DIRECTIVE 2007/66 AND THE DIFFICULT SEARCH FOR BALANCE IN JUDICIAL PROTECTION CONCERNING PUBLIC PROCUREMENTS

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Abstract.

What kind of judicial protection has the EU developed in the sector of public procurements? What balance has EU law struck between the three main poles in this area – the public contracting authority, the successful tenderer and the excluded tenderers - as far as judicial protection is concerned? In order to tackle this question, three aspects of the regulatory framework established by Directive 07/66 are investigated: firstly, the protection provided in the period between the decision to award a contract and the conclusion of the contract in question; secondly, the protection granted after the conclusion of the contract; thirdly, the protection offered by the award of damages. The analysis shows that EU law lays down a flexible framework in which the balance between the various interests changes in relation to both the phase in which the dispute arises and the gravity of the infraction. At the same time, however, the new regulatory framework responds to the unitary rationale of protecting all the various interests in play after the decision to award. The new regulatory framework can be welcomed under several regards. Yet, it also presents some shadows, in particular as far as the regulatory discretion left to the States is concerned.

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1. The Problem.

What kind of judicial protection has the European Union (EU) developed in the sector of public procurements? What balance has European law struck between the various interests at play in this area as far as judicial protection is concerned? EU substantive law in the field of public procurements creates a particularly complex «gravitational field», in which the goal of fair competition between European internal market operators is combined with the equally important value of the economic efficiency of administrative action [1]. What balance has European law struck between the three main poles in this gravitational field – the public contracting authority, the successful tenderer and the excluded tenderers - as far as judicial protection is concerned? Is this balance reasonable or problematically ambiguous?

To answer such questions in an analytical way, this paper will examine the balance struck by Directive 07/66. This Directive represents, as it is well known, the most recent step in the long evolution of a sophisticated framework for protecting concerned tenderers, generated by European courts and political institutions. This development stretches back to Directives 89/665 and 92/13,

[1] On the basic principles of the European law on public procurements, pursuing at the same time the target of competition between economic operators in the internal market and the goal of the economic efficiency of administrative action, see S. Cassese (ed.), *La nuova costituzione economica* (2007). Of the rich literature on public procurements European law, see S. Arrowsmith, *An Assessment of the New Legislative Package on Public Procurement,* 2 Common Mkt. L. Rev. 1277 (2004); C. Bovis, *Public Procurement in the European Union (*2005); Y. Allain, *The new European Directives on Public Procurement: Change or Continuity?*, 1 Publ. Contr. L. J. 517 (2006).; J. M. Hebly (ed.), *European Public Procurement: History of the 'Classic' Directive 2004/18/EC* (2007). The notion of economic efficiency of the administrative action is used in the text to refer to those situations in which predetermined objectives are achieved with a mininum expenditure of resources and authorities are able to get better value for money through the implementation of the awarding proceedings; see, Europe Economics, *Evaluation of Public Procurement Directives. Final Report* (2006) http://ec.europa.eu/internal_market/publicprocurement/docs/final_report_en.pdf; for a general discussion on the possible applications of the notion of economic efficiency to administrative action, see e.g. B. E. Dollery and J. L. Wallis, *Economic Efficiency*, Enc. Publ. Adm. & Publ. Pol. (2008); and M. Sheppard, *Efficiency in Public Administration* (2009), available at www.allacademic.com/meta/p83878_index.html.

which Directive 07/66 later modified and built upon [2]. The pages that follow will not go through the various steps of such process of creation of a framework for protecting concerned tenderers. Rather, they will focus on Directive 07/66's comprehensive framework for consolidating and systematizing this protection.

The overall rationale of the protection established by Directive 07/66 will be reconstructed by considering three specific aspects of the regulatory framework: the protection provided in the period between the decision to award a contract and the conclusion of the contract in question; the protection granted after the conclusion of the contract; and the protection offered by the award of damages. These three aspects do not depict the complete picture of the protection in the area of public contracts provided by European law. But they do let us focus on three elements which particularly impact the balance that European law sets between the various competing interests in the awarding of public contracts.

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[2] The abundant legal commentary on Directives 89/665 and 92/13, regarding public supply, works and service contracts and public contracts in the sectors of water, energy, transport and telecommunications, respectively, cannot be thoroughly reviewed here; see, however, the overviews provided by G. Morbidelli, *Note introduttive sulla direttiva ricorsi*, 1 Riv. It. D. Pubbl. Com. 825 (1991), and S. Arrowsmith, *Remedies for Enforcing the Public Procurement Rules* (1993). Directive 07/66 was adopted by the European Parliament and by the Council on 11 December 2007 (OJ 2007 L 335) and the deadline for its implementation at the national level was fixed for 20 December 2009. This represents an attempt to rationalize the existing European legislation. This is suggested by the Directive's title, according to which the new regulatory framework aims at improving the effectiveness of review procedures concerning the award of public contracts, also in light of the evolution of the jurisprudence of the Court of Justice (recall the famous decisions in *Alcatel*, *Commission v. Austria* and *Stadt Halle*) and the new substantive Directives 04/17 and 04/18. Among the comments published thus far, see in particular G. Greco, *La direttiva 2007/66/CE: illegittimità comunitaria, sorte del contratto ed effetti collaterali indotti*, 1 Riv. It. D. Pubbl. Com. 1029 (2008); M. S. Sabbatini, *La direttiva 2007/66/CE sulle procedure di ricorso in materia di appalti pubblici: la trasparenza è anche una questione di termini*, 1 Dir. Comm. Int. 131 (2008); M. Lipari, *Annullamento dell'aggiudicazione ed effetti del contratto: la parola al diritto comunitario* (2008), in www.giustamm.it; A. Bartolini and S. Fantini, *La nuova direttiva ricorsi*, 2 Urb. App. 665 and 1093 respectively (2008); E. M. Barbieri, *Il processo amministrativo in materia di appalti e la direttiva comunitaria 11 dicembre 2007, n. 66/CE*, 1 Riv. It. D. Pubbl. Com. 493 (2009).

These aspects of the regulatory framework will not be examined in comprehensive detail. Rather, we will proceed in a general way, focusing on those rules and provisions that seem useful to capture the rationale of the European legislation. At the close of this examination, we will return to our initial questions, in order to attempt some concluding observations.

2. Protection prior to the conclusion of the contract: the suspensions regime.

The first aspect to consider is the protection provided in the period between the decision to award a contract and the conclusion of the contract in question. This protection has been significantly enhanced by the Directive. The Directive incorporates the general approach of the Commission, which has always emphasized the need to prevent or quickly correct for breaches of European law, so as to encourage private operators to participate in national administrations' calls for tenders [3].

This protection revolves around various institutions, which should be examined in detail in order to catch the balance between the interests of the public administration, the successful tenderer and other interested market competitors following the awarding of the public contract. In explicating the rationale underlying the new legal framework, however, it may suffice to focus on the minimum standstill period that must expire before the contract may be concluded, which the Directive defines awkwardly as the «suspension». This is particularly important because it is characteristic of the protection available in the period between the decision to award and the conclusion of the contract, and also because it influences the other kinds of protection.

Directive 07/66 provides that a period of at least 10 calendar days must expire following the decision to award before

[3] See, in particular, the Commission's proposal in its communication COM (2006) 195 final. This proposal provided also for some review mechanisms in the period prior to the conclusion of the contract that have not in fact been preserved in the final text of the Directive: the primary one is the attribution of new powers to independent authorities, which would have been empowered to notify the awarding authorities of the most serious infractions; this proposal was rejected due to the opposition of national governments, citing the difficulty of budgeting for the economic burdens of funding such authorities.

a contract may be concluded [4]. If the decision to award the contract is eventually challenged, this period gets extended, so that the awarding authority or entity cannot conclude the contract before at least another 10 days have passed, which must allow the review body to make a decision on the application either for interim measures or for review, as provided by the Member State in its implementing legislation [5]. A third suspension term applies when a Member State requires the concerned tenderer to seek review by the contracting authority first. In that case, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract [6].

These suspensions, provided for the first time by Directive 07/66's modifications to Directives 89/665 and 92/13, represent a new element in the EU conception of protection in the sector of public procurements.

The suspensions provided by European law consolidate and reinforce the effectiveness of the review mechanisms in the area of public contracts, not exactly by protecting the position of concerned tenderers, but by striking a balance between the conflicting interests of the actors playing in this sector, i.e. the contracting authorities, the successful tenderer and the other concerned tenderers. The suspensions regime set up by European law strikes a reasonable balance between the interests pursued by each of these three subjects. The temporal interval between the decision to award the contract and its conclusion gives other concerned tenderers enough time to apply for review of the decision. It allows contracting authorities to get best value for money from their procurements, in so far as it is an instrument to remove a possible infraction. It also defers the costs that the contractor has to sustain in commencing the performance of the contract. In this sense, the protection provided by the new suspensions, in the period between the decision to award and the conclusion of the contract, seems an optimal balance between the

[4] Articles 1/2 and 2/3 of Directive 07/66 (new Articles 2a/2 of Directive 89/665 and 2a/2 of Directive 92/13).
[5] Articles 1/1 and 2/2 of Directive 07/66 (new Articles 2/3 of Directive 89/665 and 2/3 of Directive 92/13).
[6] Articles 1/1 and 2/1 of Directive 07/66 (new Article 1/5 of Directive 89/665 and 1/5 of Directive 92/13).

various interests triggered by the decision to award a public contract.

In the search for this balance, the EU system bears certain similarities to the American system for resolution of bid protests. In the U.S., the filing with the contracting agency of a protest pre- or post-award, as provided by Art. 33/103 of the Federal Acquisition Regulation, produces the legal effect of suspending, respectively, the award or the performance of the contract, pending agency resolution of the protest. This is so unless the contracting officer adopts an override decision, which is a written act setting forth the urgent and compelling reasons or the «best interest of the Government» necessitating the conclusion of the contract [7]. A suspension of the awarding of the contract is also determined by filing a complaint with the General Accounting Office, as provided by Art. 33/104 of the Federal Acquisition Regulation, which is also subject to a possible override decision [8]. The similarities between the American and European systems, however, do not cancel out the significant differences. Just consider that there is no minimum standstill period between the decision to award and the signature of the contract. American law, moreover, does not provide for automatic suspension, just interim measures, in the case of an application to the Court of Federal Claims. This court has jurisdiction over controversies regarding the administrative procedure leading up to and following the awarding of public contracts.

The new Directive is more exacting upon Member States than it might first appear.

We can appreciate the impact of the new European rules on a Member State by looking at Italy. Even before the adoption of Directive 07/66, according to Italian law a contract could not be concluded before thirty days had passed from the communication

[7] Such justification or determination shall be approved at a level above the contracting officer, or by another official pursuant to agency procedures

[8] For a survey of the procedures before the awarding authority and the General Accounting Office, as well as their comparison with the European legal order, see A. Massera *L'attività contrattuale*, in G. Napolitano (ed.), *Diritto amministrativo comparato* (2007) and B. Marchetti, *Il sistema di risoluzione delle* bid disputes *nel modello federale statunitense di* public procurement, 1 R. T. D. Pubbl. 963 (2009).

to the concerned tenderers of the decision to award [9]. This could suggest that the suspensions regime envisaged by the new European law did not really constitute a genuine step forward with respect to the domestic legislation. However, these suspensions have actually affected Italian law in several regards, as confirmed also by the implementing measure adopted in 2010 [10]. The following four aspects may be considered.

Firstly, the period provided by EU law in the case of an application for review is completely new to Italian law [11].

Secondly, even with respect to the initial minimum standstill period, the EU Directive has required an adjustment of the Italian law. The latter already envisaged a 30-day time period running from the communication to concerned tenderers. But this communication served a less important function than it is required by the new European legislation. Italian law provided that the candidates must be informed not only of the outcome of the invitation to tender, but also of the reasons underlying the decision that has been taken. But while the outcome of the bidding competition was communicated automatically, these underlying reasons were given only upon the written request of the interested party [12]. The new Directive, instead, requires that the communication of the decision to award made to every tenderer be accompanied by «a summary of the relevant reasons» indicating the reasons for which the candidate was rejected [13]. And the Italian implementing measure has laid down a new discipline of the initial standstill period that takes into account these specific indications given by Directive 07/66 [14].

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[9] Art. 11/10 of the Code of public works, services and supply contracts, implementing Directive 2004/17/EC and 2004/18/EC, in force since July 1, 2006 (Legislative Decree of 12 April 2006, n. 163, as subsequently amended).

[10] Decreto legislativo 10 marzo 2010, n. 53, containing a number of amendments to the Italian Code of public procurements.

[11] Such suspension has been introduced in the Italian Code of public procurement by the legislative decree implementing Directive 07/66; see Article 11/10-ter of the Code of public procurement.

[12] Art. 79/1, 3 and 5 of the Legislative Decree of 12 April 2006, n. 163.

[13] Articles 1/2 and 2/3 of Directive 07/66 (new Articles 2a/2 of Directive 89/665 and 2a/2 of Directive 92/13)

[14] See the new Articles 11/9-10 and 79/5-bis of the Italian Code of Public Procurements.

European law affects Italian national law in a third, related manner. Before the adoption of the new Directive, Italian law allowed the contracting authorities to derogate from the standstill period in the case of «motivated reasons of particular urgency». European law, by contrast, allows Member States to derogate from the standstill period only in specific cases: for example, where European law does not require the prior publication of a contract notice or in the case of a contract based on a framework agreement or a specific contract based on a dynamic purchasing system [15]. The Italian implementing measure has modified accordingly the Code of public procurements, although the contracting authorities still have the possibility to derogate from the standstill period for urgency reasons when delay would determine a serious prejudice to the public interest served by the procurement: a possibility that seems scarcely compatible with the narrow set of exceptions envisaged by the Directive [16].

A fourth reason why the European suspensions regime is directly relevant for the Italian legal order is that suspensions, as it has been properly observed, will probably obviate the functional need for the monocratic *ante causam* and *inaudita altera parte* interim measures [17]. So, quite far from being irrelevant, the introduction of suspensions is likely to compress a judicial doctrine, recasting the current system.

3. Protection with respect to concluded contracts: European legislative self-restraint, and its disadvantages.

The protection afforded in the period between the decision to award and the conclusion of the contract represents a reasonable balance between the various interests at stake after the decision to award. A more nuanced picture can be drawn with reference to the protection provided by European law after the conclusion of the contract.

To examine the European balance between the various interests at play once the contract has been concluded, we need to

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[15] Articles 1/2 and 2/3 of Directive 07/66 (new Articles 2b of Directive 89/665 and 2b of Directive 92/13).

[16] See the new Article 11/9 of the Italian Code of Public Procurements.

[17] G. Greco, *La direttiva 2007/66/CE: illegittimità comunitaria, sorte del contratto ed effetti collaterali indotti*, cit. at 2.

look at the key provisions governing the effects of the setting aside of the award decision on the public contract concluded on the basis of that decision.

Directive 07/66 contains many important innovations in this regard.

Maintaining continuity with the former European rules, the Directive reaffirms that the legal effects of the setting aside of a decision to award on the contract concluded subsequent to its award shall be determined by national law [18]. Yet, in contrast to the original text of Directives 89/665 and 92/13, the new provisions introduce a remarkable exception to that principle: the effects on the concluded contract are determined directly by the European legislation in certain cases in which the breach of EU law is particularly serious and the activation of effective judicial remedies would be particularly difficult, because of a lack of transparency or a failure of respect for the standstill period [19].

This applies specifically in cases of: i) tenders which have been wrongly awarded without prior publication of a contract notice; ii) infringements of one or more of the standstill periods previously mentioned, if this has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies and on condition that the infringement is combined with an infringement of the substantive public procurements' directives and that infringement has affected the tenderer's chances of obtaining the contract; iii) violations of the rules of competition for public contracts based on a framework agreement or a dynamic purchasing system, if the Member States have invoked the derogation from the standstill period.

In all of these cases, the Directive requires the Member States to ensure that the contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body. Moreover, the Directive provides for generous periods for the review of concluded contracts: introducing a relevant innovation, it establishes that the time limit for review in cases of the above violations should be at least six months with effect from the day

[18] Articles 1/1 and 2/2 of Directive 07/66 (new Articles 2/7 of Directive 89/665 and 2/6 of Directive 92/13).

[19] Articles 1/2 and 2/3 of Directive 07/66 (new Articles 2d/1 of Directive 89/665 and 2d/1 of Directive 92/13).

following the date of the conclusion of the contract and at least 30 calendar days with effect from the day following the date on which the contracting authority published a contract award notice or informed the tenderers and candidates concerned of the conclusion of the contract [20].

Arguably, the regulatory framework laid down by the new Directive is articulated and differentiates among various possible situations.

In cases of serious breaches of European law and of difficulties in the activation of effective review, the balance between the competing interests in the public contracts sector following the conclusion of the contract is struck directly by European law. The ineffectiveness of the contract shifts this balance clearly in favour of those economic operators who have been illegally deprived of the opportunity to compete, whom the directive seeks to advantage by restoring business opportunities and creating new business opportunities [21]. The seriousness of the violation and the difficulty of obtaining pre-contractual review justify the negative effects upon the contractor and the public authorities. Such choice implies also the setting aside of certain national judicial doctrines. In Italy, for example, the public authorities' failure to respect the time limits for the conclusion of the contract is qualified by some administrative courts as just a mere «irregularity». This approach is no longer justifiable under the new European law.

In all of the other areas, the definition of the balance between the interests at play following the conclusion of the contract is left to the Member States, who determine the consequences of the ineffectiveness of an award of a public contract. The Member States enjoy a wide discretion in determining the concrete balance between the interests of the third party harmed by the award, those of the contractor and the need for economic efficiency of the administrative action. Consider the differences between the automatic ineffectiveness with ex tunc effects, which is strongly oriented to the needs of the concerned

[20] Articles 1/2 and 2/3 of Directive 07/66 (new Articles 2f/1 of Directive 89/665 and 2f/1 of Directive 92/13).

[21] Directive 07/66, fourteenth whereas

tenderer, and more balanced solutions preserving the contract and the interests of the good faith contractor.

The regulatory choice made by the European legislator gives application to the principle of subsidiarity. Such choice does not simply reflect the traditionally prudent approach of international regulation, which establishes minimum duties upon the States to provide for national mechanisms for applying for the review of the decisions of awarding authorities [22]. The approach of this Directive demonstrates instead a valuable self-restraint on the part of the European legislator. Member States are left with full discretion over the determination of the legal effects on the contract of the setting aside of a decision to award. And European law intervenes only in those particularly insidious cases in which it is necessary, where the violation of EU law is serious or effective judicial protection is harmed. This ought to have the effect of checking the recent tendency of excessive EU interference into national regulation. Just consider the Commission's attempt to require – indirectly, through the use of the infringement proceedings – the resolution of the contract, notwithstanding that Directives 89/665 and 92/13 established that the Member States could limit the powers of the review body, once that the contract

[22] The main reference is to the Agreement on Government Procurement concluded in 1994 by the World Trade Organization. On the basis of Article XX, the Parties to the agreement undertake to provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the Agreement arising in the context of procurements in which they have an interest. The Agreement's prudence and respect for the procedural autonomy of the Party states can be clearly seen in letter c) of paragraph 7: this provision requires that «correction of the breach of the Agreement or compensation for the loss or damages suffered…may be limited to costs for tender preparation or protest», without preventing Parties from preserving the effects of contracts already concluded. As B. Marchetti writes, in *Il giudice delle obbligazioni e dei contratti delle pubbliche amministrazioni: profili di diritto comparato*, forthcoming in *Diritto pubblico* (2010), § 2.1. «the Government Procurement provisions do not bind the State to a particular consequence for an unlawfully awarded contract». For an introduction to the content of the Agreement, see A. Massera, *L'attività contrattuale*, cit. at 8, 252 ff.; for a detailed analysis, see, in particular, M. M. Salvadore, *Gli appalti pubblici nell'organizzazione mondiale del commercio e nella comunità europea* (2001); S. Arrowsmith, *Government Procurement in the WTO* (2003); H. Caroli Casavola, *L'internazionalizzazione della disciplina dei contratti delle pubbliche amministrazioni*, 1 R. T. D. Pubbl. 7 (2006); and S. Evenett and B. Hoekman (ed.), *The WTO and Government Procurement* (2006).

is concluded, to awarding damages to the person harmed by an infringement [23].

The EU law's preference for a heightened protection of economic operators illegally denied the opportunity to compete over the interests of the contractor and the contracting authorities seems proportionate. Its radical choice to restore competition, by denying the effects of the contract, is justifiable in light of the seriousness of the violation of EU law and the particular harm to third parties' judicial protection.

Once we observe these values in the new regulatory framework though, we must examine whether European law ought to assert itself in a more wide-ranging and incisive way.

A more incisive European intervention would perhaps have been desirable with reference to those cases where European law directly determines the consequences on the contract of the setting aside of a decision to award.

At least two lacunae may be identified in the regulatory framework.

The first is the EU law's renunciation to define the legal meaning of an ineffective contract: it is for the national law to provide the consequences of a contract being considered ineffective, and thus to determine whether there shall be the retroactive cancellation of all contractual obligations or just the

[23] The Commission took this path, for example, in the proceeding that led to the decision in *Commission v. Germany*, case C-503/04, in [2007] ECR I-6153. The case was born out of a prior decision in 2003, in which the Court of Justice had found Germany to be in breach of EU obligations because two of its municipalities had violated the European regulations in awarding public contracts (*Commission v. Germany*, Joined Cases C-20/01 and C-28/01, in [2003] ECR I-3609). Following that, the Commission brought an infringement action before the Court of Justice contesting Germany for its failure to fulfill its obligations under the Court's decision, because at least one of the two contractual relationships challenged in the previous case was still intact. In this case, the infraction procedure becomes a tool enabling the Commission to challenge the preservation of a contractual relationship, notwithstanding that Directives 89/665 and 92/13 permit Member States to limit the powers of review bodies, once the contract has been concluded, to the awarding of remedial damages. The Commission's approach has been upheld by the Court of Justice. For a criticism of this position, see G. Greco, *Superprimato del diritto europeo: le direttive sui mezzi di ricorso vincolano tutti, ma non la Commissione e la Corte di giustizia*, 1 Riv. It. Dir. Pubbl. Com. 431 (2009).

cancellation of those obligations which still have to be performed [24].

The second gap in the current regulatory framework is the renouncement to define at the European level the precise meaning of the «overriding reasons relating to a general interest» that would justify a national review body, where provided by national law, not to consider a contract ineffective, even though it was awarded illegally [25].

It might be argued that these are not genuine gaps in the European legislation, but rather legal spaces correctly left to national law. And it could be argued also that the Directive does provide corrective mechanisms to prevent the Member States from undermining the overall approach of the European regulatory framework: though in certain situations the Member States can avoid the requirement of declaring illegally awarded contracts ineffective, the Directive nevertheless obliges them to impose alternative penalties, which can consist of fines levied on the contracting authority or the shortening of the duration of the contract [26].

And yet, we cannot blithely assume that such corrective mechanisms will function properly, nor can we doubt that the legal spaces that EU law has left to national legislation, and in particular the precise definition of the «overriding reasons relating to a general interest», will give rise to serious controversies, hardly functional to the exigencies both of public administrations and of private operators of the internal market. An obvious example, though probably not the most insidious, is the current economic crisis: does the need to confront the crisis permit a derogation from the Directive's normative framework? The Directive assumes that the market functions normally. But could serious market failures themselves trigger the overriding reasons relating to a general interest, and thus justify a derogation from the EU rules?

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[24] Articles 1/2 and 2/3 of Directive 07/66 (new Articles 2d/2 of Directive 89/665 and 2d/2 of Directive 92/13).

[25] Articles 1/2 and 2/3 of Directive 07/66 (new Articles 2d/3 of Directive 89/665 and 2d/3 of Directive 92/13).

[26] Articles 1/2 and 2/3 of Directive 07/66 (new Articles 2e of Directive 89/665 and 2e of Directive 92/13).

The intervention of European law-makers could have perhaps been not only more incisive and penetrating, but more extensive in scope as well.

Actually, the decision to confirm the choice made by the previous directives, leaving in principle to the Member States the task of determining the legal effects on the contract of the setting aside of a decision to award, could perhaps be read as an application of the principle of subsidiarity, as well as gesture of respect towards different national legal systems. But this decision also fails to adequately protect the interest in the certainty of the law, which is indispensable to the good functioning of the European economic and social space.

Italy offers a particularly clear example of the danger of giving national legislatures too much autonomy in determining the legal effects on the contract of the setting aside of a decision to award.

In the silence of the European law, Italian law-makers enacted a sectoral law, concerning public contracts in the areas of infrastructure and strategic, productive plants. Such legislation provides that the annulment of the award decision does not imply the setting aside of the contract concluded afterwards, limiting the protection granted to the tenderers concerned to equitable monetary damages [27]. At the same time, the legislature failed to adopt a general, non sectoral legislation, regulating the consequences of the annulment of the award decision for public contracts in general.

This has triggered a very rich debate in Italy on the «fate» of the contract after the annulment of the award decision [28]. Two main positions have emerged: (1) contracts ought to be regarded as void [29]; or (2) the annulment of the decision to award should

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[27] Art. 14 Legislative Decree 190/2002, later incorporated into Art. 246/4 of the Procurements Code, cit

[28] See, *ex multis*, the comprehensive overview of L. Garofalo, *Annullamento dell'aggiudicazione e caducazione del contratto: innovazioni legislative e svolgimenti sistematici*, 1 Dir. Proc. Amm. 138 (2008); J. Polinari, *Annullamento dell'aggiudicazione e sorte del contratto: spunti per una lettura sistematica*, 1 App. Contr. 37 (2009); M. G. Vivarelli, *Ancora sulla sorte del contratto in seguito all'annullamento dell'aggiudicazione: nuove e vecchie prospettive*, 1 R. T. A. 327 (2009).

[29] For the relevant case-law, see Council of State, *adunanza plenaria*, 30 July 2008, n. 9, establishing that «following the judicial annulment of the decision to

not prejudice the rights of the parties, if these rights have been acquired in good faith [30].

This debate is of high interest from the theoretical point of view, and it certainly expresses a rich vitality of courts and legal scholarship. But the reality on the ground is that economic operators in the European internal market must navigate a legal system that is extremely uncertain and confusing. This situation is so grave to induce a court to observe that «the possibilities left open by the case-law, civil and administrative, appear to be lacking in the coherence and systematic quality indispensable to such an important area of law, and necessary to ensure the certainty of contractual relationships, the uniformity of the

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award the public contract, the contract becomes ineffective»; Council of State, section V, 12 February 2008, n. 490; Regional Administrative Tribunal of Lombardy, section I, 8 May 2008, n. 1380, arguing the automatic ineffectiveness of the contract through an *a contrario* interpretation of Article 246/4 of the Procurements Code (the rule according to which «the suspension or annulment of the award does not imply the ineffectiveness of the concluded contract» applies *only* for infrastructure and industrial development contracts; therefore, outside of these areas, the annulment of the award also implies the ineffectiveness of the contract); Council of State, section V, 14 December 2006, n. 7402; Council of State, section V, 29 November 2005, n. 6579; Council of State, section V, 28 September 2005, n. 5194; Council of State, section V, 11 November 2004, n. 7346; Court of Cassation, unified section 28 November 2007, n. 24658; and Cassation section I, 15 April 2008, n. 9906, which represents the most important decision and which establishes that «the annulment of the decision to award…voids the entire effect…starting with the procurement contract», which, lacking in its own autonomy and being a merely formal and reproductive act, suffers from the same vices as the award to which it depends. In the reflection of legal science, the automatic ineffectiveness of the contract is supported by R. Garofoli, *La giurisdizione*, in A. M. Sandulli (ed.), *Trattato sui contratti pubblici*, vol. VI (2008). For a detailed summary of the various arguments courts use to justify the elimination of the contractual bond, see P. Minervini, *La patologia dei contratti con la pubblica amministrazione*, in C. Franchini (ed.), *I contratti con la pubblica amministrazione* (2007) and S. S. Scoca, *Evidenza pubblica e contratto: profili sostanziali e processuali* (2008).

[30] See, in particular, Council of State, section VI 30 May 2003, n. 2992; Council of State, section IV 27 October 2003 n. 2666, Council of State, section V 12 November 2004 n. 7346, Council of State, section V, 28 September 2005 n. 5194. In the legal science, this position is developed by G. Greco, *I contratti dell'amministrazione tra diritto pubblico e privato. I contratti ad evidenza pubblica* (1986), and G. Scoca, *Annullamento dell'aggiudicazione e sorte del contratto* (2007), in www.giustamm.it.

relative rules and the effectiveness of judicial protection» [31]. In the same vein, some commentators have written of a «crazed puzzle, in which the individual pieces almost never fit together, and do not even suggest what the final picture ought to be» [32].

We might find this judgment to be excessively severe, because the final picture can in fact be envisioned by the courts, even in the absence of a general legislative framework. This is precisely what seems to have happened with respect to the question of jurisdiction over the fate of the contract after the annulment of the decision to award. The Court of Cassation, in the important decision of its unified sections of 28 December 2007, n. 27169, held that «following the annulment of the decision to award by the administrative court, it falls to the civil court to decide upon the fate of the public contract» [33]: a statement that has been later upheld and developed in the decision of the Council of State of 30 July 2008, n. 9 [34]. Moreover, the process of convergence

[31] Ordinance n. 1328/2008 of 16 June 2008, with which Section V of the Council of State forwarded to the *adunanza plenaria* of the Council of State the question of the fate of a public contract concluded on the basis of an annulled award; the question produced the above recalled decision of the Council of State, 30 July 2008, n. 9

[32] G. Greco, *La direttiva 2007/66/CE: illegittimità comunitaria, sorte del contratto ed effetti collaterali indotti*, cit. at 2.

[33] The main reason for such orientation is that civil courts have jurisdiction over contractual relationships, in which public authorities are not exercising authoritative powers. According to this line of reasoning, the successful plaintiff, who has already obtained the annulment by an administrative court of the decision to award, would be required to act before a civil court to request a new judgment on the effects of the annulment of the award upon the concluded contract. See also the decision of the unified civil sections of the Court of Cassation, 18 July 2008, n. 19805.

[34] The *adunanza plenaria* of the Council of State, decision of 30 July 2008, n. 9, confirmed the decision of the Court of Cassation with respect to the jurisdiction of civil courts on the effects of the annulment of the award upon the concluded contract. The judgement of the Council of State has overridden the many challenges raised by administrative courts, which tended to decide, in the context of a review of the award decision, also on the validity or efficacy of the concluded contract. The plenary hearing of the Council of State, however, also specified the position of the Court of Cassation. If the relevant public authorities do not comply with the judgement, the administrative court may review the acts of the public authorities where an action of compliance is brought. In this context, the administrative court may also fully review the administration's activity, adopting all measures necessary to give exact and integral execution to the judgement. In other terms, after the civil court's

concerns not only the issue of the competent jurisdiction, but also the question of the substantial consequences on the concluded contract of the setting aside of the award decision. As a matter of fact, the case-law seems to have converged upon a position in favour of the voiding of the contract following the judicial annulment of the award [35]. Therefore, not only can the courts create a coherent picture out of the puzzle pieces, this is what they have effectively done.

It could also be added that the new Directive represents a positive step forward with respect to the former law. It is true that the national law can still freely determine the consequences upon the contract of the annulment of the decision to award. But it is also true that the new Directive, especially in its preamble, provides some indications in favour of judicial remedies able to provide focused and rapid protection [36], and also of the need to provide a reasonable and proportionate balance between the effective protection of the concerned tenderer and the need to guarantee the legal certainty of the decisions of the awarding authorities. National legislators therefore might find in this new European framework support for the construction of the relevant domestic law, and national courts could work to make this law

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decision, the public authority may allow the interested bidder, wrongly denied the opportunity to compete, to take over the contract, thus correcting for the prejudice caused by the illegal award. Only in the compliance judgment can the administrative court adopt all measures necessary and opportune to give exact and integral execution of the judgement, which includes replacing the wrongly successful bidder and the inclusion of the party which obtained the award's nullification. On the ambiguity of this position, see in particular the comment of A. Massera, *Annullamento dell'aggiudicazione e sorte del contratto: le molte facce di un dialogo asincrono tra i giudici*, 1 Riv. It. D. Pubbl. Com. 307 ff. (2009). The judgement of the Council of State, Section V, ordinance 26 August 2008, n. 4532, drew from the plenary hearing n. 9 of 2008 some implications regarding interim protection in the special proceedings for public contracts. The Council of State, given the lack of jurisdiction of administrative courts over the fate of the contract, excluded the possibility to grant interim measures that may enable the possible substitution of the successful plaintiff while waiting for the decision on the merits

[35] The reference is to the plenary hearing of 30 July 2008, n. 9, and to the decision of the Court of Cassation, Section I, 15 April 2008, n. 9906

[36] See in particular, A. Massera, *Annullamento dell'aggiudicazione e sorte del contratto: le molte facce di un dialogo asincrono tra i giudici*, cit. at 34.

coherent with the European framework [37]. This process, moreover, could be facilitated by European Court of Justice, which plays the role of the final arbiter in the interpretative processes that are triggered by the concerned tenderers and through which the relationship between national and European law are constructed.

And still, we can ask whether the European regulatory choice, which depends upon national law-makers and, especially where national law-makers are silent or lay down nuanced solutions, upon national courts, really responds to the needs of economic operators in the European internal market [38]. Is a choice whose value depends upon a gradual process of convergence [39] and on the initiative of market operators and the capacity and patience of lawyers and judges, sufficient to respect the values of legal certainty underpinning the European market?

It will be interesting, in this perspective, to assess the functioning of the Italian regime established by the legislation implementing Directive 07/66. The judicial annulment of the decision to award does not always imply that the public contract becomes ineffective, as courts can assess the public and private interests at stake in order to preserve the effectiveness of the contract, considering elements such as the state of execution of the contract, the reciprocal interest of the parties and the good faith of the contractor [40]. Admittedly, such regime is highly flexible and encourages the elaboration of ad hoc solutions by the courts through their assessment of a number of predetermined legal criteria. Yet, it will be necessary to assess in the next years its

[37] In Italy, for example, the Court of Cassation has even anticipated the national legislator. Before Directive 07/66 was implemented in the domestic legal order, the Court of Cassation has modified the position taken in the decision of 28 December 2007, n. 27169. Such position was considered not compatible with the new Directive, whose principles of a focused and rapid protection require to overcome the distinction between the jurisdictions of administrative courts on the annulment of the decision to award and the jurisdiction of civil courts on the effects of the annulment of the award upon the concluded contract. See Court of Cassation, unified section 10 February 2010, n. 2906

[38] The relationship between legal procedures and their function in the European economic space is stressed, in the Italian debate, by F. Merusi, *Annullamento dell'atto amministrativo e caducazione del contratto*, 1 F. A.-T.A.R. 659 (2004).

[39] A. Massera, *Annullamento dell'aggiudicazione e sorte del contratto: le molte facce di un dialogo asincrono tra i giudici*, cit. at 34 writes of a «asynchronic dialogue between courts», with reference the Italian legal system.

[40] Article 245-ter of the Code of public procurement.

concrete functioning, in order to verify whether the flexibility inherent to the new regime is really functional to the needs of legal certainty underlying the European internal market or whether it results in legal fragmentation and unjustified differentiation.

4. Awarding damages.

The third and final element illuminating the overall rationale of the EU protection granted in the area of public procurements is the possibility to award damages to the harmed persons.

Directive n. 66 of 2007 builds upon the earlier framework of Directives 89/665 and 92/13, allowing Member States to limit the powers of the body responsible for review to the awarding of damages to any person harmed by an infringement, after the conclusion of the contract [41]. This regulatory choice ought to be read in the light of the above observations about the fate of the contract after the decision to award it has been set aside. Member States may limit their protection to the awarding of damages, without considering ineffective the concluded contract. Yet, Member States' discretion in this area does not extend to cases of serious violations of EU law and of excessive reduction of the concerned tenderers' protection, where the Directive directly provides for the ineffectiveness of the contract, and thus opens up the possibility of new opportunities for economic operators illegally excluded, in the forms set forth by the national law.

The relationship between protection through the award of damages and the consequences of the annulment of a decision to award, clarifies the rationale behind the new European regulatory framework.

In cases of serious breaches of European law and particular prejudice to the protection of the concerned tenderers, EU law strikes a balance between the competing interests that is clearly tilted in favour of those economic operators illegally deprived of the opportunity to compete.

[41] Articles 1/1 and 2/2 of Directive 07/66 (new Articles 2/7 of Directive 89/665 and 2/6 of Directive 92/13

In all other cases, by contrast, EU law leaves the definition of this balance to the discretion of the Member States, that can variously mix a protection based upon the ineffectiveness of the concluded contract with a protection centred upon the award of damages, and that can therefore establish different balances between the interests of the public contracting authority, those of the successful tenderer and those of the excluded tenderers.

Consider the wide difference between, on the one hand, the automatic ineffectiveness of the contract with *ex tunc* effects and restoration of the excluded operator's rights, which is strongly oriented to the needs of the concerned tenderer, and, on the other hand, a protection strictly based upon the award of damages, essentially aimed at preserving the position of the contractor. There are also intermediate solutions between these two extremes, aimed at more nuanced outcomes. French law provides an example: it reconciles the need to protect interested competitors and the need to allow contractors to perform the activities defined by the contract through a complex remedial system, which provides a relative preservation of the contract and the protection of the third party prior to the conclusion of the contract, and monetary damages following its conclusion [42]. Another example is provided by the Italian legislation implementing Directive 07/66, where the award of damages is envisaged only in those cases in which the ineffectiveness of the contract is not considered by the administrative court as the most appropriate option.

We can appreciate the restraint of the European regulative choice: the European law-makers have basically made use of the normative instrument of the directive consistently with its specific function, that is leaving Member States the space to define the concrete means for attaining the objectives established at the European level, in respect of the variety of different national legal traditions.

The decision of the European legislator to avoid fixing the balance between the competing interests once and for all also

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[42] This refers to the legal framework developed before the adoption of Directive 07/66 and determined by the *Code des Marchés Publics* as well as by case-law, and particularly by the *Conseil d'Etat* in the *Tropic* decision of 16 July 2007 (*Conseil d'Etat Ass*., 16 July. 2007, *Societé Tropic Travaux Signalisation*, n° 291545); among the numerous comments on this decision, see those collected in number 5 of the 2 Rev. Fr. D. Adm. 923 (2007).

responds to the need for flexibility and differentiation, often recognized in Western legal systems.

In the American system for resolution of bid protests, for example, the appropriate type of protection is not defined ex ante by the relevant norms. The specification of the balance between the different interests at play is instead left to the body charged with resolving the dispute. This body enjoys a wide discretion, as demonstrated by the broad range of the decisions that the General Accounting Office can adopt, and the sophisticated, penetrating powers of the Court of Federal Claims. This court can decide to preserve the contract notwithstanding the demonstrated unlawfulness of the decision to award, depending on the interests at stake. It can also adopt various kinds of corrective decisions, such as requiring the public authority to award the contract to the protester and awarding damages to interested competitors for lost earnings [43].

Still, the decision of the European law-makers is rich of ambiguities.

The Directive certainly allows for the coexistence of many different solutions from one Member State to another. But while this variety might be intellectually interesting, it is not at all clear whether it is fit to meet the needs of a single European market and its operators.

For example, both the French and the UK legal systems traditionally permit the awarding of damages, calculated on the basis not only of the costs of participation in the bidding competition but also of lost profits, as demonstrated by the interested tenderer. But the criteria used to make this determination are more rigid in the UK [44], and more generic in France, where a distinction between lost chances and chances

[43] The wide discretion of the Court of Federal Claims has been recently underscored by B. Marchetti, *Il giudice delle obbligazioni e dei contratti delle pubbliche amministrazioni: profili di diritto comparato*, cit. at 22, § 3.

[44] On this point, see the summary of M. Browsher and P. Moser, *Damages for Breach of the EC Public procurement Rules in the United Kingdom*, 1 Pub. Proc. L. Rev. 195 (2006).

sérieuse is applied [45]. And other countries, like Germany, do not calculate lost profits at all [46].

The functioning of the internal market, as economists have clearly shown, does not necessarily require a perfectly harmonized legal regime [47]. And European market operators themselves do not count the lack of a uniform legal system as one of the main obstacles to presenting bids outside of their country of origin [48].

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[45] *Conséil d'État*, 18 June 2003, *Groupement d'entreprises solidaires ETPO Guadalouope*.

[46] The German legislation for the protection of competition, *Gesetz gegen Wettbewerbsbeschränkungen* – GWB, provides in paragraph 126 that a third party which demonstrates that it had a serious chance of obtaining the award of the contract if there had not been the violation of the competition law has a right to damages for the costs of the preparation of the offer and participation in the tender. For a synthetic account, see J. Pietzcker, *La nuova impostazione del diritto tedesco delle aggiudicazioni: alcuni aspetti di fondo*, in E. Ferrari (ed.), *I contratti della pubblica amministrazione in Europa* (2003) and P.M. Huber, *L'europeizzazione del settore degli appalti pubblici in Germania*, in E. Ferrari (ed.), *I contratti della pubblica amministrazione in Europa* (2003).

[47] For a discussion on this point, see for example, W. Molle, *The Economics of European Integration: Theory, Practice, Policy* (2006); for a law and economics analysis, see R. Inman and D. Rubinfeld, *Federalism*, in *Encyclopedia of law and economics* (2000). The legal literature on the strictly connected issue of regulatory competition in the European internal market is too abundant to be usefully recalled here; see however the classic works by N. Reich, *Competition between Legal Orders. A New Paradigm of EC Law?*, 2 Common Mkt. L. Rev 861 (1992), J. Sun, J. Pelkmans, *Regulatory competition in the Single market*, 1 J. Common Mkt. St (1995).; C. D. Ehlermann, *Compétition entre systèmes réglementaires*, 1 Rev. M. C. U. E. 220 (1995) and D. Esty, D. Gerardin (ed.), *Regulatory Competition and Economic Integration: Comparative Perspectives* (2001); among the Italian studies see in particular A. Zoppini (ed.), *La concorrenza tra gli ordinamenti giuridici* (2004); and L. Torchia, *Il governo delle differenze. Il principio di equivalenza nell'ordinamento europeo* (2006).

[48] On this point, see the interesting study, *Evaluation of Small and Medium-Sized Enterprises' (SMEs') Access to Public Procurement Markets in the EU*, carried out by GHK and Technopolis and commissioned by the European Commission in http://ec.europa.eu/enterprise/newsroom/cf/itemshortdetail.cfm?item_id=33 The authors observe that «t]he key barriers to entry for all SMEs appear to be the awarding authorities' over-emphasis on (purchase) price, the administrative burden," together with "the low quality of tender documentation; lack of opportunities for a dialogue with the client; no or inadequate provisions for the exclusion of unrealistic offers", as well as "insufficient possibilities for legal remedies».

Nevertheless, it is still worth asking whether the differences in the degree of protection that an operator may receive, depending upon where in the European market it finds itself, are really serving the goals of competition and economic growth. The fact that the national implementation of the European law is so variable represents an element of legal complexity that can translate into an obstacle to the mobility of European undertakers and their effective ability to participate in calls for tender, for example by discouraging small or medium businesses from participating in competitions in national legal orders where the judicial protection is inadequate or a possible dispute following the decision to award would be too costly [49]. It has not, moreover, been demonstrated that the variety of national regimes has triggered a process of comparison and mutual adjustment and correction of individual national laws, as some economists consider to be possible [50].

Lacking empirical evidence of the actual impact of the possible coexistence of many different solutions from one Member State to another, in any case, the inconveniences associated with this lack of a comprehensive and fully accomplished European regulatory framework ought not to be exaggerated. Admittedly, the Directive does orient the choices of national legislatures and, in many cases, indirectly offers a solution to the questions possibly arising at the national level.

In general terms, one should admit that the Directive expresses an overall preference for the preservation of the concluded contract. The provision of a sophisticated suspensions regime prior to the conclusion of the contract aims at giving the concerned tenderer the tools necessary to obtain full satisfaction in this phase. And the ineffectiveness of the contract is envisaged by

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[49] For a general discussion of the relationship between harmonization and the reduction of transaction costs, not in specific reference to judicial protection or the substantive law of public contracts in the European single market, see L. Ribstein and B. Kobayashi, *An Economic Analysys of Uniform State Laws*, 1 J. of Legal St. 131(1996); with reference to European civil law, U. Mattei, *Hard Code Now!* (2002), in www.bepress.com/gj/frontiers/vol2/iss1/art1; among the extremely abundant studies on regulatory arbitrage and its implications see M. Gnes, *La scelta del diritto. Concorrenza tra ordinamenti, arbitraggi, diritto comune europeo*, (2004).

[50] Based on the classic theory of C. M. Tiebout, *A Pure Theory of Local Expenditures*, 1 J. of Pol. Ec. 416 (1956).

the Directive itself only in those cases in which there is a serious breach and effective protection has been made excessively difficult. Thus, the Directive does not directly limit national legislatures, which remain free to combine a protection based upon the ineffectiveness of the concluded contract with a protection centred upon the award of damages. However, the European law does orientate domestic choices, as a national rule intended to be fully in conformity with the Directive's underlying rationale would have to limit the cases of ineffectiveness of the contract to those expressly provided by the European law [51].

As for the specific questions that may be raised within the national legal systems, an example is provided by the discussion on the Italian doctrine according to which an action for damages can be brought only if the relevant administrative measure has been challenged before a court and damages may be awarded only if the measure has been annulled (so called *pregiudizialità amministrativa*) [52].

The Italian Court of Cassation has rejected the necessity of prior annulment of a decision to award before damages can be awarded in Italy, observing that «to admit the necessary dependence of the monetary damages on the previous annulment of the unlawful and harmful act, rather than on just the verification of its unlawfulness, would mean shrinking the protection of the private actor vis-à-vis the public administration and subordinating his right to monetary damages to an Italian-style administrative *Verwirkung*» [53]. The awarding of monetary damages, in other words, must be tied to an autonomous five-year statute of limitations. And the interests of whoever is asking for monetary damages ought to prevail over those of the other parties to the dispute.

But just when the question seemed resolved in Italy, the European Directive comes in to reopen it, suggesting a different

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[51] For a more restrictive interpretation of the European requirement, see G. Greco, *La direttiva 2007/66/CE: illegittimità comunitaria, sorte del contratto ed effetti collaterali indotti*, cit. at 2, which interprets the directive as implying a genuine limit upon national legislatures, that should maintain the effects of the contract.

[52] Among the recent studies on the subject see, in particular, F. Cortese, *La questione della pregiudizialità amministrativa* (2007).

[53] Court of Cassation, Unified Sections, ordinance of 13 June 2006, n. 13659 and n. 13660.

construction to the national legislator [54]. Firstly, it gives Member States the ability to «provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers» [55]. Secondly, it provides for a very short time limit, just 10 days, for presenting the various applications for review, included the application aimed at obtaining the award of damages [56]. This is clearly a minimum period, that the national legislature can extend. And yet, this minimum term reveals the Directive's basic orientation in favour of the interested candidates' ability to adequately assert their interests in an action for damages without becoming victims of dilatory behaviour by the public authorities. But the European Directive also favours the other parties to the dispute, in particular the public authorities, and is ultimately much less centred on the protection of the interested candidate than the Italian Court of Cassation.

So, the Directive leaves the Member States the ability to fix the comprehensive balance between the different interests competing in the public contracts sector after adoption of the decision to award. But it provides national legislatures with a general framework and some specific indications pulling them towards choices aimed not at guaranteeing the rights of the interested candidates but rather at balancing the different needs of the interested candidates, the contractor and the public administration. This orientation does not go into the direction of a genuine uniformity, but it certainly contributes to the construction of a homogeneous regulatory space, even though this may imply, as in the case of the Italian *pregiudizialità amministrativa*, reopening a legal issue that seemed finally resolved.

5. Conclusions.

[54] As for the Italian legal order, the issue has not been addressed by the legislation implementing Directive 07/66 and should be regulated by the Code of the administrative judicial proceedings whose adoption is currently under discussion.

[55] Article 1/1 of Directive 07/66 (new Article 2/6 of Directive 89/665).

[56] Articles 1/1 and 2/3 of Directive 07/66 (new Articles 2c of Directive 89/665 and 2c of Directive 92/13).

The analysis carried out in the previous pages suggests some general conclusions.

A first conclusion that we can draw from the inquiry is that the European Directive adopts a differentiated approach to the judicial protection in the public procurements sector. It does not fix a single, immutable balance between the competing needs of the public contracting authority, the successful tenderer and his market competitors, in the period following the decision to award. Rather, it opts for a more flexible framework in which the balance between the various interests changes in relation to both the phase in which the dispute arises and the gravity of the infraction.

In particular, three main hypotheses may be identified.

In the phase between the decision to award and the conclusion of the contract, the European suspensions regime balances between the different conflicting interests in play, without sacrificing one to the others: in fact, it allows the interested tenderer to take the initiative within a time permitting the applicant to obtain a restoration of his rights and business opportunities; it allows infractions to be corrected, in the interest of the economic efficiency of the administrative action; it postpones the expenses that the contractor will have to sustain in beginning the performance of the contract.

A different balance is struck in the period after the conclusion of the contract, where there has been a serious violation of European law or judicial protection has been made particularly uneasy. In this case, the ineffectiveness of the contract shifts the balance clearly in favour of the economic operator illegally deprived of the opportunity to compete, providing that his commercial opportunities ought to be restored, to the detriment of the contractor and the public administration.

Where the contract has been concluded, but the violations are not particularly grave, European law lets Member States define the balance between the various interests in play, and identify the most suitable combination between a protection based upon the ineffectiveness of the concluded contract and a protection centred upon the award of damages. However, the new European Directive is not completely neutral between the choices that Member States are called to make. Various indications suggest a comprehensive orientation towards a proportionate and reasonable balance between the effective protection of the

protesting competitor (who must be able to assert his interests adequately, without being victimized by possible dilatory behaviour by the public administration) and the need to guarantee the legal certainty of the decisions of the awarding authorities, in favour of these authorities and the private contractors.

As articulated as this is, such regulatory framework nevertheless responds to the unitary rationale of fixing a balance between the various interests in competition after the decision to award, in such a way as to take account of each of these interests in play, without unduly prejudicing the satisfaction of the others. This is the objective pursued by the European law in the phase leading up to the conclusion of the contract; the suspensions regime enables the protection of the competitors' interests without ignoring those of the contractor and the public administration. And this is also the objective towards which the Directive indirectly orients national legislatures in providing rules for cases in which the contract is already concluded. A solution strongly weighted in favour of the market competitors is provided only in exceptional cases, and is justified by the gravity of the violation of the EU law and the particular reduction of effective protection for the economic operator illegally deprived of the opportunity to compete.

A second general conclusion follows from this first conclusive remark. Notwithstanding certain statements made in its preamble, the European Directive does not ultimately aim at the categorical protection of the aggrieved market competitors, illegally denied the opportunity to compete for public contracts. In balancing the needs of the administration, the private contractor and its market competitors, the European law instead aims to combine the effectiveness of judicial protection with the effectiveness of European law. The new Directive aims at implementing, on the side of judicial protection, the same principles of transparency, non-discrimination and efficiency of the administrative action that guide the substantive law of European public procurements. Thus, the new Directive is a faithful continuation of its predecessors, which sought to address obstacles to freedom of movement and competition caused by the lack of adequate protective mechanisms for the effective application of the substantive Directives.

The new framework erected by the latest Directive – and this is a third and last general conclusion - presents some lights and shadows.

The lights concern those profiles that the European law regulates directly. Regulating the period between the decision to award and the conclusion of the contract, the new Directive determines a reasonable and convincing balance between the different interests of the administration, the private contractor and its market competitors, without sacrificing one to the others. And the incisive protection granted in certain cases to market competitors, to the detriment of the contractor and the public administration, can be substantively justified by the gravity of the violation of the EU law and the particular reduction of effective protection characterizing those specific cases.

The shadows relate with the regulatory discretion left to the States. It is true that the decision to refer to national law is justifiable as a matter of political compromise and understandable as a historical matter reflecting the traditional caution of international regulation. And one can appreciate the respect that this choice expresses towards the preservation of the variety of legal traditions of the different Member States, overcoming a recent tendency towards an excessive interference in the national regulatory space. We must also remember that the Directive aims at reducing the possible inconveniences of national legislative autonomy, by offering a general framework and various specific indications to orient national discretion towards a proportionate balance of the different needs of the interested candidates, the contractor and the public administration.

At the same time, however, the decision to rely heavily on national courts and legislatures presents certain inconveniences. First of all, it does not fully guarantee that legal certainty indispensable to the European economic and social space, as unambiguously demonstrated by the Italian debate over the «fate» of the contract after the annulment of the decision to award. Member States' discretion moreover leads to the coexistence of many different solutions, varying from one Member State to the other, according to a paradigm of legal pluralism that is hard to reconcile with the needs of the European single market and its operators. It is true that the functioning of the single market does not necessarily presuppose a perfectly harmonized legal regime.

Still, the differences in the degree of protection available to a private economic operator, depending upon where in the European market it is positioned, might represent such a legal complexity as to be an obstacle to the mobility of EU economic operators; and no demonstration has been given so far that a process of mutual comparison and correction of national differences has been triggered by the variety of national regimes of judicial protection.

Hence a risk and an opportunity. The risk is that the regulatory spaces left to the Member States may become factors in the paralysis or slowdown of the European market. The opportunity falls to legal practitioners, courts and scholars to contribute to the drawing of a legal picture able to coherently support the goals of competition in the single European market.