of judicial protection and cooperation between the Court of Justice and the national courts*, in: *Festschrift til Ole Due*, (1994), p. 355; the European Commission's Green Paper on *Public procurement in the European Union: exploring the way forward*, Brussels, 27.11. 1996, COM (96) 583 final ed., at [3.24].

¹⁶ E.g. where there exists some disciplinary or other body established under the prerogative or by statute, there is considered to be a sufficient public law element. See *McLaren v The Home Office* [1990] IRLR 338, 342.

¹⁷ See *R (on the application of Gamesa Energy UK Limited) v The National Assembly for Wales* [2006] EWHC 2167 (Admin).

¹⁸ See Council Directive 89/665/EEC (Remedies Directive) of 21.12.1989 *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*, (1989) OJ L 395 of 30.12.1989, pp. 33-35.

¹⁹ See Case C-81/98, *Alcatel*, *op. cit.*, at [40]: "[t]he lack of an intervening period between the decision awarding a contract and the conclusion of the contract is irrelevant". According to the new Remedies Directive 2007/66EC [(2007) OJ L335/31 of 20.12.07], -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-, there should be a standstill period of at least 10 days between the decision awarding the contract and the conclusion of the contract. The Directive shall enter into force on the 20th day following its publication in the Official Journal (Article 4), i.e. by 09.01.2008, and Member States shall

Regulations only stipulates that obligations under the Regulations and enforceable Community obligations ‘in respect of a public contract’ are duties ‘owned to an economic operator’, in the meaning of s. 4 of the Regulations. This laconic wording gives rise to concerns about whether the tender process regime under the Regulations may be conceived so as to be compatible with the principle of effectiveness of Community law to which they refer.

According to the ECJ, effectiveness can be fulfilled by a remedy which may set aside an unlawful awarding authority’s decision, *prior to the conclusion of the contract*, “if the relevant conditions are met”²⁰. This applies even to the awarding decision²¹, and, in any case, “regardless of the possibility, once the contract has been concluded, of obtaining an award of damages”²² (see *infra* part III). Setting-aside also seems to comply with the Directive 2004/18/EC, which by implication gives the awarding authority the option to decide not to conclude a contract put out to tender, with neither this option to be limited to exceptional cases, nor serious grounds to be required for the abortion²³. So, *a fortiori*, an independent review body must not be refused the power to set aside decisions taken by the awarding authority in the tender process, with this power to be subjected to certain legal grounds as usual.

It is not only the Community law which facilitates the setting-aside of an unlawful contracting authority’s decision, taken in the course of the tender process, but also national legal orders. Illustrative is the example of France. France has a longstanding body of legal rules on procurement, consolidated mainly in the *Code des Marchés Publics* (Public Procurement Code), and, in consequence, a significant experience of protest over procurement awards. It has been long recognized that affected firms may litigate breaches of these rules in the courts, usually the administrative courts²⁴. As the ECJ put it, “in several Member States, any contract concluded between a contracting authority and a contractor is an administrative contract, which as such is governed by public law”²⁵. The French court which has jurisdiction over tender process matters is the *Conseil d’État*, provided that the contracting authority is a public authority. The *Conseil*

implement the provisions necessary to comply with the changes by 20.12.2009 (Article 3). Notably this 10-days standstill period already exists in the Regulations. See s. 32 (3) of the Public Contracts Regulations 2006 and s. 33 (3) of the Utilities Contracts Regulations 2006 (SI 2006/6).

²⁰ See Case C-81/98, *Alcatel*, *op. cit.*, at [29].

²¹ See Case C-81/98, *Alcatel*, *op. cit.* at [32]; Opinion of the Advocate General Mischo delivered on 10.06.1999, on Case C-81/98, *Alcatel*, [1999] ECR I-7671, at [36]. However, setting-aside is not the only outcome of an unlawful decision of a contracting authority. See Case C-448/01, *EVN AG and Wienstrom GmbH*, [2003] ECR I-14527: in cases of unlawfulness of a decision relating to an award criterion, the national review body is granted the option to annul the decision or to award damages.

²² See Case C-81/98, *Alcatel*, *op. cit.*, at [29 & 43].

²³ See Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697 at [23 and 25]; *Federal Security Services Ltd v The Northern Ireland Court Service* [2009] NIQB 15.

²⁴ See S. Arrowsmith, *The law of public and utilities procurement*, (2005), p. 9; J.M. Fernandez Martin, *The EC public procurement rules: a critical analysis*, (1996), p. 230-244.

²⁵ Case C-399/98, *Ordine degli Architetti delle province di Milano e Lodi and Others, La Scala*, [2001] ECR I-5409 at [73].

d' État is the main French administrative court and, as such, has the power to set aside unlawful decisions which take place (at least) in the tender process.

Again, in the UK, although decisions taken by a public authority are generally amenable to judicial review²⁶, a claim relating to breach of the public procurement rules cannot be brought by way of an application for judicial review²⁷. The Courts reason that, in certain areas, it is neither enough that the contracting authority is a public body, nor that it is acting in the exercise of a public function under statutory power²⁸, because to oust the Court's judicial review jurisdiction requires clear and explicit language and the Regulations do not contain such language²⁹. So, it is perceived under the 'silent' Regulations that a claim can only be brought by an 'ordinary' action³⁰. This goes hand in hand with the assumption that "[w]here there is set in place an elaborate statutory structure for challenge to, and review of, an administrative decision, the structure must in the ordinary way be fully invoked before seeking to engage the judicial review jurisdiction"³¹.

There is an exemption to this rule. It has been recognised that challenge to the procurement process can be amenable to judicial review only if there is a 'sufficient public-law element' to justify the intervention of the 'administrative court'³². We saw previously that a mere institutional or a mere functional criterion cannot make an application for judicial review on the grounds of alleged breach of public procurement regime, admissible. What actually establishes the parameters for 'publicness' of a legal

²⁶ See *R v Secretary of State for Trade and Industry, ex p Lonhro Plc* [1989] 1 WLR 525 [530E&533A]; *R v Oldman metropolitan Borough Council, ex p Garlick* [1993] AC 509 [519A]; *R v Northavon District Council, ex p Smith* [1994] 2 AC402 [408F-G]; *R (Yogathas) v Secretary of State for the Home Department* [2002] UKHL 36; . See also *Rights Brought Home: The Human Rights Bill*, CM 3792, 1997, at [2.2]: the criterion in principle seems to be institutional; bodies which the government regards as pure public authorities are central government (including executive agencies), local government, the police, immigration officers, prisons, and courts and tribunals themselves. See also *R v British Broadcasting Corporation ex parte Lavelle* [1983] ICR 99, 106; *R v Derbyshire County Council ex parte Noble* [1990] IRLR 332 CA; *R v Chief Constable of South Wales ex parte Thornhill* [1987] IRLR 314 CA: ie when the domestic nature criterion of a deciding authority applies, it is regarded as a reason why the application should be refused.

²⁷ See *Gillian Chandler v. The London Borough of Camben, op. cit.* But *R v Legal Aid Board, ex p Donn & Co (a Firm)* [1996] 3 All ER 1: decision to award a contract; *R v Bridgend County Borough Council, ex p Jones*, 1.10.1999, unrep.

²⁸ See *R (on the application of Gamesa Energy UK Ltd) v. National Assembly for Wales, op. cit.* See also *R v East Berkshire Health Authority ex parte Walsh* [1985] QB 152: the mere fact that the employer is a public body is not a sufficient public law element to make judicial review to lie.

²⁹ See s. 47 (7) which only stipulates that: "proceedings shall be brought in the High Court", without specifying in which section; *R (on the application of Menai Collect Ltd & ors) v. Department for Constitutional Affairs*, [2006] EWHC (Admin); *R (on the application of Gamesa Energy UK Ltd) v. National assembly for Wales, op. cit.*; *R (on the application of the Law Society) and Legal Services Commission*, 2007.

³⁰ See *Cookson and Clegg v Ministry of Defence* [2005] EWHC 38 (Admin).

³¹ See *R v Sandwell Metropolitan Borough Council, ex p Wilkinson* (1999) 31 HLR 22, 28.

³² See *R (on the application of Gamesa Energy UK Limited) v The National Assembly for Wales, op. cit.*, where the Welsh National Assembly ran a tender process for organisations to submit tenders to plan wind farm developments at seven National Assembly owned sites.

act is the interplay between two basic ideas, equality and legality. The equality principle points to the similarity between, for example, a public body tenderer and his private counterpart. If there is similarity, it tends to mitigate against granting publicness. On the contrary, the legality principle focuses attention on the probity of the exercise of the respondent body's powers. If such a principle takes place, it tends to provide a basis for arguments in favour of publicness.

In the tender process the contracting authority, -again the term is, for the purposes of this paper, restricted to public authorities-, is of course subject to the principle of legality by nature³³. Unlike the private contractor who may do whatever is not prohibited by the law, the contracting authority is only permitted to do what the law gives it the power to do³⁴. As Wade and Forsyth put it, "administrative law is the area where the principle [of legality] is to be seen in its most active operation. Its primary meaning is that everything must be done according to law ... Every act of governmental power, i.e. every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree"³⁵. In other words, "the purpose of judicial review is to ensure that government is conducted within the law"³⁶. Furthermore, it has been held that if an authority "is authorized" to carry out a particular activity or project, it also has the power to enter into contracts for the performance of the activity or the project concerned³⁷. However, contracting authorities are often given discretionary power to perform their duties, which may leave room for challenge against the public nature of the authorities' decisions.

In *Menai* case³⁸, the Court seems to make a point of principle: whenever the matter complained of a breach of a duty laid upon the authority by the statute does not oblige it to award the contract, -which is usually the case³⁹-, this is a purely commercial issue and not apt for judicial review. But, even in commercial issues, there may be a 'true public

³³ According to the *ultra vires* doctrine, acts by public authorities which go beyond the powers conferred by statutes are invalid. See *R v Richmond upon Thames Council, ex p McCarthy and Stone Ltd*, [1992] 2 AC 48; *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1.

³⁴ See *Hazell v Hammersmith and Fulham LBC*, *op. cit.*: application of the *ultra vires* doctrine to public contracts; S. Arrowsmith, *The law of public and utilities procurement*, *op. cit.*, p. 44.

³⁵ W. Wade and C. Forsyth, *Administrative Law*, (1994), 24.

³⁶ See *R v Secretary of State for Transport, ex p London Borough of Richmond Upon Thames (No. 3)* [1995] Env LR 409, 415.

³⁷ See *Att.-Gen. v Great Eastern Railway* (1879/1880) 5 App.Cas. 473, HL at 478. However difficult is to determine, under this judgement, whether an authority's activity is *ultra vires* or not, lies outside the scope of this paper. For our purposes, it suffices that there has been recognised that contracting-out falls within the doctrine. See for details, S. Arrowsmith, *The law of public and utilities procurement*, *op. cit.*, p. 44 *et seq.*

³⁸ *R (on the application of Menai Collect Ltd & ors) v. Department for Constitutional Affairs*, *op. cit.*: "... the tender evaluation process is an essentially commercial process ... It is not every wandering from the precise paths of best practice that lends fuel to a claim for judicial review".

³⁹ Under EC law, contracting authorities are by implication given the option to decide not to award a contract put out to tender. Such an option is neither limited to exceptional cases nor subjected to being based on serious grounds; see Case C-27/98 *Fracasso and Leitschutz*, *op. cit.*; and CFI Order of 19 October 2007, *Evropaiki Dynamiki*, OJ C 315 of 22 December 2007, p. 39 at [51].

law element' when there is "bribery, corruption, implementation of unlawful policy and the like"⁴⁰.

Issues of unlawful policy implementation may arise when there is an unjustified interference with the EC Treaty codified rights⁴¹. These rights are: free movement of citizens (Article 18 EC)⁴², freedom of import (Article 28 EC)⁴³, freedom of export (Article 29 EC)⁴⁴, free movement of workers (Article 39 EC)⁴⁵, freedom of establishment (Article 43 EC)⁴⁶, freedom of services (Article 49 EC)⁴⁷ and equal treatment/ freedom from discrimination (Articles 12⁴⁸ & 141 EC⁴⁹). All these are generally admitted as grounds for judicial review, because "judicial review affords adequate protection for [those] rights in respect of the *validity* of public actions"⁵⁰, with 'public action' to cover mainly 'decisions'⁵¹ of public bodies⁵². Some of those essential rights are the rationale of

⁴⁰ See also *R (on the application of Gamesa Energy UK Ltd) v. National Assembly for Wales*, *op. cit.*

⁴¹ See H. Woolf, J. Jowell & A. Le Sueur, *op. cit.*, p. 65.

⁴² See e.g. *R (Kaur) v Secretary of State for the Home Department* [2001] All ER (EC) 250: UK is entitled to lay down conditions as to when individuals becoming 'nationals' for purposes of Article 18 EC rights.

⁴³ See e.g. *R (Countryside Alliance) v Attorney General* [2007] UKHL 52: Hunting Act is not breaching Article 28 EC.

⁴⁴ See e.g. *R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd* [1999] 2 AC 418: 'decision' restricting police protection for live calf exporters justified and so not a breach of Article 29.

⁴⁵ See e.g. *R (Conde) v Lambeth London Borough Council* [2005] EWHC 62 (Admin) (2005) 8 CCLR 486: refusal of housing assistance for an EEA national seeking work Article 39 - compatible.

⁴⁶ See e.g. *Centros Ltd v Erhvervs-og Selskabsstyrelsen* [2000] Ch 446: on whether it is unlawful to refuse to register a company formed in another member state.

⁴⁷ See e.g. *R (Countryside Alliance) v Attorney General, op. cit.*: hunting Act is not breaching Article 49.

⁴⁸ See e.g. *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons, op. cit.*: breach of Article 12 EC in favouring domestic tendering company. See ECJ case *SIAC Construction Ltd v County Council of the County of Mayo* [2001] 1 ECR 7725 at [34]: "tenderers must be in a position of equality both when they formulate their tenders and when those tenders are being assessed by the adjudicating authority"; Lord Carlway, *Aquarton Marine v Strathclyde Fire Board* 2007 CSOH 185, unreported; *Lightways (Contractors) Ltd v North Ayrshire Council, op. cit.*

⁴⁹ See e.g. *R v Secretary of State for employment, ex p Equal Opportunities Commission* [1995] 1 AC 1: statutory requirement for 5 years' minimum period for redundancy/ unfair dismissal protections is incompatible with Article 141, as not being objectively justified.

⁵⁰ See *R (Noble Organisation) v Thanet District Council* [2005] EWCA Civ 782 at [60], emphasis has been added.

⁵¹ See *R v Oldman metropolitan Borough Council, ex p Garlick, op. cit.*, at [519A]; *R v Northavon District Council, ex p Smith, op. cit.*, at [408F-G]; *R (Yogathas) v Secretary of State for the Home Department, op. cit.*; *R v Secretary of State for Trade and Industry, ex p Lonhro Plc* [1989] 1 WLR 525 [530E&533A].

⁵² See *Rights Brought Home: The Human Rights Bill, op. cit.*, at [2.2]: the criterion in principle seems to be institutional; bodies which the government regards as "pure" public authorities are central government (including executive agencies), local government, the police, immigration officers, prisons, and courts and tribunals themselves. See also *R v British Broadcasting Corporation ex parte Lavelle, op. cit.*, 106; *R v Derbyshire County Council ex parte Noble, op. cit.*; *R v Chief Constable of South Wales ex parte Thornhill, op. cit.*: ie when the "domestic" nature criterion of a deciding body applies, it is regarded as a reason why the application should be refused.

the Directive 2004/18/EC⁵³ and, consequently, the rationale of the Regulations, so that, in the event of ambiguity, the Regulation's wording must be interpreted in compliance with those EC primary rules⁵⁴. Once alleged ambiguity may make EC primary rules to take effect, their adequate enforcement is of primary interest, which in turn may render public procurement disputes subject to judicial review.

Moreover, unlike the private contractor, the public authority is often given the power to intervene and modify unilaterally the tendering conditions⁵⁵. To do so, it has been given discretion. The exercise of discretionary powers in the tender process has been subjected to the principles of equal treatment and transparency, in the sense that changes should not be so great that different or additional prospective tenderers would have been attracted⁵⁶. Once the EC principles are to control the exercise of discretionary power, it is of the Community and domestic⁵⁷ interest to ensure their adequate protection. As indicated, judicial review is considered to be an adequate means for the EC rules enforcement, so that the control of the exercise of the contracting authority's discretionary powers may well be brought before the court by means of an application for judicial review.

At this point, the question turns to be whether the enforcement of EC competition rules and, subsequently, the protection of free competition may also be a ground for judicial review.

The UK Courts insist on the fact that public procurement, which falls within the scope of the Regulations, is underpinned by the concept of a 'market'⁵⁸, where domestic market rules apply. According to them, domestic market considerations cannot be taken into account in the frame of public law proceedings (i.e. judicial review). However, public procurement is not only economic operators and 'markets', as it has been considered so far⁵⁹, but also a regime where EC competition concerns arise. The *Conseil d'État* in

⁵³ See Opinion of Advocate General Stix-Hackl delivered on 1 July 2004, in case C-247/02 – *Sintesi SpA v Autorità per la Vigilanza sui Lavori Pubblici*, at [29 & 30].

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⁵⁵ See *R (on the application of the law Society) v Legal Services Commission* [2007] EWHC 1848 (Admin); [2007] EWCA Civ 1264.

⁵⁶ See Commission Decision, 2.10.2002, State aid No. N264/2002, *London Underground PPP, ???; Brown & Golfinopoulos, The permissibility of post-selection modifications in a tendering procedure: decision by the European Commission that the London Underground public-private partnership does not involve state aid*, (2003) 12 PPLR NA47.

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⁵⁸ See *Gillian Chandler v The London Borough of Camden and The Secretary of State for Children, Schools and Families*, *op. cit.*

⁵⁹ On 13 February 2009, the High Court in the case of *Gillian Chandler v The London Borough of Camden and The Secretary of State for Children, Schools and Families*, *op. cit.*: it is artificial to “shoehorn” the process of setting up an academy into the public procurement regime. A sponsor acting through an academy trust would not be an economic operator and there was not a “market” for the setting up of academies because the operations involved in sponsorship would be entering into a form of philanthropy which does not constitute a “market” in any meaningful way. As neither concept was satisfied, the sponsoring of an academy was considered outside the scope of the public procurement rules. This particular decision demonstrates that individuals who cannot be classed as economic operators do not have any standing to bring a claim under the Regulations and cannot use judicial review as a vehicle to bring such a challenge.

Million et Marais case clarified that an awarding authority that is a public authority and so exercises public power, could not be perceived to be directly subjected to the domestic competition law⁶⁰, but its decisions relating to public procurement can only be reviewed on the grounds of the *effet util* of the EC rules which prohibit collusions and the abuse of dominant position⁶¹.

Indeed, although the Commission pointed out at the beginning that the Directives, -and, in consequence, for the purposes of this paper, the Regulations-, do not serve to implement Article 81 EC⁶², and so competition concerns in the public procurement area were initially conceived to be restricted to each of the tenders or ‘competitions’ and only focus on the effects in the markets concerned, nowadays there is an increasing trend to take ‘pure’ competition considerations into account when analysing procurement cases under EC law. In particular, it is now considered that tender process aims to open up public markets to competition⁶³. As a consequence, it is concluded that ensuring conditions of free competition is being one of the fundamental principles of Community law on the award of public contracts⁶⁴. This goes hand in hand with the assumption that Community law as a whole is designed to ensure free access of all relevant undertakings to the markets concerned, regardless of their State of origin and to eliminate practices that restrict competition⁶⁵.

Opening contracts to a wide range of economic competitors and ensuring their operation within market conditions, actually promotes the public interest⁶⁶. It should not be ignored that public procurement rules are also for deterring waste of public money and for promoting effectiveness of the supply⁶⁷; waste of public money may be the result of ignorance of market conditions, or of corruption⁶⁸. As indicated, “bribery, corruption, implementation of unlawful policy and the like” is regarded to be a sound basis for

⁶⁰ See C. Yannakopoulos, *L’apport de la protection de la libre concurrence à la théorie du contrat administrative*, *Revue du droit public* 2/2008, p. 421 [442&443].

⁶¹ See o. Guézou, *L’opposabilité du droit interne de la concurrence aux actes administratifs*, *AJDA* 1998, p. 247.

⁶² See Opinion of Advocate General Stix-Hackl delivered on 1 July 2004, in case C-247/02 – *Sintesi SpA v Autorità per la Vigilanza sui Lavori Pubblici*, at [28].

⁶³ See Case 31/87, *Beentjes*, [1988] ECR 4635, at [21]; Case C-243/89, *Commission v Denmark*, [1993] ECR I-3353, at [33]; Case C-513/99, *Concordia Bus Finland Oy*, [2002] ECR I-7213, at [81]; Case C-470/99, *Universale Bau*, [2002] ECR I-11617, at [89].

⁶⁴ See Opinion of Advocate General Stix-Hackl delivered on 1 July 2004, in case C-247/02 – *Sintesi SpA v Autorità per la Vigilanza sui Lavori Pubblici*, at [33].

⁶⁵ See Case C-324/98, *Telaustria Verlags and Telefonadress*, [2000] ECR I-10745, at [62]. See also Case C-399/98, *Ordine degli Architetti delle province di Milano e Lodi* [2001] ECR I-5409, at [75]; Joined Cases C-285/99 and C-286/99, *Impresa Lombardini and Others* [2001] ECR I-9233, at [35]; Case C-92/00, *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft* [2002] ECR I-5553, at [44]; Case C-411/00, *Felix Swoboda*, [2002] ECR I-10567, at [33]; Case C-214/00, *Commission v Spain*, [2003] ECR I-4667, at [53].

⁶⁶ See C. Yannakopoulos, *L’apport de la protection de la libre concurrence à la théorie du contrat administrative*, *Revue du droit public* 2/2008, p. 421 [426].

⁶⁷ See *Collectivité publiques et concurrence*, *Etudes et Documents du Conseil d’État* 2002, p. 281 et seq.

⁶⁸ See P. Trepte, *Regulating procurement. Understanding the ends and means of Public Procurement Regulations*, (2004).

judicial review to apply in public procurement cases. In turn, if ignorance of the competition element is to lead to corruption, alleged breach of EC competition rules *per se* may well be regarded as a ground for judicial review.

One could also support this argument with the consideration that since alleged breach of EC state aid rules, -which are part of EC competition law⁶⁹-, has been recognized as a ground for judicial review of 'public actions'⁷⁰, the EC competition regime as a whole must be recognized as a ground for judicial review.

In the case of public contracts, which fall outside the scope of the Regulations, -because, for example, they do not meet the financial thresholds-, but inside the scope of EC primary law⁷¹, the UK Courts leave open the possibility that judicial review be a remedy⁷². As indicated, judicial review has been considered to offer adequate protection for the majority of the EC principles, such as transparency and prohibition of discrimination, which in consequence, have been recognized as autonomous grounds for judicial review. Once such primary EC rules apply *per se* in public procurement cases that fall outside the scope of the Regulations, and there has been indicated that the development of proper market conditions and the EC competition regime are interlinked, breach of EC competition rules must also be considered as a ground for judicial review. Besides, in these cases, the principle of effectiveness of Community law only operates, not the principle of procedural autonomy (see *supra* part IV).

To summarise, a competition element operates in the tender process that gives effect to the primary EC competition rules. Thus, breach of the Regulations may also mean infringement of EC primary rules, so that the 'silence' of the Regulations would not be enough to prohibit the reviewability of the decisions which are taken by the awarding authority in the course of the tender process. This is mainly because, where the EC primary rules operate, the UK Courts themselves leave open the question of reviewability of public procurement cases. In such cases, only the principle of effectiveness operates, not the principle of procedural autonomy (see *supra* part IV).

Furthermore, in the tender process, ensuring the entry of public markets to free competition is a guarantee against waste of public money⁷³, and it is for the judge to

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⁷⁰ See *R v Commissioners of Customs and Excise, ex p Lunn Poly Ltd* [1999] EuLR 653: Finance Act 1997 s.21, introducing differential rates of insurance premium tax, incompatible with Article 87, as an unnotified unjustified state aid; J.-P. Keppenne & K. Gross, *Quelques considerations sur le controle des aides d'Etat*, in EC state aid law, Kluwer Law International, The Netherlands:2008, p. 391 *et seq.* This is mainly because the ECJ has recognised that Article 88 (3) EC has direct effect so that national courts may annul administrative decisions infringing Article 87 EC. See ECJ judgment of 11.6.1992, case C-149-150/91, *Sanders*, [1992] ECR 3899; case 120/73, *Gebrüder Lorenz GmbH v Federal Republic of Germany et Land de Rhenanie-Palatinat* [1973] ECR 1471.

⁷¹ In accordance with the EC public procurement Directives, there are particular rules, under the Regulations 2006, concerning aggregation, which are intended to prevent avoidance by the use of a series of contracts which, individually, fall below the threshold values.

⁷² See *Clive Lewis* [2002] JR 272; *Richard Gordon QC* [2007] JR 19.

⁷³ Economic operators have the requisite know-how of the advertised purchase.

balance the interests of competitors and the public interest⁷⁴. According to the ECJ, “the Member States may apportion amongst several national institutions the task of adopting the various necessary implementing measures ... in such a way that they do not jeopardize the proper functioning of the organization of the market”⁷⁵. If adequate judicial protection is offered, jeopardy may be effectively deterred. This may happen by means of an application for judicial review, lodged in the 'administrative' section of the High Court⁷⁶.

III. The execution of the contract stage.

The execution of the contract is the public procurement stage from the conclusion of the contract onwards⁷⁷. According to Article 2 (6) of the Remedies Directive 89/665/EEC, liability, if the contract has entered into, may only consist of pay of damages⁷⁸. S. 47(9) of the Regulations stipulates the same⁷⁹. Damages, the main redress in tort law, complies, in principle, with the ECJ ruling, that an effective remedy must be available at the stage where infringements can still be rectified⁸⁰. This stage is obviously the tender process⁸¹.

However, the requirements of the tender process may revive in the course of the execution of the public contract in a *sui generis* form. The ECJ in the *CAS Succhi di Frutta* case⁸² made clear that if, in the currency of the contract, the contracting authority “is authorized” to make amendments of significant conditions of the invitation to tender

⁷⁴ See R. Williams, *A new remedies directive for the European Community*, [2008] 17 PPLR NA19 [24]: not for the applicant.

⁷⁵ Case 106/77, *Simmenthal*, (1978) ECR 629, at [5].

⁷⁶ See *R v Oldman metropolitan Borough Council, ex p Garlick, op. cit.*, at [519A]; *R v Northavon District Council, ex p Smith, op. cit.*, at [408F-G]; *R (Yogathas) v Secretary of State for the Home Department, op. cit.*; *R v Secretary of State for Trade and Industry, ex p Lonhro Plc* [1989] 1 WLR 525 [530E&533A]. See also *Rights Brought Home: The Human Rights Bill, op. cit.*, at [2.2]: the criterion in principle seems to be institutional; bodies which the government regards as 'pure' public authorities are central government (including executive agencies), local government, the police, immigration officers, prisons, and courts and tribunals themselves. See also *R v British Broadcasting Corporation ex parte Lavelle, op. cit.*, 106; *R v Derbyshire County Council ex parte Noble, op. cit.*; *R v Chief Constable of South Wales ex parte Thornhill, op. cit.*: i.e. when the 'domestic' nature criterion of a deciding body applies, it is regarded as a reason why the application should be refused.

⁷⁷ “At no point does the term ‘contract’ extend to include framework agreements”. See *McLaughlin & Harvey Ltd v Dept of Finance & Personnel No 3* [2008] NIQB 122 at [8].

⁷⁸ See also Opinion of the Advocate General Mischo delivered on 10.06.1999, on the Case C-81/98, *Alcatel, op. cit.*, at [37].

⁷⁹ For the applicability of the section to the framework agreements, see ss. 2 (1) (b) & 19 of the Regulations; *McLaughlin & Harvey Ltd v Dept of Finance & Personnel No 3, op. cit.*, at [15&16]: a framework agreement is a species of a contract, it is clearly not the species identified in s. 47 (9) of the Regulations.

⁸⁰ See Case C-212/02, *Commission v Republic of Austria*, OJ C 201, 07.08.2004, p. 3; Opinion of the Advocate General Mischo of 10.06.1999, on Case C-81/98, *Alcatel, op. cit.*, at [38]. See also *Lightways (Contractors) Ltd v North Ayrshire Council, op. cit.*, at [53, 57].

⁸¹ See Opinion of the Advocate General Mischo delivered on 10.06.1999, on the Case C-81/98, *Alcatel, op. cit.*, at [38]: “[t]he extend of the contrast between [the two stages] should not be underestimated”.

⁸² Case C-496/99 P, [2004] ECR I-3801 at [120-121].

at will, the performance of changes of this kind does demonstrate the intention of the parties to renegotiate the essential terms of that contract and so qualifies as a new award of the contract⁸³. In open and restricted procedures, however, negotiations on fundamental aspects of contracts whose outcome is likely to distort competition are not permissible⁸⁴. This is mainly because the uniform application of the conditions of the invitation to tender and the objectivity of the procedure would no longer be guaranteed, which in turn would inevitably lead to infringement of the principles of transparency and equal treatment as between tenderers⁸⁵. From this case-law, it may follow that there is still room, in the course of the execution, for the contracting authority to make 'decisions'.

Accordingly, in France, Article 20 of the new Public Procurement Code prohibits any modification of the invitation to tender without conducting new competition procedures. In this way, it ensures the operation of free competition after the conclusion of the contract⁸⁶.

In the part II of this paper, it has been suggested that UK awarding authorities' decisions in the course of tender process must be amenable to judicial review. If the assumption that a *sui generis* tender process may revive in the currency of the contract under certain conditions, the contracting authority's *sui generis* decisions which take effect in this stage, must also be amenable to judicial review for the same reasons as in the tender process. There seems, however, to be an impediment against this end: the contractual relationship. According to the ECJ, "the fact that the development agreement is governed by public law and was concluded in the exercise of public power does not preclude, but rather militates in favour of, the existence of a contract ..."⁸⁷.

⁸³ See Case C-454/06, *Pressetext Nachrichtenagentur GmbH*, [2008] ECR I-4401 at [34]; Opinion of Advocate General Kokott of 13 March 2008, in case C-454/06, *Pressetext Nachrichtenagentur GmbH*.

⁸⁴ See the so-called *Ban-on-negotiations*, OJ L 111, 30.04.1994, 114: discussions for the purposes of clarifying or supplementing the tenders are only allowed provided that this does not involve discrimination.

⁸⁵ See Case C-496/99 P, *CAS Succhi di Frutta*, *op. cit.*, at [120-121].

⁸⁶ See C. Yannakopoulos, *L'apport de la protection de la libre concurrence à la théorie du contrat administrative*, *Revue du droit public* 2/2008, p. 421 [424].

⁸⁷ Case C-399/98, *Ordine degli Architetti delle province di Milano e Lodi and Others, La Scala*, *op. cit.*, at [73]. However, under the Human Rights Act 1998 (HRA), which is regarded as extending litigation to locate the boundary between public and private spheres, there seems no ground to exclude contractual relations from amenability to judicial review; see G. S. Morris, *The Human Rights Act and the Public/Private Divide in Employment Law*, *ILJ* 1998 27, 293. From the beginning, it has been anticipated that the courts would follow the principles developed for the purposes of judicial review; see the Home Secretary, Mr Jack Straw, *HC Debs Vol 314*, cols 406, 410, 17 June 1998. The main principle would be the requirement of a 'public element' into the relationship; see *R v Panel on Take-overs and Mergers, ex parte Datafin* [1987] 2 WLR 699, Sir John Donaldson MR [714]; de Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, (1995 and supplement 1998), Ch 3; Supperstone and Goudie, *Judicial Review*, (1997), Ch 3; J. Black, *Constitutionalising Self-Regulation*, [1996] 59 *MLR* 24. This remark is relevant because challenges to the lawfulness of a public authority's decision may be on more than one of the grounds of judicial review: a right under the European Convention of Human Rights, a European Community law right and a right under ordinary domestic law "may all form grounds within a single claim for judicial review"; see 'overlapping categories' in H. Woolf, J. Jowell & A. Le Sueur, *op. cit.*, p. 67 *et seq.*

In the ‘analogous’ cases of employment, when the employer is a public authority, concerns about the contractual relationships have been considered to be essentially private in nature⁸⁸, when there does not exist a special statutory element underpinning the relationship⁸⁹, but only pure contractual obligations⁹⁰. It is well established that “the purpose of judicial review is to ensure that government is conducted within law”, not within a contract⁹¹ so that a contract should in principle be enforced only by ordinary action⁹².

However, the mere existence of a contractual relationship is regarded not to preclude judicial review⁹³, when there is a ‘public law element’, e.g. a special statutory element, underpinning the contractual relationship from which the obligations of the parties arise. In addition, decisions, e.g. by the public authority as an employer⁹⁴, which are of general application, also fall to be considered as subject to judicial review⁹⁵. According to the courts, this applies even if the numbers affected are not great⁹⁶.

In the light of this case-law, I will examine now whether and to what extent post-signature decisions of the contracting authority may be considered to have adequate statutory underpinning and/ or are of general application.

⁸⁸ See also *R v Lord Chancellor’s Department ex parte Nangle* [1991] IRLR 343 [346-348]; *R v British Broadcasting Corporation ex parte Lavelle*, *op. cit.*, 106; *R v Derbyshire County Council ex parte Noble*, *op. cit.*; *R v Chief Constable of South Wales ex parte Thornhill*, *op. cit.*

⁸⁹ See *R v East Berkshire Health Authority ex parte Walsh*, *op. cit.*, at [164-166], (Sir J. Donaldson) & [172], (May LJ); *R v Secretary of State for the Home Department ex parte Benwell* [1985] 1 QB 554 (Hodgson J).

⁹⁰ See *R (Supportways) v Hampshire County Council* [2006] EWCA Civ 1035.

⁹¹ See *R v Secretary of State for Transport, ex p London Borough of Richmond Upon Thames (No. 3)*, *op. cit.*, [415]; *R (Beeson) v Dorset County Council* [2002] EWCA Civ 1812 [2003] UKHRR 353 at [17]: “[t]he basis of judicial review rests in the free-standing principle that every action of a public body must be justified by law ...”.

⁹² See *R v Derbyshire County Council, ex parte Noble*, *op. cit.*, at [334 & 336] (Woolf LJ); *R v BBC ex parte Lavelle*, *op. cit.*; H. Woolf, *Public Law – Private Law: Why the Divide?* [1986] PL 220 [222-223].

⁹³ See *R (Mullins) v Appeal Board of the Jockey Club* [2005] EWCH 2197 (Admin) at [29]; *R v Panel on Take-overs and Mergers, ex p Datafin Plc*, *op. cit.*; *R v East Berkshire Health Authority ex parte Walsh*, *op. cit.*

⁹⁴ See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *R v Hillingdon Health Authority ex parte Goodwin* [1984] ICR 800; *R v Liverpool City Council, ex parte Ferguson and Ferguson*, *op. cit.*

⁹⁵ Indeed, judicial review is a means for public interest’s satisfaction, which, within ‘the fluid nature of the requirement of sufficiency’ [Law Com. 226, para 5.16], has been reflected to the Justice Sedley’s reasoning on the standing requirement: it may not be necessary for the claimant to show any personal proximity to the decision or special impact or interest over an above that ‘shared with the generality of the public’; see *R (on the application of Dixon) v. Somerset CC* [1997] EWHC Admin 393 at [13]. Of interest it is the distinction drawn by the Court of Appeal as between the claimant who has ‘no real or genuine interest in obtaining the relief sought’ and the one who ‘legitimately and perhaps passionately is interested in obtaining the relief sought, relies as grounds for seeking that relief on matters in which he has no personal interest’, with the former being considered as not having sufficient interest; see *R (on the application of Kides) v South Cambridgeshire DC* [2002] EWCA Civ 1370 at [132].

⁹⁶ See the dictum of Nolan LJ in *R v London Borough of Hammersmith and Fulham, ex parte NALGO* [1991] IRLR 249 [256]. For an example of the operation of judicial discretion in finding ‘publicness’, see *R v CPS ex parte Hogg* (1994) 6 Admin LR 778.

The clue has recently been given by the ECJ in the above stated case *CAS Succhi di Frutta*⁹⁷. The Court reasoned on the grounds of the event that the contracting authority “is authorized” to make significant changes at will. The term ‘authorization’ is originally linked to the principle of legality. As indicated, public authorities are only allowed to do what the law ‘authorizes’ them to do⁹⁸. Thus, it may be concluded that even in the stage of the execution of the contract there is the requisite ‘public law element’. This assumption seems to have been confirmed by the *Conseil d’ État*, which, subsequently, held that contracts which have been concluded illegally, in particular those which have been awarded in infringement of the Public Procurement Code, may be declared to be null or void⁹⁹. This change in the *Conseil d’ État* attitude has satisfied those academics who find themselves having had a lot of concerns about the effectiveness of the unsuccessful tenderers’ judicial protection¹⁰⁰. As indicated, the *Conseil d’ État* was previously rather reluctant to recognise any other right of the unsuccessful tenderers, but only to obtain damages in the case of infringement of public procurement rules¹⁰¹.

As far as the potential general character of the contracting authority’s intervention is concerned, the ECJ, in the same decision, made a point of principle: in the course of the execution of the contract, an unsuccessful tenderer must be regarded as ‘individually concerned’ by an amendment of a significant condition of the invitation to tender¹⁰². Otherwise, the uniform application of the conditions of the invitation to tender and, again, the objectivity of the procedure would no longer be guaranteed and, in turn, would inevitably lead to infringement of the principles of transparency and equal treatment as between tenderers. The *Conseil d’ État*, also subsequently, recognized that an application for the annulment of a contract can directly be brought by an unsuccessful bidder¹⁰³.

⁹⁷ Case C-496/99 P, *op. cit.*, at [120-121].

⁹⁸ See also C. Yannakopoulos, *op. cit.*, [435 & 436]: public contracts are public authorities’ activities which fall within the scope of the principle of legality, that is, public bodies should be given a statutory power to conclude a contract.

⁹⁹ Judgment of 10.07.2007, Bulletin juridique des contrats publics 2007, p. 391; Opinion of the *commissaire du gouvernement*, D. Casas, *op. cit.* Other interested parties may only ask the administrative court to order the contracting parties to apply themselves before the competent court for a declaration of nullity. See, *Conseil d’ État*, judgment of 07.10.1994, *Mr and Mrs Lopez*, Lebon p. 430; Opinion of the *Commissaire du gouvernement*, R. Schwartz, *op. cit.* Even if the contract is not challenged and the nullity argument is not put forward by any of the parties, the judge must make the finding of its nullity in case of a dispute concerning its enforcement. See *Conseil d’ État*, judgment of 27.11.1942, *Société Bongrand et Dupin*, Lebon, p. 335; judgement of 26.03, *Dame veuve et Dlle Moulinet*, Lebon p. 209.

¹⁰⁰ See J.M. Fernandez Martin, *op. cit.*, p. 230-244.

¹⁰¹ See *Conseil d’ État*, judgment of 06.08.1915, *Cochet v Commune de bellegarde*, Lebon, p. 284.

¹⁰² See Case C-496/99 P, *CAS Succhi di Frutta*, *op. cit.*, at [120-121].

¹⁰³ Other interested parties may only ask the administrative court to order the contracting parties to apply themselves before the competent court for a declaration of nullity. See, *Conseil d’ État*, judgment of 07.10.1994, *Mr and Mrs Lopez*, Lebon p. 430; Opinion of the *Commissaire du gouvernement*, R. Schwartz, *op. cit.* Even if the contract is not challenged and the nullity argument is not put forward by any of the parties, the judge must make the finding of its nullity in case of a dispute concerning its enforcement. See

Limiting, however, the standing to the unsuccessful ‘tenderers’ and ‘bidders’, as it may follow from the ECJ judgment¹⁰⁴, may challenge the *prima facie* general character of the post-signature ‘decisions’. According to the UK case-law the number of the affected persons is irrelevant. Decisions taken in the currency of a contract are regarded to be of general character ‘even if the numbers affected are not great’¹⁰⁵. It may follow that only the limitation of the interested economic operators to unsuccessful tenderers or bidders is not able to preclude the general character of the contracting authority’s ‘decision’.

From this analysis, it follows that EC competition law may be the way in which both the requisite statutory element and the requisite general character of the post-signature *sui generis* decisions are to be construed. Moreover, if the prerequisites for the judicial review to apply are considered to have been established through the pathway of EC competition law, EC competition law and public law cannot be considered to be at odds any more. Instead, they must be regarded as mutually influential, so that EC competition law may facilitate judicial review to apply and, in turn, judicial review may provide adequate and effective protection of actual and potential competitors in the public market.

As Gaudemet put it rightly, ensuring free competition eventually means regulating public order¹⁰⁶. Although public law and competition law are initially the outcomes of two distinct ideologies, they both now seem to protect the so-called economic public order¹⁰⁷. As indicated (*supra* part II), competition in the public procurement area provides for the means to open up public markets to competition and, in consequence, to deter waste of public money. So, given the fact that judicial review presupposes public interest intervention into a dispute¹⁰⁸, EC competition law is also able to provide this prerequisite in the field of public procurement. It would not be an exaggeration then to say that public procurement is the area where EC competition law encounters public interest law and *vice versa*.

Furthermore, it is established that challenges to public contracts could be brought by way of judicial review where only the EC Treaty principles apply, in appropriate cases, such as where a decision is irrational or unfair (see *supra* part II). Accordingly, once the EC principle of free competition has been perceived in the context of public law, its alleged breach may be a ground for judicial review. This is mainly because the competition element, as analysed so far, challenges the nature of the contract itself so as not to be considered as *res inter alios acta* any more. In particular, the competition element with its regulatory impact on contracting authorities’ decisions is similar to the

Conseil d'État, judgment of 27.11.1942, *Société Bongrand et Dupin*, Lebon, p. 335; judgement of 26.03, *Dame veuve et Dlle Moulinet*, Lebon p. 209.

¹⁰⁴ See Case C-496/99 P, *CAS Succhi di Frutta*, *op. cit.*, at [120-121], emphasis added.

¹⁰⁵ See above footnote 96.

¹⁰⁶ See Y. Gaudemet, *Droit de la concurrence: une autre introduction*, in *Le Code de commerce 1807-2007: Livre du bicentenaire*, Dalloz, 2007, p. 397 [404]: “*Liberté individuelle protégée, elle signifie désormais contrainte, ‘ordre public régulé’*”.

¹⁰⁷ See C. Yannakopoulos, *op. cit.*, [426].

¹⁰⁸ See *R v Lord Chancellor, ex p Child Poverty Action group* [1999] 1 WLR 347 at [22.2.10].

regulatory character that the ‘administrative acts’ have¹⁰⁹. In other words, within the context of national administrative law, a strong link between the principle of free competition and the principle of equality of treatment of individuals¹¹⁰ continues to be in the currency of the public contract.

IV. Reviewability of both stages.

There are only two ways for the enforcement of EC competition rules in England: in the ‘ordinary’ courts¹¹¹ by means of a free standing action for damages or by means of a follow-on action based upon an infringement decision rendered by the Office of Fair Trading¹¹², and in the Competition Appeal Tribunal, which also hears ‘monetary claims’¹¹³.

Domestic procedural laws that only allow action for damages are often described as impediments to the enforcement of Community competition rules¹¹⁴. It has been clarified that “the principle of effectiveness of EC law requires no more than proper application of EC law and adequate remedies for the breach of EC rights”¹¹⁵. In the field of equal treatment, this requirement has been held to imply that the sanctions available must “guarantee real and effective judicial protection ... [and] must have a real deterrent effect” on the party who is in breach of Community law¹¹⁶. Procedural laws must enable individuals “to ascertain the full extent of the rights”¹¹⁷.

To give Community law full force and effect, national courts must have the power to refrain from applying a provision of national law and remedies which exist in the domestic legal systems simply might not apply under the same conditions as to similar cases of national law¹¹⁸. According to the ECJ, only in lack of Community law

¹⁰⁹ See C. Yannakopoulos, *op. cit.*, [432].

¹¹⁰ See C. Yannakopoulos, *op. cit.*, [440].

¹¹¹ See s. 2 (1) of the European Communities Act (1972). Since June 2004 the Chancery Division of the High Court; see Civil Procedure Rules: Practice Direction: Competition Law Claims Relating to the Application of Articles 81 and 82 of the EC Treaty and Chapters I&II of Part I of the Competition Act 1998: October 2005.

¹¹² See s. 58 A of the Competition Act (CA) (1998), as amended by s. 20 of the Enterprise Act (EA) (2002).

¹¹³ See s. 47 A of the Competition Act (CA) (1998), as amended by s. 18 of the Enterprise Act (EA) (2002).

¹¹⁴ See e.g. Commission Staff Working Paper: Annex to the Green paper: *Damages action for breach of EC anti-trust rules* SEC (2005) 1732 (19.12.2005).

¹¹⁵ G. Cumming, B. Spitz & R. Janal, *Civil procedure used for enforcement of EC competition law by English, French and German civil courts*, (2007), p. 3.

¹¹⁶ See Case 14/83, *Von Colson*, (1984) ECR 1891, at [18 & 23]; Case C-180/95, *Draehmpaehl*, (1997) ECR I-2195, at [24 & 25].

¹¹⁷ See Case C-236/95, *Commission v. Greece*, (1996) ECR I-4459, at [13]; Koutoupa-Regakos, *The new Greek legislation transporting the 89/665 Remedies Directive*, (1998) PPLR CS 12 [CS14 & 15].

¹¹⁸ See F. Schockweiler, *La responsabilité de l’ autorité nationale en cas de violation du droit communautaire*, (1992) Rev. trim. Dr. eur. 27 [47 & 48]. The main concern of the Court is to ensure the *effet util* of Community law. See Case C-3/88, *Commission v Italy*, [2002] ECR, I-10567, at [19]; Case C-411/00, *Felix Swoboda GmbH*, [2002] ECR, I-10567, at [58].

regulation, should domestic procedural laws be applied¹¹⁹. This may be so, even if a national court concerned does not have such a competence under national law.

According to the principle of effectiveness¹²⁰ and the principle of supremacy of Community law¹²¹, a national court must be able to set aside an unlawful decision of a contracting entity to the extent that it conflicts with directly effective Community law. Even in cases which do not involve directly effective Community law rights, the domestic courts are obliged to adapt normal methods of statutory interpretation in order to ensure that national legislation which deals with the same subject as Community law is construed in a manner that is consistent with it¹²². As a consequence, EC competition rules, which are involved in both stages of public procurement, whether they have direct effect or not, must be effectively enforced.

However, it has been submitted that public procurement procedures are regarded as a mechanism to secure the public interest rather than a method for vindicating individual interests¹²³. So, the interest of securing effectiveness must be balanced against considerations, such as legal certainty, sound administration and the orderly conduct of proceedings by the Court¹²⁴. Arguably, it is only if the impediment on the enforcement is not justifiable on the grounds of the principles which underlie the national procedural systems, that the doctrine of effectiveness and non-discrimination would apply to as to lead to a change in the national system of procedural or substantive law in so far as to produce not a *minimum* but rather an adequately or most adequately effective enforcement of Articles 81 and 82 EC¹²⁵.

It is argued that domestic procedural public-private law divide will continue for so long as the substantive divide exists¹²⁶. Although litigants may raise an argument about the divide for tactical reasons, this still presupposes a substantive, conceptual distinction between the two branches of law. It is accepted that when public authorities act in the commercial sphere¹²⁷ and when there is no evidence of bad faith, corruption or improper

¹¹⁹ See Case C-294/02, *Commission v AMI Semiconductor Belgium BVBA and Others*, NJ 2005, 570 at [68-70].

¹²⁰ See also P. Gibson LJ, *Autologic Holdings Plc v Inland Revenue Commissioners* [2004] EWCA Civ 680 at [25]: “[a]ny provision of national law which makes the exercise of the right conferred by Community law practically impossible or extremely difficult cannot prevail”.

¹²¹ See Case C-103/88, *Costanzo*, (1989) ECR 1839. See also Lord Bingham in *A v chief Constable of west Yorkshire* [2004] UKHL 21 at [9]: “the law of the Community prevails over any provision of domestic law inconsistent with it”.

¹²² See H. Woolf, J. Jowell & A. Le Sueur, *op. cit.*, p. 65.

¹²³ See S. Arrowsmith, J. Linarelli & D. Wallace, *op. cit.*, p. 758.

¹²⁴ See Case 199/82, *San Giorgio*, [1983] ECR 3595; Joined cases C-295-298/04, *Manfredi*, [2006] ECR I-6619; A. Biondi, *Remedies for breach of EC law*, (1997), p. 27.

¹²⁵ See G. Cumming, B. Spitz & R. Janal, *op. cit.*, p. 4 & 13, with further references; case C-430 - 431/93, *Van Schijndel*, [1995] ECR I-4705; case C-312/93, *Peterbroeck*, [1995] ECR I-4599.

¹²⁶ See N. Bamforth, *Restitution and the Scope of Judicial Review*, [1997] PL, 603.

¹²⁷ See *R (Hopley) v Liverpool Health Authority* [2002] EWHC 1723 (Admin) at [54]: ‘commercial’-type decisions only reviewable “if there is an additional public element introduced to the process”; *R (West) v Lloyds of London* [2004] EWCA Civ 506 at [31]: decisions “concerned solely with the commercial relationship ... governed by the contracts”.

policy¹²⁸, public law is not engaged, except where the actual source of the relevant power or obligation creates such engagement¹²⁹. Although it is perceived by the courts so far that public authorities when they act as awarding/ contracting authorities are actually involved in a commercial market, it is becoming clearer and clearer that the substance of the legal relations which are developed in the frame of public procurement, consists of a true public law element which is interestingly going to be established with the aid of EC competition rules. In the event that the existence of a public law element is admitted, then the procedural divide may be challenged insofar that the public law element applies.

Again, the principle of effectiveness and the principle of supremacy require effective enforcement of EC competition rules in both stages of public procurement to which the rules apply. Furthermore, as indicated, ensuring the enforcement of EC competition rules in both public procurement stages eventually means regulating public order¹³⁰, which, in turn, makes the principle of legality to apply to all awarding/ contracting authorities' acts. This is a good reason for the judicial review to apply, mainly because judicial review is “a last resort where there is illegality”¹³¹.

Furthermore, once in the UK judicial review has been recognised as offering adequate protection to the rest of EC legal principles, there does not seem to be a reason why judicial review is not to be considered as an appropriate means for the protection of potential tenderers and the unsuccessful bidders in both stages. Indeed, in the course of the execution of the contract, ‘material’ changes in the terms and conditions¹³² of the invitation to tender may affect not only the unsuccessful bidders but also the potential tenderers. This is because, if the amended terms and conditions had been part of the invitation, they would have allowed tenderers or tenders other than the initial ones to be admitted or accepted respectively.

¹²⁸ See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 [229], Lord Greene MR: “[b]ad faith, dishonesty – those of course, stand by themselves”; *Earl Fitzwilliam’s Wentworth Estates Co Ltd v Minister of Town and Country Planning* [1951] 2 KB 284 [307]: “the law always has regard to the dominant purpose”; *Smith v East Elloe Rural District Council* [1956] AC 736 [762]; *R v Debryshire County Council, ex p Times Supplements Ltd* (1991) 3 Admin LR 241 [253A], Watkins LJ: it is “an abuse of power contrary to the public good”; *R v Lewisham Borough Council, ex p Shell* [1988] 1 All ER 938 [952f]: impermissible motive “inextricably mixed up with [permissible] ... and this extraneous and impermissible purpose has the effect of vitiating the decision as a whole”; *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513 [563H]: “good faith ... is an indispensable element of the lawful exercise of ... any ... statutory discretion”.

¹²⁹ See <http://www.ffw.com/publications/all/articles/contracting-authorities-the-r.aspx> (accessed on 03.08.2009).

¹³⁰ See Y. Gaudemet, *op. cit.*, [404]: “*Liberté individuelle protégée, elle signifie désormais contrainte, ‘ordre public régulé’*”.

¹³¹ See *R (Lloyd) v Dagenham London Borough Council* [2001] EWCA Civ 533 at [27].

¹³² Inclusive of a post-signature extension of the scope of the contract which encompasses works, goods or services not initially advertised, or changes of the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract.

Van Gerven points out that the principle of adequate protection of rights derived from Community law requires the relief granted under the particular national legal systems not to put “the complainant at too large a competitive disadvantage as compared with complainant looking for similar relief in other Member States”¹³³. This may be the case in the UK with regard to public procurement disputes. Once, according to this paper, there does not seem to be any matter of principle of UK law, able to prevent judicial review proceedings from applying in public procurement cases, affected economic operators, in the course of both tender process launched by UK public authorities and the execution of the public contract, must not be put “at too large a competitive disadvantage as compared with” tenderers or bidders which participate, for example, in French public procurement procedures. Award of damages is rather a weak relief compared to setting-aside of an unlawful decision taken by the contracting authority, let alone proof difficulties which may arise in quantifying the loss and proving a causal link with the infringement of Community law¹³⁴. The more radical remedy is termination of the contract which can certainly be reached by way of judicial review¹³⁵.

It is also unclear how far the EU requirements for challenging procedures entail that courts should exercise some control over factual and discretionary adjudications which does not involve errors of law. While ‘ordinary’ actions involve factual considerations¹³⁶, judicial review is only about “a challenge to the legal validity of the decision”¹³⁷; in other

¹³³ W. van Gerven, *Of rights, remedies and procedures*, (2002) CMLR 501 [525-526, 536].

¹³⁴ See Opinion of the Advocate General Mischo delivered on 10.06.1999, on Case C-81/98, *Alcatel*, *op. cit.*, at [38].

¹³⁵ See Directive 2007/66/EC, recital 14: “[i]neffectiveness [of the contract] is the most effective way to restore competition and to create new business opportunities for those economic operators which have been deprived illegally of their opportunity to compete”. Indeed, unliquidated damages is not always an adequate method of enforcement: neither is it deterrent enough for the awarding authorities nor does it fully satisfy the economic operator who passed over. See J. Arnould, *Damages for performing an illegal contract – the other side of the mirror: comments on three recent judgments of the French Council of State*, (2008) 17 PPLR, NA 274. Under the previous regime of the Directive 89/665/EEC, in particular Article 2 (6), the Member State might decide that the review body shall not be able to set aside unlawful decisions if the contract has already been concluded subsequent to its award, except where a decision must be set aside prior to the award of damages. Subsequently, Article 2 (6) permitted Member States to preserve the effects of contracts concluded in breach of the Directives. It was considered that, in this way, the legitimate expectations of the parties were protected, but it was ignored that the contracting authority's conduct in the currency of the contract may affect third parties.

That provision, because of its specific nature, cannot be regarded as regulating the relations between a Member State and the Community in the context of Articles 226 and 228 EC. See Case C-503/04 *Commission v Germany* [2007] ECR I-06153 at [33-35]. Even if the principles of legal certainty and of the protection of legitimate expectations, the principle of *pacta sunt servanda* and the right to property could be used against the contracting authority by the other party to the contract in the event of rescission of a contract concluded in breach of Directive 92/50 relating to the coordination of procedures for the award of public service contracts, a Member State cannot in any event rely on those principles or that right in order to justify the non-implementation of a judgment establishing a failure to fulfill obligations under Article 226 EC and thereby evade its own liability under Community law.

¹³⁶ See G. Cumming, B. Spitz & R. Janal, *op. cit.*, p. 40.

¹³⁷ See *In re Michael Nwafor* [1994] Imm AR 91 [93]; Lord Clyde in *Reid v Secretary of State for Scotland* [1999] 2 AC 512 [541F-542A].

words, judges hearing applications for judicial review only have the power to review legal errors¹³⁸.

It could be argued that if courts were wholly abdicated responsibility over these matters, it would leave too much latitude for procuring entities to abuse the rules, by distinguishing discriminatory decisions behind false factual and discretionary assessments¹³⁹. In addition, given the fact that the party who alleges breach of statutory duty bears the burden of proof¹⁴⁰, it is likely the proof of the required effect on competition to be burdensome¹⁴¹. English case-law requires not only the establishment of the requisite product market but also an analysis of networks and their possible distortion of inter and intra band competition notably through the foreclosure of access to new entrants to the product market¹⁴², with the judgment of the House of Lords in *Inntrepreneur Pub Co. (CPC) & others v. Creham*¹⁴³ case, by requiring that the enforcing party produce expert evidence, to have the potential of rendering the enforcement of Articles 81 and 82 EC even more difficult, though less onerous¹⁴⁴.

The principle of effectiveness in addition to procuring adequately effective enforcement of Articles 81 and 82 EC may also contribute to the advancement of procedural reform within the context of domestic procedural systems¹⁴⁵. As indicated, litigation is not always sufficiently constructed to protect the interests of suppliers¹⁴⁶. A successful review system would seek both to provide a deterrent to breaches of the rules, and provide real redress¹⁴⁷. Does the enactment by means of domestic law of the regulations of the recent Directive 2007/66/EC¹⁴⁸, which amends Directive 89/665/EEC, contribute

¹³⁸ See S. Arrowsmith, J. Linarelli & D. Wallace, *op. cit.*, p. 764-765.

¹³⁹ *Ibid*, p. 804.

¹⁴⁰ See *Potato Marketing Board v. Robertsons* (1983) 1 CMLR 93 [98] (County Ct); Case C-242/95, *GT-Link v. DSB*, [1997] ECR I-4449: the question of the burden of proof is a matter for national law subject to the principle of effectiveness and non-discrimination.

¹⁴¹ See *Inntrepreneur Estates v. Boyes* (1993) 2 ELGE 112 [116]; *Iberian UK Ltd v. BPB Industries* (1996) CMLR 601; *Potato Marketing Board v. Hambden Smith* (1997) EuRL 435; *Fulton Motors Ltd v. Toyota* (GB) Ltd (1998) EuLR 327.

¹⁴² See Case C-234/89, *Delimitis v. Henninger Brau AG*, [1991] ECR I-935; Case C-453/99, *Courage Ltd v. Creham*, [2001] ECR I-6297; *Creham v. Inntrepreneur Pub Co* (2003) EWHC 1510 (Ch); *Bernard Crehan v. Inntrepreneur Pub Co (CPC)*, [2004] EWCA Civ 637, at [97].

¹⁴³ [2006] UKHL 38.

¹⁴⁴ See G. Cumming, B. Spitz & R. Janal, *op. cit.*, p. 54, who submit that the doctrine of effectiveness and non-discrimination could well lead to the modification of the burden of proof; s. 98 of the Employment Rights Act (1998), which provides that the burden should be divided between the claimant and the defendant.

¹⁴⁵ See G. Cumming, B. Spitz & R. Janal, *op. cit.*, p. 13. See also H. Woolf, J. Jowell & A. Le Sueur, *op. cit.*, p. 65: '[n]ew remedies have ... been fashioned to ensure full protection of Community law rights, including damages where there has been a serious breach of Community law by a public authority - this ... is a significant innovation for a legal system that has generally set its face against compensation for public law wrongs'.

¹⁴⁶ See United Kingdom Department of Trade and Industry, *Public Procurement Review*, (1994) at [103-104] (questioning the effectiveness of the EC remedies system in procurement).

¹⁴⁷ See S. Arrowsmith, J. Linarelli & D. Wallace, *op. cit.*, p. 757.

¹⁴⁸ Amending Directive 89/665/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, [2007] OJ L 335/31.

to the advancement of the UK procedural system with regard to public procurement cases?

This Directive provides an added focus on pre-contractual remedies. In particular, Article 2 (3) introduces a standstill period, breach of which may be a ground for a claim the public contract to be declared ineffective. Declaration of ineffectiveness may also be in the event that a contract has been awarded without transparency and *prior competitive tendering*¹⁴⁹. As the recitals of the Directive clarify, “ineffectiveness should not be automatic but should be ascertained by or should be the result of the decision of an independent review body”¹⁵⁰.

Whether a declaration of ineffectiveness provides full protection of the rights derived from Community law or not, it is an improvement of the regime and may deter breaches of the public procurement rules which unlawfully deprive candidates and tenderers of pre-contractual remedies.

The Directive provides for a choice between retroactive and prospective cancellation of contractual obligations. If retroactive cancellation is adopted by Member States, there will be significant legal and administrative consequences in the event that a Court grants an order of ineffectiveness, let alone the difficulty of how a retroactive cancellation could be executed.

It has been argued that despite the declaration of ineffectiveness of a contract, a substantial part of obligations of the awarding authority for the past will survive¹⁵¹. Some contractual obligations of the company for the past will also remain. For instance, in the case of a building or infrastructure which is not suitable for its purposes, because the construction was not carried out according to the state of the art, the awarding authority will be entitled to damages¹⁵².

In addition, doubts about the suitability of judicial review in both stages may arise, if one keeps in mind the adverse effects that nullity may have on the person with which the contract was concluded. Nullity of the contract may well suit the interests of unsuccessful

¹⁴⁹ E. g. illegal direct awards of contracts which is regarded to be “the most serious breach of Community law in the field of public procurement”. See Case C-26/03, *Stadt Halle and RPL Lochau*, [2005] ECR I-1 [37]. If the Court decides that such contracts should not remain in force, the contract will need to be re-tendered.

¹⁵⁰ See J. Golding & P. Henty, *The new remedies directive of the EC: standstill and ineffectiveness*, [2008] PPLR 146 [150]: on the contrary Article 2 (d) enumerates the situation in which ineffectiveness would apply automatically “[a]rguably, this should rather have been left to the review body to decide taking into account all circumstances of the case”.

¹⁵¹ See J. Arnould, *op. cit.*, [NA279]. He refers to *Mr Tête* and *Société Spie Batignolles* judgments which concerned cases where the contract had been declared null by an administrative court; to the *Société Decaux and Département des Alpes-Maritimes* judgment which concerned a case where the contract had been annulled (the action for annulment against a public contract is a special remedy, which is only open to the Prefect, against contracts concluded by local authorities).

¹⁵² See *Conseil d'État*, February 2008, *Mr Schmeltz and Mr Orselli*, *Actualité Juridique Droit Administratif* 2008, p. 1102, with the note of L. Marcovici.

bidders, but what happens to the supplier, service provider or contractor with which the contract was concluded? In France, it is well established by the *Conseil d' État* that in the case of nullity, the contract is deprived of any effect, and neither can the supplier, service provider or contractor obtain payment on a contractual basis nor can he maintain the sums which have already been paid¹⁵³. However, the contracting authority still remains liable on the grounds of unjust enrichment¹⁵⁴ and negligence¹⁵⁵. On the ground of negligence, for example, the company may obtain compensation for losses other than the cost of goods or services it has supplied or the works it has performed.

But do damages and loss made by the preferred bidder preserve public money? In France, courts are not allowed to take into account the market price for similar goods or services¹⁵⁶. In other words, they are not allowed to take into account the fact that the company would have had no chance to make such profits in normal conditions. As a result, the awarding authority may have to bear higher costs. It may also have to bear the companies' profits several times: the profits expected from the contract by the company to which it was illegally awarded, the profits of the company to which the contract should have been awarded and the profits of the company to which a new contract is awarded. So, hardly can the objective 'to restore competition' be reached, since the company with which the contract was initially concluded is not excluded from the new tendering procedure.

If 'ineffectiveness' entails monetary claims, this does not *per se* preclude the application for judicial review even in the UK legal order. But monetary relief which is sought in the judicial review claim, may attract circumspection if they are the true focus of the claim¹⁵⁷. Whether monetary claims are to be reviewed by the administrative section or by the ordinary ones of the High Court, the UK judiciary is more demanding, as indicated,

¹⁵³ See J. Arnould, *op. cit.*, [NA275].

¹⁵⁴ See *Conseil d' État*, judgment of 24.11.2006, *Me Malmezat Prat*, Lebon p. 490; Opinion of the *Commissaire du gouvernement*, d. Casas, *Bulletin juridique des contrats publics* 2007, p. 49; Council of State, 22.02.2008, *Mr Tête*, *Actualité juridique Droit administrative* 2008, p. 992 with the note of J.D. Dreyfus; Council of State, 10.04.2008, *Société Decaux and Département des Alpes-Maritimes*, *Bulletin juridique des contrats publics* 2008, p. 280: if necessary the Court may order an expert to determine the amount of these different costs.

¹⁵⁵ See *Conseil d' État*, judgment of 26.03.2008, *Société Spie Batignolles*, *Contrats et Marchés Publics* 2008, no 93: again, an expert opinion may be necessary.

¹⁵⁶ See J. Arnould, *op. cit.*, [NA278].

¹⁵⁷ See *R v London Commodity Exchange (1986) Ltd, ex p Brealey* [1994] COD 145: essentially it is a private claim for damages and therefore a matter for private law; *R (Machi) v Legal Services Commission* [2001] EWHC Admin 580 at [24]: the Court decided to hear the case because ruling on unlawfulness "would create an issue estoppel ... and might be of assistance" to damages claim; *R (Kurdistan Workers Party) v Secretary of State for the Home Department* [2002] EWHC 644 (Admin) at [87]: damages claim is "not in itself a good reason for permitting judicial review"; *R (Mohamed) v Secretary of State for the Home Department* [2003] EWHC 1530 (Admin): declaration that previous detention was unlawful, with directions as to disposal of consequential damages claim; *Mclaughlin v Governor of the Cayman Islands* [2007] UKPC 50: salary and pension entitlements following from judicial review of procedurally invalid dismissal of public office-holder; *Risk management partners ltd v Brent London Borough Council* [2008] EWHC 1094 (Admin): damages under the Regulations, following successful judicial review claim.

than its French counterpart, so that, in the UK, ineffectiveness may hardly lead to distortion of a kind of the competition.

Ineffectiveness, however, may well be declared even in more cases when there is breach of EC competition rules in either stage. This is mainly because, as this paper has indicated, public authorities are obliged to ensure the respect of the Community competition norms in all stages of public procurement, so that public contracts may be regarded as products of the system itself¹⁵⁸. Again, while challenges against ‘decisions’ that are taken by the contracting authority in its capacity as a public authority¹⁵⁹, may easily be subjected to judicial review, disputes in the currency of the contract rise more complicated issues.

In the tender process, a disappointed potential provider is often regarded as having the right to proceed under the Regulations if its claim is covered by them¹⁶⁰. Indeed, the loss of a significant chance of obtaining the contract is enough to found a claim and this can arise out of the loss of an opportunity of taking part in a properly constituted and operated process¹⁶¹. This perceived scope of the affected economic operators may also be in the currency of the contract in the event of post-signature changes in the very terms and conditions of the contract. Indeed, while in the course of the tender process only the bidders are usually granted standing, all potential tenderers may be recognised on the basis of the above assumption as affected by an unlawful post-signature ‘decision’¹⁶².

The attempt to articulate the concept of ‘the administrative act’ and the concept of ‘material’ post-signature changes is not a merely recent tendency, but reflects the initial French theories of incorporation and of *tout invisible*¹⁶³, which had been introduced

¹⁵⁸ See F. Riem, *La notion de transparence dans le droit de la concurrence*, Éditions L’Harmattan, 2002, p. 86.

¹⁵⁹ See *R v Oldman metropolitan Borough Council, ex p Garlick, op. cit.*, at [519A]; *R v Northavon District Council, ex p Smith, op. cit.*, at [408F-G]; *R (Yogathas) v Secretary of State for the Home Department, op. cit.*; *R v Secretary of State for Trade and Industry, ex p Lonhro Plc, op. cit.*, [530E&533A].

¹⁶⁰ See Court of Appeal, *Cookson and Clegg v Ministry of Defence, op. cit.*

¹⁶¹ Court of Appeal decision 2008, *London Borough of Newham*.

¹⁶² See C. Yannakopoulos, *op. cit.*, [440-441]. The principle of non-discrimination imposes limits on the procedural autonomy of the Member States; in the application of procedural rules, no discrimination can take place among persons who according to Community law are required to be treated equally. See Case 186/87, *Cowan*, (1989) ECR 195, at [19]; C-43/95, *Data Delecta*, (1996) ECR I-4661, at [12 & 15]. See also at [13]: “...it is corollary of those freedoms that they must be able, in order to resolve any disputes arising from their economic activities, to bring actions in the courts of a Member State in the same way as nationals of that State”. Otherwise, the exchange of supplies and services within the Community would – possibly indirectly – be affected. This may imply, for instance, that when an entity has the right to sue, then similar entities also have to be given a standing to sue. See also S. Arrowsmith, J. Linarelli & D. Wallace, *op. cit.*, p. 751: other persons might, also, sometimes proceed so – for example, taxpayers claiming wasted expenditure, or opposition politicians, although the majority of the jurisdictions do not grant them a standing.

¹⁶³ See N. Dantoni-Cor, *L’annulation de l’acte detachable*, DA 1999, no 14, p. 7.

before the theory of the *actes détachables*¹⁶⁴. They both implied regulatory powers underpinning public contracts. This underpinning is now revitalised with the aid of the competition law¹⁶⁵. They also seem to comply with the English very initial ruling. According to the third principle that Lord Diplock expressed in *O'Reilly* case¹⁶⁶, it is contrary to public policy –and as such an abuse of process- for a person seeking to vindicate public law rights to evade the protections judicial review provides for public authorities by proceeding by an ordinary writ action.

Furthermore, Lord Woolf, building on Lord Diplock's 'pragmatic suggestions'¹⁶⁷, argued that the courts are required to look not only to technical questions relating to the distinctions between public and private law rights and bodies, but also to the practical consequences of using the procedure chosen by the applicant. So, if the applicant's choice of procedure, whether judicial review or a writ, "has no significant disadvantages for the parties, the public or the court, then it should not normally be regarded as constituting an abuse"¹⁶⁸. At the moment, such proportionality concerns are well reflected in the Directive 2007/66/EC which provides that courts may not render an illegal contract ineffective when ineffectiveness would lead to disproportionate consequences¹⁶⁹. For example, it should be taken into account the costs relating from the delay of the execution of the contract, the costs relating from the launching of a new procurement procedure, the costs resulting from the change of the economic operator performing the contract and the costs of legal obligations resulting from the ineffectiveness¹⁷⁰. National security concerns could also be relevant¹⁷¹. The Directive provides for alternative sanctions, when ineffectiveness is not appropriate, such as the imposition of fines or the shortening of the duration of the contract. But, the award of damages is clearly stated to be inappropriate penalty¹⁷². To this extent, judicial review seems to be more and more the adequate means by which affected economic operators may be protected.

Once the judicial review for the protection of economic operators is to be admissible, the question that follows is on which ground the application for judicial review may be brought before the courts. As indicated, the requisite public law element in both stages of public procurement is being established with the aid of EC competition rules. In the tender process, the principle of legality of the awarding authority's decisions prevails and

¹⁶⁴ According to this theory the two stages of public procurement, the tender process and the execution of the contract are rigidly distinct. The awarding authority's decisions which take effect in the course of the former are definitely administrative decisions which are subject to judicial review.

¹⁶⁵ See C. Yannakopoulos, *op. cit.*, [438].

¹⁶⁶ *O'Reilly v. Mackman* [1983] 2 AC 237 [285].

¹⁶⁷ [1997] 4 All ER 747 [755].

¹⁶⁸ *Ibid.*

¹⁶⁹ See J. Golding & P. Henty, *op. cit.*, [151]; *McLaughlin & Harvey Ltd v Dept of Finance & Personnel No 3*, *op. cit.*, at [21]: paying companies included within the framework agreement to carry out work and, additionally, paying the plaintiff damages would be 'in the most literal sense of the word waste of money'.

¹⁷⁰ See J. Golding & P. Henty, *op. cit.*, [151].

¹⁷¹ See *BSF Group Ltd v Secretary of State for Defence and Purple Foodservice Ltd* [2006] EWHC 1513 (Ch): the Court did not grant an interim injunction, partly because to do so would threaten the continued supply of food and bottled water supplies to HM Forces positioned overseas.

¹⁷² See J. Golding & P. Henty, *op. cit.*, [153].

in the currency of the public contract there is still room for contracting authority to make decisions of general application, which are also subject to the principle of legality. As a consequence, the power of the public authority to make decisions in both stages is conceived to be regulated by the EC competition rules¹⁷³. To sum up, EC competition rules make the public procurement regime up and also regulate the relevant public power, so that breach of EC competition rules may well ground illegality of the contracting authority's acts, as a ground for judicial review.

V. Conclusion.

Bit by bit, it has been argued that existing case law does not actually whittle away the role played by judicial review in public procurement disputes. Instead, judicial review can spring to life given the opportunity. The opportunity has been given by the recognition that the tender process eventually aims at opening up public markets to competition, so that in this stage EC competition rules apply. Once EC competition law entered the tender process, it continues even more powerfully to regulate the currency of the public contract, so that infringement of EC competition norms may well establish illegality of the contracting authority's action, as a ground for judicial review.

¹⁷³

See above footnote 130.