A COMPARATIVE STUDY OF THE IMPACT OF VIOLATIONS OF PUBLIC LAW ON CONCLUDED PUBLIC CONTRACTS

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ABSTRACT

A highly interesting and controversial question in the regulation of public contracts is what follows in that situation where a contract has been concluded unlawfully, that is, in breach of those rules of public nature that regulate the contractual activity of public authorities.

Will a contract lose or limit its initial effects, and, if so, under what circumstances, who can challenge the effects of such contracts and, how are the various conflicting interests involved balanced?

The answer to these questions is of crucial importance for the integrity of any public procurement regulatory system, and consequently the realization of many of their policy objectives.

By using comparative and contextual legal analysis of several selected jurisdictions, this thesis identifies, conceptualises and systematises the practical and policy considerations surrounding the treatment of unlawfully concluded public contracts.

The analysis conducted attempts to systematically present the difficult balance between the various conflicting interests and multifaceted regulatory issues that arise in the context of unlawfully concluded public contracts.

The thesis suggests that a careful balance between the public and private interest is essential for the treatment of such contracts and proposes a roadmap of regulatory and policy considerations that legal systems may wish to reflect upon when dealing with this issue.

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Part I

Setting the scene

Chapter 1

Introduction

I. Context and objectives of the research

A highly interesting and controversial question in public contracts regulation is what follows in the situation where a contract has been concluded unlawfully, that is, in breach of those 'public law'[1] rules that regulate the contractual activity of public authorities.

Will a contract 'lose or limit its initial effects'?[2] Who can challenge the effects of such contracts? What are the consequences for the contractor, the public authority itself, a third potentially interested party to the contract and the public interest in general?

The answers to these questions are of crucial importance for the integrity any enforcement system in government contracts regulation and consequently the realisation of many of their policy objectives.

For instance, not remedying the effects of an unlawfully concluded contract can impede well-established goals of public contracts regulation such as accountability, transparency and fair competition.

Moreover, as it is further explained in chapter 2, allowing the enforcement of unlawful contracts and/or mitigating the option for such contracts to be subject to challenge by third-parties, may produce harmful externalities with potentially adverse consequences to the public interest.

Conversely, an interference on the effects of a contract may substantially distort the service delivery, also to the detriment of the public interest.

[1] For the exact definition 'public law' see Ch.3-II.2
[2] The term 'losing or limiting its effects' refers to the contract being affected either by rendered unenforceable or by modifying its initial effects (for example through its prospective cancellation or premature discharging).

Non-enforcement or limitations to the effects of a contract may also prove to be particularly harsh for a contractor that may have entered the contract in good faith and with no relative knowledge of the alleged illegality.

Financial compensation may be granted to repair his losses which, however, may create a burden to the financial budget of a public entity and potentially, the State more generally.

Contrariwise, if a legal system does not provide an adequate form of redress as a countermeasure to protect the public purse and/or safeguard the policy behind the public law rule, it may discourage the private sector from engaging in contracts with the public sector in the potential detriment of value for money.

Evidently, there are various conflicting interests involved. Therefore, regulating the impact of unlawful transactions in a balanced manner between the public and the private interests is an important task for any regulatory regime on public contracts.

Nevertheless, the traditional position of important international regulatory regimes is to refrain from providing appropriate references on how unlawfully concluded contracts may be treated.

A good demonstration of this can be found under the revised version of the UNCITRAL Model Law on Public Procurement (2011), which although has now removed the ban on post-contract actions before an independent body (Art.67 (3)), it still does not provide specific provisions that clarify the conditions according to which the effects of a contract can be challenged by third-parties in a review procedure or how these effects can be remedied.

Similarly, the WTO regime on Government Procurement (The Revised Agreement on Government Procurement (2012)) makes a mere abstract suggestion on ''corrective action''[3] where there has been a breach of the agreement, without specifying if such corrective action can also extend to

[3] Article XVII(7)(b)

unlawfully entered contracts and whether it includes a remedy for challenging the effects of such contracts.

This may not be coincidental, and it might be justified, inter alia, on the ground, that the subject at stake raises several complexities that can be traced both on the institutional setting of national jurisdictions and to policy considerations that are not apparent at the stage of challenges before a contract is concluded.

The purpose of this thesis is to identify and systematise the relevant practical and policy considerations regarding how unlawfully concluded public contracts might be dealt with and examine the approaches on this matter among different legal systems.

In achieving those aims, it conducts a doctrinal and comparative contextual analysis, the reasons for which are considered below.

II. Research objectives

The research objectives of this thesis are the following:

To develop a policy and regulatory normative framework for looking on the issue of the treatment of unlawfully concluded public contracts (chapters 2 & 3).

Use this framework to examine, systematise and map the approaches among different and diverse legal systems (chapters 4-7).

Provide a critical evaluation of these practical approaches by reflecting on the policy and regulatory considerations (chapter 8).

Eventually, the thesis aims to create a roadmap of this uncharted area of law which will provide useful insights for national and international legal systems on a specific regulatory aspect of public contracts and, which may also be used as a point of reference and provide food for thought for future research (chapter 8.IV).

III. Contemporary importance and relevance of the research

A study on the analysis of the impact of violations of public law on concluded public contracts is of high research value. As indicated, there are various conflicting interests involved and complex regulatory issues arise with a multifaceted dimension.

This study attempts to identify and comprehensively present these regulatory issues and examine the similarities and differences on the approaches adopted by different legal systems.

It is submitted that this analysis provides useful insights for the domestic, regional and international regulation of public contracts.

A careful literature review has indicated that there is no comprehensive study of this type.[4]

Hence, this project provides an original contribution to the literature of the legal studies with a significant value to policy and legal makers, as well as to practitioners, academics and future researchers in the field of law.

IV. Methodology

This thesis is primarily premised upon a doctrinal and comparative contextual legal analysis. Other methodological tools, such as legal theory and policy analysis are employed, while a flexible interdisciplinary approach and empirical methods have been excluded.

IV.1. Why doctrinal and comparative

The analysis of this thesis is conducted by an investigation of normative sources, such as statutory texts, general principles of law, binding precedents,

[4] See further chapter 9 on the impact of this study in the existing literature.

and other authoritative sources like case law and scholarly legal writings. Therefore, the main data used, respond to a doctrine legal method.

Doctrinal research has been described as a method which treats the law and legal systems as distinctive social institutions, the law, in essence, is treated as a sealed system which can be studied through methods unique to the 'science of law' and, legal developments can be interpreted, critiqued, and validated by reference to the internal logic of this sealed system.[5]

Doctrinal research involves not only a systematic reconstruction of existing rules but also the evaluation of existing proposed rules against normative conceptions of justice.[6]

The doctrinal legal method will be conducted, as already indicated, in a comparative context. The comparative method is said to be a comparison of legal institutions or of the solutions to comparable legal problems in different systems,[7] and an analysis of internal dynamics and principles of the existing laws of the jurisdictions studied.[8]

The comparative element will enable the project to provide a comprehensive coverage of the treatment of unlawfully concluded public contracts by bringing in additional perspectives on the same legal issues, identifying the similarities and differences on the approaches of diverse legal systems and provide normative suggestions from the findings.

This methodological approach was selected based on the aim of the research, which is not to evaluate the "effectiveness" of one legal system, but rather to get different insights on the same matters to present the main issues that surround the impact of public law on concluded contracts and provide a critical appraisal of them.

[5] Banakar, 'Normativity in Legal Sociology: Methodological Reflections on Law and Regulation in Late Modernity', (Springer, 2015), p.31
[6] Vick, 'Interdisciplinarity and the Discipline of Law', (2004), 31(2), J. Law & Soc., 163, 178
[7] Orucu, 'Developing Comparative Law', in Orucu & Nelken (edition), 'Comparative Law: A Handbook', (Hart, 2007), p.172.
[8] Bell, 'Legal Research and the Distinctiveness of Comparative Law', in Hoecke, (edition), 'Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline' (Hart Publishing, 2013), p.158

While the primary method for doing this, will be through an internal evaluation of the law itself, policy and legal theory that are relevant to the subject will assist the analysis, a type of approach that can be classified as "doctrinal in context".

It is submitted that the comparative and contextual legal analysis is the most appropriate method for a legal research area that has never been explored and comprehensively mapped before.

By examining different regulatory approaches, the most pertinent issues around the treatment of unlawfully concluded public contracts can be extracted and analysed.

Consequently, this study will highlight any interesting aspects that may be subject to future research and which may require the engagement of other methodological tools.[9]

IV.2. Choice of jurisdictions

As already submitted, the project aims to conduct a comparative study on the impact of violations of public law rules on concluded public contracts. Due to limits of space, sources and time, it is simply not possible to conduct an exhaustive review of numerous jurisdictions on this matter.

Nevertheless, it is imperative that the 'sampling' case studies provide useful insights for the purposes of this research.

The author has chosen to compare the legal issues surrounding the subject matter under question in EU law, the law of the United Kingdom, Greek law, and the law of the United States.

These four jurisdictions reflect, firstly, multi-level and unitary jurisdictions, and secondly, the common law and civil law traditions. Therefore, they provide an interesting mixture of regulatory approaches.

[9] See Chapter 9

The EU legal system has been chosen because it is a unique example of supranational jurisdiction with an important influence and impact in the international regulation of public contracts.[10]

In addition, its supranational legal status - contrary to federal jurisdictions such as Canada and the United States - allows for a centralized legal regime of public contracts, applying to all member States and their contracting authorities at every level.[11]

In 2007, the revised remedies directive[12] introduced the remedy of ineffectiveness, which subjects the EU Member States to the obligation to guarantee the retrospective or prospective cancellation of a public contract when certain serious violations have taken place.[13]

Additionally, the 2014 public procurement regime introduced a requirement for the Member States to empower public authorities with the discretion of terminating an existing contract if certain violations have taken place.

Both remedial measures aim to fill the lacuna in the legal protection that existed and precluded the cancellation of a contract that was justified on the principles of legal certainty, the protection of legitimate expectations and the principle of *pacta sunt servanda*; legal principles recognised by EU law.[14]

However, both measures also leave many issues unanswered regarding the procedural steps and the consequences following an ineffectiveness or termination declaration.

[10] Many of its substantive and remedial legal mechanisms such as the obligation of a standstill period requirement had an impact in the regulation of the UNCITRAL Model Law. See Nicholas, 'Legislative Comment: The 2011 UNCITRAL Model Law on Public Procurement', (2012), P.P.L.R., 3, 111-123. Additionally, its legal mechanisms had a considerable influence on the GPA regulation. See Blauberger & Krämer, 'European Competition vs. Global Competitiveness: Transferring EU Rules on State Aid and Public Procurement beyond Europe', (2010) CCP, working paper No. 10-10.
[11] Lemieux, 'EU Law of Public Contracts: A View from the Outside' in Trybus, Caranta & Edelstam (edition), 'EU Public Contract Law - Public Procurement and Beyond', Collection, Droit Administratif - Administrative Law, (Bruylant 2014), p.464
[12] Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts
[13] See further chapter 4
[14] *Commission v Germany, C-503/04*

Against this background, the position of EU law provides a very interesting research subject concerning the extent to which it controls the consequences of unlawfully concluded contracts rather than leaving them to national laws as well as the interaction between EU law and national law on this matter.

Hence, in this context, the thesis analyses the position of EU law to investigate the limits of external regulation (that of EU law) and its interaction with that of domestic law (with the use of the examples of Greece and the UK) on the issue of the impact of public law violations on procurement contracts.

The main interesting aspect of this interaction is how far EU law as an external regulator with a specific functional approach (i.e. creating a level playing field in the internal market for the award of public contracts) has influenced or even reshaped the domestic approaches to the treatment of unlawfully concluded contracts.

The second jurisdiction that has been selected is the UK. It should be noted from the outset that the analysis of the position of the UK on this issue mainly refers to the position of English law.

The English legal system is the most prominent common law system, and thus has a significant impact and influence on legal, regulatory and policy reasoning, among all other common law jurisdictions.[15]

The starting point of the law is that these contracts fall exclusively within the ambit of private law, hence minimising the possibility of public law remedies to be granted for third-parties who may wish to challenge the effects of a contract.

Additionally, there has been a wide debate among academics and the judiciary about the effects that a public law violation produces on a contract and the remedial measures available to a contractor in case a contract is affected.[16]

[15] A good demonstration is Australia, which provides a very similar legal and institutional framework. See, Seddon, 'Government Contracts: Federal, State and Local' (4th edition, The Federation Press, 2009)

[16] See, inter alia, Arrowsmith, 'The impact of public law on the private law of contract' (1996) in Halson, (edition), 'Exploring the Boundaries of contract' (Dartmouth, 1996); Arrowsmith, 'Government contracts and public law', (1990), Legal Studies, 10/3, 231-244; Birks & Rose (edition), 'Lessons of the Swaps Litigation' (Mansfield Press, 2000)

Finally, the UK is a member of the EU hitherto (and in any case, has implemented the applicable EU law in public procurement).[17]

Hence, an analysis of the position of the English legal system on the matter under question will shed light on any impact to its traditional domestic approaches by external regulation while also enhancing the understanding of the EU law approach.

The third case study is that of Greece. Greek law stems from the continental legal tradition. In the context of public contracts regulation, Greek law has created a distinct system of public contracts law, where traditional public law principles and doctrines apply, and where public and private law are conceptually distinct matters.

This system is alien to the common law traditions. Thus, in this context, an examination between Greek and English law approach provide useful insights and tests whether the public-private law distinction provides in effect (as opposed to institutional design) for different approaches on the treatment of unlawfully concluded contracts.

Socio-legal characteristics that are apparent in Greece are also important factors for examining this jurisdiction.

For instance, widespread phenomena of corruption, favouritism and "clientistic" behaviour have diachronically been taking place in the public contract market.[18] Such phenomena can frequently result in the conclusion of unlawful contracts.

Also, Greece is a jurisdiction that can be characterised by a highly formalistic approach in its legal reasoning and practice. Hence, it provides useful insights on how the institutional setting may affect the treatment of unlawfully concluded contracts.

[17] On the future of procurement regulation post-Brexit see, inter alia, Arrowsmith, 'The implications of Brexit for public procurement law and policy' (2017), P.P.L.R., 1, 1-33.
[18] See, European Commission, 'Annex 8 Greece to the EU Anti-Corruption Report', COM (2014) 38 final

Further, although Greece is a relatively small jurisdiction, it provides for a high volume of litigation in public contracts. It is also a highly litigious jurisdiction, where there is a tendency of litigants to exhaust all available legal means. Thus, providing an extensive body of case law on the treatment of unlawfully concluded contracts.

Finally, Greece is a Member State of the EU. Therefore, an analysis of its position on the matter under question will shed light on any impact to its traditional domestic approaches by external regulation while also enhancing the understanding of the EU law approach.

Against this background, the Greek study provides an interesting case study that provides useful insights on how legal theory and practice treats the impact of public law violations on concluded contracts.

The final case study that is analysed is that of the U.S. federal law. The U.S. federal system is one of the most developed procurement systems in the world.[19] It is a system that is subject to numerous statutes and regulations, which ranks from provisions within the U.S. Constitution to specialised legislation applicable to government contracts.[20]

U.S. federal law provides good material both in theory and in litigation on the ways of dealing with contracts concluded in violation of the rules applicable to public contracts.

Moreover, the approach of U.S. law, similarly with that of the EU law, provides for an important influence in the international regulation of public contracts.[21]

Thus, a careful analysis and systematisation of the U.S. federal law approach may give useful lessons for international law instruments and countries that may wish to take lessons from it.

[19] Yukins, 'The U.S. Federal Procurement System: An Introduction', (2017), PLJ, 2/3, 69-93

[20] See for a brief introduction Yukins, ibid; Schwartz, 'United States of America' in Noguellou & Stelknes, '*Droit comparé des contrats publics* – Comparative law on public contracts', (Bruylant, 2010)

[21] Schwartz, 'Learning from the United States procurement law experience: on ''law transfer'' and its limitations' (2002), P.P.L.R., 2, 115-125

V. Structure of the project

This thesis is divided into three parts and nine chapters.

Part I is separated into three chapters. The current introductory chapter (1) aimed to explain the context and objectives of this research.

The second chapter (2) attempts to conceptualise the pertinent policy and regulatory issues surrounding the impact of public law violations and develop a framework upon which the treatment of unlawfully concluded contracts may be examined.

After stipulating the theoretical considerations, the third chapter (3) provides for the necessary template upon which the comparative study is conducted. It brings some main hypotheses submitted in chapter two into order, clarifies the terminology used and the exact scope of this thesis, and provides the framework for analysis upon which the comparative analysis is based.

Part II conducts the comparative analysis and maps the approaches of the case studies chosen. It is separated into four chapters (4-7), each of which covers a case study. The structure of this analysis is based on the framework of analysis submitted in chapters two and three.

Part III brings together and extracts the main findings from the case studies. It is divided into two chapters.

The first chapter (8) extracts the main findings from the case studies and comprehensively systematises the most pertinent issues in relation to the treatment of unlawfully concluded public contracts by critically examining the practical approaches and reflecting them on the suggested policy and regulatory framework.

This chapter concludes by suggesting a roadmap upon which legal systems may consider evaluating their approach to dealing with unlawfully concluded public contracts.

The final chapter (9) concludes. It highlights the contribution of the thesis to the existing scholarship and suggests areas of further study.

Chapter 2

The impact of public law violations on concluded contracts - Conceptualising the policy and regulatory issues

I. Introduction

This thesis takes as a starting point that a careful balance between the public and the private interest is essential for regulating the treatment of unlawfully concluded contracts.

This chapter conceptualises the pertinent regulatory and policy issue surrounding the impact of violations of public law on concluded contracts.

The purpose of this exercise is twofold.

First, it aims to act as the necessary template upon which the comparative analysis is based as further demonstrated in chapter 3.

Second, it aims to develop a framework of the policy and regulatory considerations involved in the treatment of unlawfully concluded public contracts.

This framework will act as a supplement to the findings from the case studies in comprehensively anatomising the complex and uncharted area of law as further explained in chapter 8.

In particular, it aims to act as the necessary reference to the relevant policy considerations upon which the practical approaches of the selected jurisdictions are examined.

The chapter proceeds as follows. Section II reflects upon some theoretical and practical considerations on the reasons why some public law violations may have an impact on the effects of a contract and why others may not.

Section III submits the potential enforcement tools of remedying unlawfully concluded contracts and explains why examining enforcement tools in a comparative context is important for the scope of this thesis.

Section IV provides a critical appraisal of the policy complexities that surround the treatment of consequential matters between the contracting parties arising from public contracts that have limit or lost their effects due to a public law violation and explains why examining this issue in a comparative context is important for the scope of this thesis.

Section V explains the alternative remedies available to aggrieved competitors when the challenge of a concluded contract is not possible and why a comparative examination of this issue is also important.

Section VI concludes.

II. Determining the impact of public law violations on concluded contracts: A taxonomy

As suggested in chapter 1, a study of the examination of public law violations on executory contracts is a complicated matter which raises several conflicting policy considerations.

By using basic legal theory and employing some intuitive hypotheses, this section aims to present the rationales that may be employed to determine when a public law violation may have an impact on the effects of a contract and when it may not.

Four interrelated rationales are identified which are examined separately below.

These are the rationale of harmful externalities (II.1), the rationale of losses in welfare to the public authority (II.2), the deontological rationale (II.3), and the rationale of determining the effects of the public law violation to a contract according to the party that raises it (II.4).

II.1. The rationale of harmful externalities

Contract theory suggests that an exception to the limitation of freedom of contract is what can be classified as 'legal overriding of contracts'.[1] A basic rationale for legislative or judicial overriding of contracts is the existence of harmful externalities.[2]

'Public law'[3] rules in the context of public contracts, serve the role of this 'legal overriding of contracts'. They aim to impose those legal restrictions on public authorities to contract according to the formalities and substantive rules that the law prescribes and for the purpose that it does.

These restrictions are important, and indeed necessary, in the context of public contracts, which by their nature aim to serve the public interest.[4]

Public authorities might lack market incentives when entering contracts, a role that can be substituted by the adherence to certain formalities and substantive rules to avoid potential harmful externalities.

Basic economic theory suggests that contracts that are likely to harm third parties are often non-enforceable.[5] In such cases, the harm to third parties must tend to exceed the benefits to the contracting parties for it to be socially desirable not to enforce them.[6]

The theory of harmful externalities to third parties has its premise in the sphere of public contracts. It is a common ground that a violation of 'public law' may create harmful externalities.[7]

The most obvious example where such harmful externalities may occur is to third-party competitors who might have been unlawfully deprived of the opportunity to win a contract.

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[1] Shavell,'Foundations of Economic Analysis of Law' (HUP, 2004), p.320
[2] Ibid.
[3] The concept of 'public law' encompasses all those rules that regulate the contractual activity of public authorities (see Ch.3-II.2)
[4] See, Mewett, 'The theory of government contracts' (1959), 5, McGill L.J, 222
[5] Shavell (n.1), p.320
[6] 'A Law and Economics Looks at Contracts against Public Policy' (2006), 119/5, The Harvard Law Review Association, 1445-1466
[7] Assuming that the substantive rules are designed for public entities to avoid producing negative externalities when procuring.

Harmful externalities may also occur to the third-parties intended beneficiaries of the contracted-for activity.

For instance, if a contract for the construction of works is awarded to a contractor with a bad record in delivering value for money and this award is the result of a violation (intentional or unintentional – this does not matter) of the prescribed 'public law' rules, the intended beneficiaries (for e.g. the citizens of a municipality) might be worse-off from the delivery of low-quality construction works.

If negative externalities must exceed, in net, the benefits to the parties themselves for enforcement of a contract not to be socially desirable, and as a result to be subject in losing or limiting (such as by being prematurely discharged) its effects, then the question is what kind of public law violations may lead to such outcome?

An answer to this question is hard to determine. However, a potential taxonomy based on the above assumption could be founded on the categorisation between restrictions related to the subject matter of a contract and restrictions related to the procedures and/or formalities for the conclusion of a contract.[8]

Restrictions related to the subject matter of the contract are all those rules that prescribe the limitations on the powers of public bodies to enter contracts.

Alternatively, restrictions related to the subject matter of the contract may also be defined as all those rules that explicitly provide the grounds under which a public body can enter a contract.

For instance, such rules could be statutory provisions that restrict the power of a public authority to enter a contract only for activities that are connected to the discharge of its functions.

[8] See also on this categorisation/classification: Arrowsmith, 'The impact of public law on the private law of contract' (1996) in Halson, (edition), 'Exploring the Boundaries of contract' (Dartmouth, 1996), which has been the main influence of the author to consider the different policy considerations that these two types of violations raise.

They could also refer to statutory provisions that prohibit a public authority from entering into a contract when the necessary funds for the performance of such contracts have not been appropriated by a body (with democratic accountability) such as a national parliament or a local assembly.

On the other hand, restrictions related to the procedures/and or formalities for the conclusion of a contract refers to all those rules that regulate the process that a public body needs to follow to conclude a contract.

The choice and use of the appropriate (lawful) tendering method constitute the most obvious example of such restrictions.

Turning back to the theory/rationale of harmful externalities, it is submitted that in case of violations related to the subject matter of a contract, the negative externalities, almost *de facto* exceed in net the benefits to the contracting parties.

In such situation, the contracted-for-activity is either prohibited (for instance because of lack of legislative power) or is restricted (for example because the performance of the contract is subject to the availability of funds). Scarce resources, namely public funds, which could be used for some authorised purpose, become unavailable with the enforcement of such contracts.

Competitors, local communities or the State as a whole may become worse-off from the enforcement of contracts which are not lawful. Hence, when such violations occur, generally, the public interest benefits from non-enforcement exceeds the benefits of enforcement.

For instance, consider the situation in which funds have been appropriated by legislation in order for a public body to buy hospital machinery and, instead, these funds are used to buy IT equipment.

Whatever the reasons for reaching this decision, the ultimate outcome is that the public body responsible for the distribution of public funds has acted beyond its legal powers and has rendered the purchase of hospital machinery within the appropriated funds redundant.

If these are to be purchased in the future the taxpayer will bear an additional cost that could have been avoided unless the contract is rendered unenforceable or at least its effects are limited by an early discharge, in which case, the loss will be minimised.

In the case of violations related to the procedure of concluding a contract, the determination of whether harmful externalities exceed in net the benefits to the contracting parties may be based on the gravity of the violation.

More specifically, a public law violation that, ex-post, adversely affects price, quantity, and/or quality of services, goods or works purchased, could have a significant impact on the third-party beneficiaries of the intended contract.

Such a violation may also have led a more suitable supplier to have been substantially deprived of the opportunity to be awarded the contract.

Conversely, violations that do not potentially ex-post substantially affect the price, quantity and or quality of the contracted for activity, are socially desirable to enforce because the external harm is, generally, less than the benefits to the parties.

This model can be illustrated by the example of the unlawful choice of one restricted procedure over another as compared to unlawful direct awards. In the latter case, the violation may lead ex-post to the adverse effects already mentioned.

For instance, it can result in low-quality construction works (as compared to what could be purchased if this violation did not take place) with a potential negative impact to the intended third-party beneficiaries and, more generally, to the public interest. Such a violation also, ex-ante, substantially prevents any other potential supplier to compete for the contract.

Contrariwise, in the former case - the unlawful choice of one restricted procedure over another - to some extent, affects negatively third-parties. For instance, it might minimise the chances of a supplier to win the contract.

Yet, they do not produce, in net, negative externalities that exceed the benefits to the contracting parties. Most importantly, the non-enforcement of a contract does not exceed the benefits of enforcement to the public authority (as one of the parties in the transaction) and, consequently, the benefits to the public interest.[9]

II.2. The rationale of losses in welfare to the public authority

Another theory that may be employed to ascertain whether a public law violation may have an impact on the effects of a contract is the reasoning that suggests that non-enforcement (or limitations on the enforcement – such as the prospective cancellation or premature discharge of a contract) may prevent a loss of welfare to the public authority.[10]

In particular, a public authority or, more generally, the state administration, performs an agent-principal function.[11] It represents not its own interests but the interests of the public – or society in general.[12]

This factor, in turn, creates particular types of hazards, which Williamson calls the "hazards of probity".[13] That is the concern of misuse of other's people's money, in this case, the money of taxpayers.

Moreover, public contracts are made by agents on behalf of the public entity. Regardless of the motives of the agent(s) in entering into contracts in violation of some public law rule, the public authority as a separate legal entity might have been made worse-off due to a purported public law violation.

[9] Assuming that the interest of a public authority and the public interest coincide.
[10] Shavell, (n.1.), p. 321. The wording that Shavell uses is *"to prevent a loss in welfare to one or both of the contracting parties".* This has been modified to emphasise the welfare losses of public authorities for the reasons explained in the main text.
[11] See Trepte, 'Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation', (OUP, 2004); Yukins, 'A Versatile Prism: Assessing Procurement Law through the Principal-Agent Model', (2010) 40 PCLJ, 63
[12] Mewett, (n.4)
[13] Williamson, 'Public and Private Bureaucracies: A Transaction Cost Economics Perspectives' (1999), J.L. Econ. & Org., 15/1, 306-342

This potential worse-off effect to the public authority may subsequently be transmitted to the public that it represents.

If losses in welfare to the public authority can justify non-enforceability or limitations to the effects of a contract, then the question is what kind of violations may potentially lead to such results?

Again, the answer is not easy to ascertain. Nevertheless, a potential taxonomy based on this rationale can be founded in the categorisation - that was already mentioned above in relation to harmful externalities (II.2) - between restrictions related to the subject matter of the contract and restrictions related to procedures and/or formalities for the conclusion of contracts.

Lack of the relevant information of the contracted for activity and the 'incompetence' to enter a contract are the main concerns that may motivate non-enforcement when welfare losses of one contracting party are at stake.[14]

Hence, in the first category (i.e. violations related to the subject matter of the contract), potential losses in welfare are very clear. The public authority - as a separate legal entity - enters a contract for which it is 'incompetent' to enter.

In the second category (violations related to the procedure of concluding a contract), the justification of non-enforcement based on the rationale of losses in welfare to the public authority is less strong.

The subject of the contracted for activity was known to the public authority and it also had the necessary capacity to enter a contract for such activity. Hence, it is assumed that relatively perfect information exists.[15]

Therefore, it may be assumed that any welfare losses to a public authority may not justify the welfare losses to a contractor that would occur from the potential unenforceability or limitations to the effects of the contract.

[14] Shavell, (n.1), p. 321

[15] According to economic theory the concept of perfect information denotes that there should be no severe informational asymmetries distorting the choice of either party. See, Cooter & Ulen, 'Law and Economics' (Pearson, 6th ed., 2012) chapter 8

Of course, this argument is not conclusive. It does, however, demonstrate that there are stronger grounds for non-enforcement or limitations to the effects of a contract when the subject matter of the contracted-for-activity is unlawful as opposed to when there has been a breach related to the formation of an otherwise lawful agreement.

II.3. The deontological rationale and the theory of deterrence

A third rationale according to which violations of public law may act as a legal overriding and extinguish or limit the effects of a contract is based on public policy concerns. There are deontological principles underlying the public law rules applicable to public contracts.

These are the protection of the integrity and dignity of the system, the adherence of public authorities to the principle of democratic accountability, and eventually, a requirement to serve, or conversely, not to harm the public interest.

How far, and which, public law violations may affect the contract under this rationale, can only be determined by the objectives aimed to be achieved, as well as the internal legal structure, and the institutional settings within a jurisdiction.

For example, a jurisdiction may suffer from serious illegal conduct such as bribery, fraud and other forms of corruption-related and undesirable social activities.

As a response in tackling these problems, the legislator and/or the judiciary may provide for various public law rules that could potentially alleviate them by restricting the options of contracting.

To create an additional layer of deterrence in the formation of contracts being the result of such activities, and act as a precedent for future cases, a

jurisdiction might require their non-enforceability if a relevant public law violation has taken place.[16]

Such a measure may especially incentivise intended contractors who would want to minimise the possibility of entering a contract in violation of such public laws that would place the contract status at stake.

In particular, the non-enforcement of a contract might prove to be costly to a contractor in terms of wasted resources.

Thus, intended contractors may try to avoid entering contracts that have been concluded in violation of such public law rules.[17]

It may be argued, that unlike the situation of intended contractors, the measure of unenforceability or limitations to the effects of a contract will not necessarily deter public authorities from entering contracts unlawfully.

Public authorities, generally, lack market incentives. Therefore, other legal means such as holding its agents that contracted on behalf of a public entity to criminal or civil liability is potentially more suitable for deterring purposes.[18]

II.4. Determining the effects of the effects of a public law violation according to the party that raises it

Another parameter that may determine the impact of a public law violation on the contract is which party raises the violation.

More specifically, the effects of a violation can only be determined if either the two contracting parties seek the matter adjudicated by a court or another relevant review body (scenario A), or if some third-party challenges the effects

[16] Pope, 'Confronting Corruption: The elements of a National Integrity System' (Transparency International, TI Source Book 2000), pp.276-277

[17] Theoretically, both parties will invest time and energy in finding out the judicial consequences of entering an unlawful contract.

[18] See inter alia on deterrence and contracts against public policy: Kostritsky, 'Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory', Illegal Contracts and Efficient Deterrence: A study in modern contract theory", (1988), Iowa L. Rev., 115-163; "A Law and Economics Looks at Contracts against Public Policy", (2006), 119/5, (n.6); Nell, 'Contracts induced by means of bribery: Should they be void or valid?", (2008), BGPE Discussion Paper, No.42; Buccirosi & Spagnolo, 'Leniency policies and Illegal transactions', (2006), J. Public Econ., 1281-1297

of the contract on the basis of an alleged public law violation ground (scenario B).

In the first scenario (A), the issue of the impact of a public law violation becomes pertinent mainly in relation to the financial and economic rights of the two parties. Usually, if one of the parties to the contract raises the issue of the adverse effects that a public law violation creates to a contractual agreement, this is done as a defence.

In other words, one party uses the effects of the public law violation to avoid the effects of an otherwise contractual breach.

For instance, a public authority might have decided that the contract was not of its interests anymore and does not want to go on with it.

A contractor (as the counterparty to the contract) might want to claim damages for his losses and the public authority might wish to raise the public law violation to avoid the effects of the contractual breach.

In this scenario, whether the public law violation disturbs the effects of the contract or not is of main concern to the two contractual parties. Third parties are not directly involved.

This, in turn, indicates that the potential effects of a public law breach might respond to different policy and practical concerns according to the party that challenges the contractual effects.

In particular, when some third-party attempts to litigate the effects of a public law violation (scenario B), the performance of the contract might have reached an advanced state and any disturbance to its effects might negatively affect the public interest.

In addition, in scenario B, unlike scenario A, it is assumed that both parties want to perform their obligations and that the public authority (as the most suitable party to assess the public interest) has decided to go on with it.

Therefore, when, in scenario A, a public law violation might lead to the disturbance of the effects of the contract, in scenario B, the effects of the same violation might be subject to further conditions.

For example, such additional conditions may be based on the determination of the balance between the potential adverse effects from the interruption of service delivery and the interest of the third-party challenger. If the public interest overrides the interest of the third-party, the contract may remain unaffected and vice versa.[19]

It may also be based on the balance between the interest of the third-party and that of the contractor.

If the interest of the contractor overrides the interest of the third-party protestor, the contract may remain unaffected and vice versa - If the third-party interest overrides that of the contractor, the contract may be rendered unenforceable and be set-aside.

This proposition can also work the other way around. It may be argued that an (X) violation may render a contract unenforceable after a third-party protest because, for instance, the harm of such contract to the third-party exceeds the benefits to the contracting parties.

Conversely, when the same (X) violation is raised by one of the contracting parties opportunistically, that is, to simply escape a bad bargain, the impact of the same violation may not have any effect on a contract.

To understand this rational consider the following example. A public authority raises the violation (X) in a dispute with the contractor to avoid the effects of an otherwise contractual breach.

In this scenario, the law may want to balance, on the one hand, the commercial considerations of incentivising the private sector to engage in contracts with

[19] For instance, when urgency considerations require the contract to go ahead regardless of the illegality and regardless how this affects third-parties.

the public sector and, hence not allow opportunistic behaviours and, on the other, the integrity of the public contract system.

Again, different policy considerations may apply according to the party that raises the violation, which eventually, may determine the impact of that violation to the effects of a contract.

III. Enforcement mechanisms

From a normative point of view, for a public law violation to either be prevented before a contract comes into being and/or remedied after a contract is entered into, there must be some enforcement mechanisms in place.

This thesis takes as a starting point that the remedying of public law violations pre-or post-award can take place through three different enforcement channels.[20]

The first is through the judicial review process, that is, the process that allows third-parties with an interest to an allegedly unlawfully concluded contract to challenge the effects of such contract (the ad hoc review).

The second is through an impartial administrative enforcement mechanism performed by some administrative, semi-judicial or judicial body.

The third is through some internal mechanism within the public authority itself which is part of the contract.

The potential role of these three mechanisms in remedying public law violations is examined separately below.

Before doing so, it is important to emphasise from the outset the significance of the reasons for examining enforcement mechanisms.

As submitted at section II.4, the impact of a public law violation may be determined by the party that raises it.

[20] It is assumed that the two contracting parties may not have the right incentives to plead the public law violation. Hence, external mechanisms are needed

Hence, a careful examination on how far a public law violation may affect the contract after, for instance, a third-party protest is pointedly important in appreciating how a legal system prioritises the various interests involved.

For example, will the public interest in uninterrupted service delivery take precedence over the economic interests of aggrieved suppliers? If yes, to what extent?

Similarly, is a public entity able to remedy its own violations by unilaterally intervening in the contract? If yes, to what extent and how is the interest of a contractor balanced in such case?

By examining different institutional perspectives of various legal systems, this project will shed light on the practical role of enforcement mechanisms in the treatment of unlawfully concluded public contracts.

III.1. Third-party challenges on the effects of unlawful contracts (The judicial review process)

Judicial review refers to a system under which third-parties can protest an allegedly unlawful contractual decision of public authorities.[21]

The role of third-parties – usually aggrieved suppliers - in the realisation of the objectives of public contracts regulation has been extensively addressed (and on many occasions praised) in literature from various perspectives.[22]

[21] The term does not have a technical meaning unless otherwise stipulated. See for example, judicial review in the UK chapter 5.

[22] See inter alia: Arrowsmith, 'Government Procurement and Judicial Review' (Carswell: Toronto, 1988); Arrowsmith, Linarelli & Wallace, 'Regulating Public Procurement: National and International Perspectives', (Kluwer Law International, 2000); Arrowsmith, 'Protecting the Interests of Bidders for Public Contracts; The Role of the Common Law' (1994), CLJ, 53, 104-139; Zhang, 'Supplier review as a mechanism for securing compliance with government public procurement rules: a critical perspective' (2007), P.P.L.R., 5, 325-351; Pachnou, 'Enforcement of the EC procurement rules: the standards required of national review systems under EC law in the context of the principle of effectiveness' (2000), P.P.L.R. 2, 55-74; Arrowsmith, Craven, 'Public procurement and access to justice: a legal and empirical study of the UK system' (2016), P.P.L.R., 6, 227-252; Spiller, 'An Institutional Theory of Public Contracts: Regulatory Implications' (2008), NREB Working Paper Series; Spiller & Marsozo, 'Third-Party Opportunism and the Theory of Public Contracts: Operationalization and Applications' in Brousseau & Glachant, (edition), 'The Manufacturing of Markets: Legal, Political and Economic Dynamics' (CUP, 2014); Marshall, Meurer & Richard, 'The Private Attorney General Meets Public Contract Law: Procurement Oversight by Protest' (1991), Hofstra L. Rev, 20, 1-71; McCubbins & Schwartz, 'Congressional Oversight Overlooked: Police Patrols versus Fire Alarms' (1984), Am. J. Polit. Sci., pp. 165-179; Marshall, Meurer & Richard,

It is common ground that interest groups, especially aggrieved suppliers, are in the best position as they have the strongest incentives - i.e. a direct economic interest - to oversight the procurement process.

Thus, such an enforcement system serves various roles. It may incentivise or conversely deter public authorities from unlawful actions, it corrects potential violations, and, evidently, it ensures that the level playing field in the public contract market is not undermined by favouring one supplier over the other.[23]

A third-party review mechanism may take place before the conclusion of a contract (e.g. by allowing the challenge of unlawful decisions) or after the conclusion of a contract.

In the second situation, a legal system may allow the challenge on the effects of an unlawfully concluded contract. Such remedial action may serve the purpose of preventing potential harmful externalities to third-parties as explained above.

For instance, it may restore the level playing field in the market and allow the protesting party to be able to compete on a 'fair' basis for the award of a particular contract.

In addition, such remedial mechanism serves the deontological principle explained above. It allows third-parties to keep public authorities accountable for their decision and prevent the execution of a contract that may not be in the public interest.

However, the operation of a review system becomes especially complicated when a contract has been entered. It becomes complicated because an indefinite amount of third-parties may challenge the effects of such a contract.

'Curbing Agency Problems in the Procurement Process by Protest Oversight' (1994), 25(2) RAND Journal of Economics, 297; Gordon, 'Constructing a Bid Protest System: The Choices that Every Procurement Challenge System Must Make' (2006), 35 P.C.L.J., 427; Dekel, 'The Legal Theory of Competitive Bidding for Government Contracts' (2008), P.C.L.J., 37/2, 237-268

[23] In principle, public authorities owe a fiduciary duty to accord all member of the public an equal opportunity to enjoy the public benefit of contracting.

The potential reasons for this complexity can be traced, first, on the institutional setting of a legal system, and second, on practical and policy considerations that are not apparent when an agreement has not yet entered the sphere of a legally binding contract.

On the one hand, the institutional setting and design of a legal system can create barriers to allowing third-parties to challenge a concluded contract. For instance, legal formalism, adherence to contractual principles[24] complicated procedural rules and slow judicial proceedings, may make any effort to challenge the effects of a contract redundant.[25]

On the other hand, one cannot ignore the significant difference between protests on allegedly unlawful decisions before the contract comes into being and protests related to the status of the contract.

For instance, in the former case, an unlawful decision can be remedied with more ease. Remedial action in such case can take the form of a 'setting aside' (through interim measures or other forms of corrective actions) the unlawful decision.

Such remedial action involves limited public expenditure, if any at all, and assuming that it does not substantially interrupt the service delivery, has limited impact to the public interest.

On the contrary, in the latter case, a successful challenge to an unlawfully concluded contract requires some remedial action that may either affect the contract (scenario A) or if this is not available, some form of compensation may be granted (scenario B).

In both scenarios, public expenditure may be involved, whether by compensating the contractor (scenario A) or compensating the successful challenger (scenario B).

[24] Such as the *pacta sunt servanda* principle.
[25] For example, the contractual obligation may have been completed by the time the protest is heard.

In addition, a challenge on the effects of a contract can substantially distort the service delivery to the detriment of the public interest.

For example, it can potentially interrupt the execution of a construction work contract, leaving the intended beneficiaries with unfinished works until litigation is resolved or, if the challenge on the effects of a contract is successful until a new procurement process is completed.

Of course, the coin has two sides when it comes to the policy and practical implications involved with the challenge to unlawful contracts by third-parties.

Thus, for instance, whereas such challenges may distort the interruption of service delivery, they may also act as a mechanism of oversight for the administration not to execute contracts that are not in the public interest.

Eventually, it may be argued that it all comes down to how a judicial review system is designed.

Which type of violations, and under what substantive and procedural conditions can third-parties challenge the effects of an unlawful contract? Are there any measures that may allow an unlawful contract to go ahead when the public interest so requires?

By examining different jurisdictions, the thesis aims to get insights of different approaches in practice, and question how far the competing interests submitted above in relation to the challenge on the effects of unlawful contracts are factored in the design of a judicial review system.

III.2. Institutional review of public contracts

Institutional review refers to a system of review conducted by administrative, semi-judicial or judicial bodies that provide for independent and impartial public enforcement and oversight mechanism for procurement contracts.

The benefits of an institutional pillar of review and control (as opposed to individual - ad hoc third-party protest applications) are numerous.[26]

For instance, it can fill the gap of enforcement when there are circumstances in which no aggrieved supplier will have a profit incentive to protest, or when aggrieved suppliers are not willing to bring an action because of the possible adverse consequences of protests, such as risk of retaliation by the procuring public authority,[27] the cost of litigation, or the difficulty of proving or assessing a public law violation.

Additionally, such mechanisms can prove superior to a supplier review system in some respects.

First, the cost of a review to a compliant public authority is apt to be small.

Second, this mechanism undermines the logic that leads to 'over-deterrence'[28] since, generally, bodies that conduct such reviews have no profit motives and tend to be impartial.

Third, this mechanism can evaluate both the input phase of the procurement process and the output phase of the execution, a function which is not, generally, available under a supplier review system.

Fourth, it can prove particularly useful to correct or prevent the effects of contract that have been entered in violation of public law, particularly in those situations when institutional barriers do not allow individual third parties to challenge a decision after a contract has been entered.

This function can take place both *ex-ante* by pre-emptively reviewing certain aspects on the legality of the contract, or *ex-post* by reviewing the execution of the contract.

[26] See, Arrowsmith, Linarelli & Wallace, (n.22), pp. 825-830
[27] Arrowsmith, (1994), CLJ, 53, 104-139 (n.22); Brown, 'Effectiveness of remedies at national level in the field of public procurement' (1998), 4 P.P.L.R., 89, 93; Pachnou, 'The effectiveness of bidder remedies for enforcing the EC public procurement rules: a case study of the public works section in the United Kingdom and Greece', PhD thesis (Nottingham University, 2003); Arrowsmith & Craven (n.22)
[28] On the potential negative aspects of a third-party review system, see Zhang, (n.22)

The pre-emptive review may be particularly useful in preventing contracts being the result of public law violations on the part of a public authority.

It may safeguard the probity of the contract *ex-ante*, minimise the possibility of harmful externalities, and, generally, enhance the confidence of all interested parties that the contract was concluded lawfully.

However, such administrative review mechanisms may also be the source of problems, especially regarding the efficiency of the procurement process.

For instance, if such mechanisms are composed of various levels of bureaucratic procedures, it might result in delays in the conclusions and the execution of a contract.

Eventually, it may be argued that the success of such mechanisms in preventing public law violations, while maintaining the necessary efficiency in the procurement and execution of a contract depends on how the scope and functions of such review mechanisms are designed.

Hence, as submitted here, and reiterated in the next chapter, one of the issues that this thesis is examining in the various selected jurisdictions is – first, the existence of such mechanisms, and second, if they exist, what is their exact scope in relation to unlawfully concluded contracts (e.g. can they prevent such violations taking place *ex ante* or do they correct them ex post or both).

III.3. Unilateral remedying of public law violations

As already indicated, and explained further in chapter 3, the scope of this thesis is to examine the impact of concluded contracts of those violations of public law nature that are attributable to public authorities.

As also indicated in this section, various mechanisms may be involved in remedying the enforcement of contracts that are the result of a public law violations.

It is submitted, that the less costly and time-consuming way for a public law violation to be remedied/corrected is through the exercise of some unilateral corrective action on the part of the public authority.

Indeed, a public authority is in the best position to correct its own unlawful acts, especially if these have been unintentional.

For instance, the authority entered the contract in the mistaken belief that it could do so when, in fact, it could not or, mistakenly used award procedure (x) which was unlawful in the circumstances.

Such corrective actions minimise the possibility of litigation by third-parties, and, generally, ensures that violations are remedied with minimum costs and in the public interest.

However, such unilateral power might also prove to be particularly problematic if a legal system does not balance it properly.

For instance, a public authority might exercise such power by terminating the existing contract to escape a bad bargain based on the ground of a purported public law violation.

If a legal system treats such conduct as a legitimate intervention and not as a potential contractual breach, it might leave the private party – who might have entered a contract in good faith – in a position not to be able to enforce his contractual rights.

Such potential treatment may create a moral hazard problem in contractual arrangements with public bodies, where one party to the contract (in this case a public authority) is able to take more risks without any particular costs.

Conversely, if a legal system does treat such exercise of unilateral power as a contractual breach, a contractor may be entitled to lost profits damages as a remedy or something close to this, which, in turn, might create an asymmetrical burden to the public purse.

The cost of a new contract might need to be covered in addition to the financial compensation granted. Consequently, if such costs need to be absorbed, a public authority might not have the right incentives to exercise such powers, hence, rendering the availability of such power redundant.

Alternatively, a legal system might choose a middle path between the above two options and allow the unilateral corrective power to be exercised under certain conditions and by providing some reasonable compensation to the private partner for the alteration of the initial contractual effects.

Evidently, a comparative examination of different jurisdiction will shed light on the practical approaches to this matter.

This project examines the approach of each jurisdiction regarding the power of public entities to unilaterally remedy a public law violation.

It examines whether such power exists, what are the conditions to exercise them, what possible forms of intervention can be exercised (e.g. terminating or modifying the purposively unlawful contract), and how consequential matters between the contracting parties are addressed when such intervention on the initial effects of a contract takes place.

IV. Alternative remedies to aggrieved suppliers

As noted above, the proposition of allowing challenges on the effects of a contract by third-parties is premised upon the presumption that such challenges can eliminate external harm.

In the context of potential suppliers who have been deprived of the opportunity to contract with a public authority, such harm may be measured either in relation to the contract profits they would have made had they won the contract if the public law violation did not take place, but also, in relation to the profit opportunity that potential competitors gained, which consequently made them worse-off.

However, it not always desirable to allow such challenges to take place. The public interest on uninterrupted service delivery may outweigh any other interest. Additionally, the gravity of the violation may not justify such a successful challenge.

If a public law violation does not have any impact to the contract either because third-parties are not entitled to challenge its effects or because *a priori* the violation does not create any adverse impacts on its effects, then are aggrieved suppliers entitled to a remedy?

Considering that the design of a supplier review system aims to somehow reconcile the unlawful deprivation of gaining a contract, some monetary compensation in the form of a damages award should be available.

Hence, if a system does not allow the challenge on the effects of an unlawful contract with the aim being the re-compete of such contract or the award of the contract to the successful challenger, then an alternative remedy could be to compensate the aggrieved supplier for his potential losses due to the unlawful decision. This may well be a measure that eliminates any harmful externality.

However, a damages award does, evidently, create an additional burden to the public purse (contract price + compensation for losses to a third-party). Thus, a careful balance need to be struck which will aim to eliminate the negative externalities to third-parties, while not creating a disproportionate burden to the public purse.

The comparative study will allow us to examine the approaches of different jurisdictions on the availability of alternative remedies to aggrieved competitors after the contract has been concluded.

What is the measure of damages award and does the availability of such award, eliminate the external harm as compared to a successful challenge on the effects of a contract?

V. Economic consequences *inter partes* arising from unlawful contracts

When a public law violation has an impact on the effects of a public contract the result of this is for the contract to either completely lose its effects, (i.e. the obligations under the contract are treated as they never existed) or limit its effects (e.g. the cancellation of the contractual obligations, which would still have to be performed or the premature discharge of a contract).

In both scenarios, a contractor may find himself at a risk of losing some of the economic resources that he allocated for an activity calculated to maximize his self-interest. It can also cost him resources that he could have utilised for another business activity.

A public entity may also find itself having made payment under the unlawful agreement that is not anymore enforceable. Consequently, it may also have wasted resources, in this case, public resources, which could have been utilised for another more socially desirable activity.

Stricto sensu when a public law violation overrides the effects of a contract, obligations under such contract, whether retrospectively or prospectively - depending on the impact that a public law violation has on a contract - cannot be enforced. This, in turn, implies that any consequential arrangements may be based on some extra-contractual or civil liability doctrine.

There is, of course, the possibility that the parties to the contract have recognised the risk of the potential public law violations and may have explicitly allocated the risk among themselves to reduce the potential costs. This option is subject to the condition that a legal system does not preclude such an arrangement.

In the event that the parties have not explicitly bargained the risk, or when such bargaining is precluded by law, the question that arises is how these economic consequential matters arising from the non-enforcement rule or limited-enforcement rules may be addressed.

This is a significant issue in the treatment of unlawfully concluded public contracts. An answer to this issue responds to the question how does the law balance the interest of the two contracting parties (the public vs the private interest) if a public law violation has an impact on the initial effects of a contract?

It is submitted that there is no one-fit theory in tackling this matter. However, from a policy perspective, there are some parameters that regardless of the approaches of each legal system, can provide some useful insights when determining this matter.

This section aims to taxonomise the relevant issues regarding the economic consequences arising from public contracts that have lost or limit their effects due to a public law violation.

This section proceeds as follows. Section IV.1 suggests some parameters that may determine the type of recovery to be granted to the two contracting parties. Section IV.2 examines whether recovery may be denied or partially satisfied and, if yes, on what potential grounds.

V.1. Determining the type of remedy

The main consideration that that should be stated from the outset, and it has already been submitted throughout this chapter, is the special nature of one of the parties to a public contract.

Unlike agreements between private individuals where both parties aim to maximise their respective self-interests, in an agreement pursued by a public authority, one of the interests that is intended to be maximised is that of the public. A public authority per se does not have incentives to make a profit.

Additionally, a public authority manages and arranges, directly or indirectly, public funds. Consequently, any transaction that has violated a public law rule

might jeopardise public resources that could be allocated for another purpose that would have better served the interest of the public.

This assumption leads to the first parameter that may determine how consequential matters are to be treated - that is, how far any attempt to restore the financial position of the contractor may affect public finances.

However, this parameter requires a qualification. Evidently, any transaction will lead to the disturbance of public finances whether entered in violation of public law or not.

Hence, the question may be better put on how far the transaction responds to a lawful purpose, i.e. for a purpose where public funds have been allocated lawfully.

This, in turn, suggests an assumption that underpinned the main hypothesis submitted in relation to the treatment of unlawfully concluded contracts, that is - that the type of violation may be a factor that determines the type of relief available to a contractor.

More specifically, when the violation is related to the subject matter of a contract, any potential compensation to a contractor for that purpose will be made from funds that were never intended to be disbursed ('inappropriate' public expenditure).

Conversely, when the subject matter is lawful, and some other irregularity took place, the purported transaction was intended to be made. Consequently, works, services or goods purchased have – in net - made the public authority better-off.[29]

In this latter occasion, there is no legitimate reason for a contractor not to able to recover at least based on what he has performed and for which the public authority gained a benefit (i.e. a remedy based on restitution).

[29] In the sense that the transaction was intended to be made and works, goods or services were required.

However, there is an inherent moral hazard issue with the above reasoning, which is that if 'inappropriate' public expenditure is deemed as a factor to deny recovery, public authorities will be able to escape a bad bargain by raising the public law violation to avoid any costs (the opportunistic use of the public law violation).

Additionally, 'inappropriate' expenditure by public authorities may very well take place for tort victim cases. In such cases, the intended funds utilised for compensation were also not intended to be disbursed. Hence, it is difficult to see why some compensation will not be granted for goods or services supplied under an unlawful contract.

Most importantly, this cost avoidance factor might disincentivise the private sector from engaging in agreements with the public sector based on the potential risk that they may have to carry.

Consequently, to balance the risks more efficiently, possibly, another variable to add in the equation is the relative knowledge of the illegality, and/or contribution to it on the part of the contractor.[30]

If the contractor seeking relief is 'excusably ignorant' of the facts giving rise to the illegality or is unaware of the unlawful nature of the transaction itself, then the court should grant relief – in whatever form it is sought to that party.

If, on the other hand, he is aware of the illegality and yet decides to enter into the transaction or has contributed to it, relief may well be denied.

By factoring this in the equation, the contractor will be careful to avoid proscribed transactions, and thus maintaining the necessary deterrent effect that the relevant public law rule intended to create.

Such a measure maximises deterrence since the contractor who might be a victim of a contractual breach, might not be permitted to recover and he will adjust his behaviour accordingly by not entering unlawful transactions.

[30] Kostritsky, (n.18), p.135

Consequently, such a harsh measure may lead to the formation of less unlawful contracts since the party with the market incentives (i.e. the contractor) will avoid entering such transactions.

The next issue to consider is what kind of relief should be granted. Should this potentially cover the profit losses that a contractor wasted as a result of entering an unlawful transaction, or should it be limited to restitution, i.e. judicial relief should aim to restore the position of the parties based on the benefits that each party gained from the other?

As was submitted above, the public law violation will override to some extent, whether prospectively or retrospectively, the effects of the contractual obligations. Hence, claims for losses based on the non-effective part of the contract cannot be enforced.

However, within the scope of this thesis, the public law violation is always attributable to the public authority, which could, in theory at least, be held it liable under some civil law doctrine such as tort or delict.

Such liability may require compensation that covers losses from performance and investment losses for the contractor, and thus, in effect, the amount of compensation may be akin or close to that provided under a contractual breach.

It is suggested that, based on the disturbance of public finances parameter described above, generally, compensation for any losses should be excluded and any calculation for compensation should be based on some restitutionary principle (i.e. based on what has been performed and has benefited the public authority).

A remedy based on restitution also responds better to the idea of vindicating the interest behind the public law rule, which usually is to deter or condemn the formation of transactions in violation of such rules.

A possible counter-argument on the above view is that, by limiting the remedial option upon restitution, a contractor who acted in good faith may find himself

deprived of profits that he would have made but for the public law violation that the public entity triggered.

In other words, the superior risk bearer, which, in theory at least, is the public authority as the party in a better position to assess the lawfulness or not of the transaction, will not have to absorb the cost of its wrongdoing.

Moreover, this position may jeopardise the incentives for the public authority not to enter an unlawful agreement, since the only risk that it will run is the obligations to reimburse the contractor for costs that it has benefited from and no more.

However, a remedy based on restitution addresses more satisfactory both interests. By forcing the parties to return to the *status quo ante*, it removes the incentives for both parties to enter unlawful contracts.

Additionally, a remedy based on restitution responds to the purpose of the public law rule which is to escape some or all of the effects of a contract in the first place.

V.2. The objections to allowing recovery

Assuming that the appropriate remedy is one based on restitution, another important question is whether there may be circumstances where recovery may be denied altogether or partially satisfied, thus depriving either or both parties of a remedy.

Considering first the possible grounds according to which a remedy may be restricted or denied to a contractor, as it was submitted above, one such ground could be the knowledge of the illegality and/or contribution to it.

Such a type of *pari delicto* approach to recovery may constitute a justifiable ground to deny or partially satisfy a remedy to a contractor. Clearly, such action will produce a strong deterrence mechanism in the formation of transactions in violation of public law rules.

If a contractor will have to bear the potential cost of performance if a violation is raised before a court, he will most likely avoid entering an unlawful transaction for which he has knowledge of its unlawfulness.

Consequently, from a normative perspective, such a measure may lead to the formation of less unlawful contracts, which, in turn, may safeguard the probity of the public contracts system.

No other ground seems to strongly justify a bar to restitution or another appropriate form of redress.

As suggested above, any other ground may create both a moral and an asymmetry hazard which, in effect, may produce potential negative commercial repercussions in respect to the engagement of the private sector with public contracts in the potential detriment of the public interest.

The next issue to consider is how consequential matters may be treated with regards to the economic rights of the public authority.

The main hypothesis here would be that unless a public authority has contributed somehow on the investment of a project, any losses that may occur to it are only limited to payments that have been made under the unlawful agreement.

The question then is should any enrichment that the contractor gained be reversed to restore the position of the public authority?

Similarly, with the position of a contractor, the public authority should be entitled to restore its economic position so that both parties are left where they would have been had the unenforceable part of the transaction was never performed.

As a rule of thumb, there should be no exceptions to this rule and this is for two reasons.

The first is based on the argument of the disturbance to public finances discussed above. A public authority should be not left worse-off from an

unlawful transaction, although the result of the unlawfulness might have been solely attributable to it.

A public authority acts in the public interest, and any wasted resources may be harmful to the taxpayer's money.

Therefore, any other policy consideration, such as deterring it from entering into agreements that are prohibited by public law, is inferior to the policy of protecting public resources.

The second reason is based on the argument that economic incentives are not the most suitable means to deter public authorities entering proscribed transactions because they do not usually operate in a market environment.

Other legal tools, such as criminal or civil actions against the individual agents of the public authority who might have acted in bad faith are more appropriate measures to deter such result.

VI. Conclusion

By employing legal theory and intuitive analysis, this chapter attempted to conceptualise some of the important policy and regulatory issues surrounding the impact of public law violations on concluded contracts.

The purpose of the exercise was to bring some order on the policy considerations involved in the treatment of unlawfully concluded contracts and act as a supplement to the practical approaches of the case studies in anatomising the treatment of unlawfully concluded public contracts.

First, it examined possible rationales that may determine under what circumstances public law violations may have an impact on the effects of a contract.

Four interrelated rationales were identified that may determine why some violations may have an impact on the contract and why others may not.

This chapter went on to explain different enforcement mechanism that legal systems may employ to either prevent an unlawful agreement coming into being but most importantly to remedy a public law violation *ex-post.*

It was explained the importance of examining enforcement mechanisms in a comparative context will reveal the tendencies and demonstrate a potential trend in relation to the prioritisation of the different interests involved.

Another issue that was examined is the type of alternative remedies that are available to aggrieved suppliers in that situation when the effects of a contract cannot be challenged.

It was suggested that, generally, a damages award should be available, but the scope of such award must be carefully balanced.

The final issue that was examined was possible rationales in identifying how consequential matters are to be treated between the contracting when a public law violation adversely affects the initial effects of a contract.

The main suggestion was that consequential matters should be treated by a remedy based on restitution.

Chapter 3

Framework for analysis

I. Introduction

This thesis takes as a starting point that the design of a neutral and uniform approach is necessary to address the different issues in a systematic way, regardless of the labels that each jurisdiction has given to the relevant legal doctrines.

This approach is necessary for a comparative study of this nature, which does not aim to evaluate the effectiveness of a legal system *per se*, but rather to get insights of different views on the same issues.

Hence, in order to avoid the obstacles of legal terminology and the institutional setting of each jurisdiction, the various legal issues have to be examined within the frame of a neutral template.

This template responds to some main hypotheses of the pertinent legal issues involved in the treatment of unlawfully concluded contracts as submitted in chapter 2. This approach aims to reduce the complexity of legal doctrines into manageable components susceptible to a comparative study of this nature.

This chapter is organised as follows. Section (II) clarifies the scope of the substantive law as well as the limitations on the rules examined in this thesis. Section (III) outlines the uniform structure upon which the comparative study is premised. Section (IV) concludes.

II. The scope and limitations of substantive law

This section provides an explanation of the substantive legal framework that is examined throughout this project.

The first part briefly deconstructs the term 'public contracts' and 'public authority'. These terms are used frequently thus a definition is necessary to simplify the scope of the analysis and avoid confusions.

The second part defines the term 'public law' for the purposes of substantive law to clarify the scope of the violations examined.

Finally, the third part sets some explicit limitations on the scope of the substantive rules examined in this project.

II.1. The definition of 'public contracts' and 'public authorities'

The term 'public contracts' or 'government contracts' refers, unless otherwise specified, to those contracts between public authorities and private contractors/partners.

It mainly covers what is usually referred as public procurement contracts, i.e. the activity of public authorities of purchasing the goods and services that they need to carry out their functions.[1]

Another term that is used frequently in the analysis is that of 'public authorities'.

The definition of this term is not intended to have a strict legal meaning as disparities exist between different jurisdictions as to what these bodies constitute.[2]

Hence, within a broad definition, this term refers to any entity that performs a 'public function'[3] (i.e. a function for the general interest) and is a State body,

[1] For a definition of public procurement contracts, Arrowsmith, Linarelli & Wallace, 'Regulating Public Procurement: National and International Perspectives', (KLI, 2000), chapter 1.
[2] See for example for the definition in the UK, Arrowsmith, 'Civil Liability and Public Authorities', (Earsgate Press, 1992), chapter 1 and in the context of the EU rules, Arrowsmith, 'The Law of Public and Utilities Procurement: Regulation in the EU and the UK' (3rd edition, S&M, 2014) chapter 5
[3] Neither this term has a strict legal meaning. It refers, broadly, to the obligation of providing services to the public.

or, in any event, a body closely connected with the traditional State functions, and which manages directly or indirectly public funds.

In other words, the main criteria for defining a legal entity as a public authority are the nature of its contracts activity – that is, to serve a public function, and the context in which it operates, i.e. a non-competitive market environment.

Throughout this project, a public authority will also be referred, inter alia as 'public body', 'public entity', 'contracting authority' or 'agency'. Many of these interchangeable terms reflect the different vocabulary used by the specific jurisdictions studied when referring to public authorities.

II.2 The definition of 'Public law'

As noted, the title of this project is labelled "A (comparative) study of the impact of violations of public law on concluded public contracts". A methodological problem in conducting such a comparative analysis lies in defining what is meant by 'public law'[4].

It is suggested that from an analytical point of view, it is possible to define public law in two ways.

The first is in a contextual sense as the body of rules relating distinctly to the allocation and regulation of state power (contextual sense).

The second is to define public law in a conceptual sense - or in a more legalistic way - as that body of rules distinct from the private law that includes special administrative and/or constitutional law doctrines, remedies, and Courts.

In this study, for the purposes of substantive law, 'public law' encompasses that 'special' body of rules that control the governmental contractual activity and are separate from or additional to the law applicable to ordinary contracts due

[4] Different terminology was considered such as the impact of violations of 'mandatory rules'; however, the term 'public law' was considered the most inclusive one for the scope of this thesis.

to the nature of the party that contracts (public authorities) and the purpose that these contracts aim to serve (the public interest).

Hence, the term public law is to be understood in a 'narrow contextual sense'. This term denotes those rules that control the contractual activity of public authorities.

A different approach would not have been possible for the following two reasons.

The first is that - from a conceptual point of view – public law does not have the same meaning in all jurisdictions or, in fact, any conceptual meaning at all.

The most notable example of this latter situation is EU law, which is not organised according to a public/private law distinction in the conceptual sense, but rather according to the lines of the overall objective of economic integration, in other words, functionally.[5]

EU law applies in a uniform manner throughout the EU and applies precisely, irrespective of how member States conceive the concepts of private and public law and their distinction.[6]

However, even in the context of EU law is designed to dismantle State obstacles, such as protectionism and favouritism in an area of law where political considerations are regularly apparent.

Therefore, in this contextual sense, public law can also be understood in the framework of EU law as in any other jurisdiction.

The second reason why this project opted for such an approach is that the rules applicable to public contracts are not necessarily categorised - at least in the chosen jurisdictions - as public law in its conceptual sense, i.e. as rules of administrative or constitutional law origin.

[5] Sammelman, 'The public-private divide in European Union: Law or an overkill of functionalism' Maastricht Faculty of Law, Working Paper No.12/2012.
[6] See, Ch.4-III.2.A

Rather, the rules applicable can be defined as a 'special body; of rules applicable to public contracts. Such special body of rules, of course, may encompass constitutional and administrative law and principles; however, it also includes other rules, which are not necessarily classified within the realm of the conceptual definition of public law.

II.3. Limitations on the scope of substantive rules

Having explained the definition of public law, this part further clarifies the scope of this thesis by explaining three important limitations that should be noted to the reader.

The first limitation as already indicated is that the project focuses solely on the impact of violations of public law attributable to a public authority. It does not examine the impact of violations of the rules that regulate the behaviour of a contractor.

The second limitation to the scope of the violations hereby examined is that these will always be attributable to a public authority as a whole entity rather than to violations of individual agents.

Of course, a violation of public law rules can only be the result of one or more natural persons acting on behalf of a public authority. Nevertheless, in this project, the behaviour and potential liability of a public authority as a whole are examined.

By adopting this limitation, the analysis avoids focusing on potential individual agency liabilities (civil, employment, or criminal), hence, allowing more space for the analysis on the effects of an unlawfully concluded public contract, and on how the law balances the various interests involved – i.e. the interest of the public authority/public interest, the interest of the contractor, and the potential interests of third-parties.

The third limitation is that this thesis does not examine the effect that retrospective changes in the law may have on concluded contracts.[7]

Potential litigation in such situation arises very frequently international investment disputes, such as disputes in concession contracts.[8]

The reason for this limitation is that it would broaden the scope of the thesis to a very large extent which exceeds the space limitations of a doctorate degree.

III. Structure of the case studies

As submitted above, the comparative study is premised upon a uniform and neutral template. The reason for this is to avoid the obstacles that legal terminology and the institutional setting of each jurisdiction may impose.

This uniform and neutral template is premised upon the regulatory hypotheses of the treatment of unlawfully concluded public contracts submitted in chapter 2.

This section presents this template upon which the comparative study is conducted. More specifically, the case studies are divided into 7 parts.

The first is an introductory part that explains the content and the structure of the chapter.

The second is an overview of the substantive rules applicable to public contracts. This second part provides the reader with the substantive rules that regulate the contractual activity of public authorities (i.e. what forms the public law rules as explained above).

The third part explains the applicable review and enforcement mechanisms. This matter is especially important to understand the institutional setting of each jurisdiction.

[7] This refers to the potential liability of a State when changes in legislation interfere with the performance of an existing contract.
[8] See, for instance, Donnelly, 'Public-Private Partnerships: Award, Performance, and Remedies' in Schill (edition), 'International Investment Law and Comparative Public Law' (OUP, 2010).

As explained in chapter 2, two pillars of enforcement mechanisms are explored.

The first pillar is that of a judicial review system (ad hoc review) that allows 'interested' third parties to challenge an allegedly unlawful contract decision.

As explained in chapter 2, the examination of such judicial review system is particularly important in understanding how the different interests around an unlawfully concluded contract are balanced.

Which third-parties can challenge an unlawful decision? What are the effects of such challenges to the effects of a contract? What type of violations can third-parties challenge after the contract is concluded? At which stage of the execution process; and under what conditions and safeguards?

These issues are examined in more detail at part four of the chapters, but an introduction on the institutional setting of each jurisdiction is given in advance.

The second pillar of enforcement is that of institutional review performed by an independent review body that may bring the case before a court or require *ex officio* the correction of an improper action.

Such an independent body can be part of a pre-contract enforcement mechanism, or a post-contract enforcement mechanism or of both. It can function both as an alternative or an additional enforcement mechanism to the judicial review system.

After introducing the enforcement system, part four examines the impact of violations of public law on concluded contracts. This consists the core part of the analysis.

For analytical purposes, this part is divided between the examination of violations of the award procedure and violations related to the subject matter of the contract.

This framework of analysis has been chosen, first and foremost, because these two types of violations respond to some extent to different policy and regulatory considerations as explained in chapter 2.[9]

While it could be argued that this distinction is to some extent artificial, and indeed, from a legalistic point of view, the distinction might be irrelevant; yet, this distinction also serves a better analytical framework.

By adopting the suggested framework, the various public law violations are examined synthetically, allowing more discussion on the actual effects that the violations of those rules have on a contract.

Part 5 examines how far the public entity itself can unilaterally remedy a public law violation.

As explained in chapter 2, a public authority may be in the best position to assess whether to intervene on an unlawful concluded contract by terminating it or by limiting its effects.

However, the issue is how does this unilateral power materialise, and if it does, how does the law balance the interests involved?

Part 6 examines the type of relief available to aggrieved competitors when the challenge on the effects of an unlawfully concluded contract is for whatever reason unavailable.

As was argued in chapter 2, when a challenge on the effects of an unlawfully concluded contract is not possible, then some form of damages award should be available to eliminate the harm from the unlawful award.

Hence, Part 6 examines the conditions that a successful claimant needs to satisfy for such an award and the scope of damages award.

Part 7 of each case study concludes by summarising the main findings from the analysis.

[9] Ch.2-II

IV. Conclusion

A comparative legal study on the impact of violations of public law on concluded public contracts involves the examination of complex legal issues.

To surpass the barriers of the institutional design and legal terminology of each jurisdiction, a neutral template is necessary.

This chapter clarified some of the ambiguous terminology involved in the analysis, the scope of the thesis, as well as the analytical framework upon which the comparative study is based.

Part II

The Comparative Study

Chapter 4

European Union Law

I. Introduction

This chapter examines the impact of the unlawful application of European Union (EU) rules on concluded public contracts.

As explained at chapter 1, EU law provides an interesting and useful case study both in terms of its impact in the international regulation of public procurement and as to the extent of its interaction (as an external regulator with a specific functional approach) with national law on the treatment of unlawfully concluded public contracts.

The chapter proceeds as follows. Section II provides a brief explanation of the substantive EU rules applicable to public contracts, section III explains the review mechanism that EU law disposes, section IV examines the impact of violations of EU law on concluded contracts, section V examines the extent that EU law regulates unilateral interventions of public authorities on unlawfully concluded contracts, section VII looks at the remedies available to third-parties when the effects of an allegedly unlawful contract cannot be challenged, section VII concludes.

II. The substantive legal framework

Public contracts in the EU are regulated by certain provisions in the Treaty of the Functioning of the European Union (TFEU). These rules, inter alia, prohibit discrimination by public bodies against firms and products from other Member States, including discriminatory procurement practices.

Additionally, public contracts are regulated by specific directives that regulate the award for major contracts.

This section outlines the above rules applicable to public contracts.[1]

It first outlines the content and purpose of the EU procurement directives (II.1) and then explains the application of the TFEU rules (II.2).

II.1. The Directives

Although it is only recently that the TFEU itself has been held to impose positive obligations in procurement,[2] it has long been considered that trade barriers in the context of the procurement function of public bodies cannot be removed solely through negative obligations.

The EU, therefore, adopted specific directives on procurement to regulate the award procedure of contracts of a certain financial value.[3] The directives that are currently implemented by the EU Member States were introduced in 2014.

These are Directive 2014/24/EU[4] (the public-sector directive) that regulates most of the contracts of public bodies, whether for supplies, works or services;

[1] See for a full account Arrowsmith, 'The Law of Public and Utilities Procurement: Regulation in the EU and the UK - Volume I' (3rd edition, S&M, 2014); Bovis, 'The Law of EU Public Procurement' (2nd edition, OUP, 2015). For a brief introduction, Trybus, 'Public Contracts in European Union Internal Market Law: Foundations and Requirements', in Noguellou & Stelknes, '*Droit comparé des contrats publics* – Comparative law on public contracts', (Bruylant, 2010)
[2] Case C-324/98*, (Teleaustria)*
[3] For the justification of regulating procurement in the form of directives see, Arrowsmith, 'The Past and the Future Evolution of EC Procurement Law: From Framework to Common Code' (2012), CYELS, 4, 1-47; 'The EC Procurement Directives, National Procurement Policies and Better Governance: The Case for a New Approach' (2002), E.L. Rev. 27(1), 3
[4] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing directive 2004/18/EC, OJ L94/65.

Directive 2014/25/EU[5] (the utilities directive) that regulates the award of contracts for works, supplies and services by bodies engaged in the utility sector; and Directive 2014/23/EU[6] (the concessions directive) regulating the award of concession contracts of work and services.[7]

Moreover, Directive 2009/81/EC[8] (defence directive), regulates contracts of entities and bodies in the defence and security sector.

These four directives constitute the substantive EU secondary legal regime applicable to public contracts.

These directives contain detailed rules regarding the award procedures and how these should be conducted. It covers various public bodies both at central and local level.

The requirements of award procedures that need to be followed include, inter alia, to advertise contracts EU-wide though the European Commission, hold competitions between interested firms, exclude firms from competition only for certain justified reasons, respect minimum time-limits for important phases of the procedure, award contracts based on the results of competition, on the basis of criteria specified in the directives and notified in advance, and provide information on decision to interested parties.[9]

Additionally, the 2014 directives provide some limited rules in relation to the execution of contracts. These include rules for the modification of contracts,

[5] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating the water, energy, transport and postal services sectors and repealing directive 2004/17/EC, OJ 94/243.
[6] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L94/1
[7] This Directive has been criticized for being unnecessary and adding further complexity in the system: Arrowmith, 'Modernising the EU's Public Procurement Regime: a Blueprint for Real Simplicity and Flexibility' (2012), P.P.L.R., 3, 71-82; Sanchez-Graells, 'What Need and Logic for a New Directive on Concessions, Particularly Regarding the Issue of their Economic Balance?' (2012) E.P.P.P.L.R., 94-104. For a different view, see Caranta, 'The Changes to the public contract directives and the story they tell about how EU law works' (2015), C.M.L. Rev., 52, 391-460
[8] Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the field of defense and security, and amending directives 2004/17/EC and 2004/18/EC, OJ, L.216/76.
[9] Arrowsmith (n.1) p.157

rules on subcontracting and rules on the unilateral termination of contract when certain award rule violations have taken place.[10]

II.2. The TFEU rules

Member States are required to apply the public procurement directives only to contracts over a certain financial threshold.[11] In principle, below this threshold, they are free to regulate as they see fit.

However, the exception to this rule is for contracts that have a 'cross-border interest', that is, contracts that might potentially be of interest to economic operators located in another Member State.[12]

Defining the concept of 'cross-border interest' is of importance since contracts below the directives threshold represent the largest amount in number and value of contracts.[13]

Nevertheless, the definition of this concept is rather ambiguous and has only been developed in the jurisprudence of the Court of Justice of the European Union (CJEU).[14]

The gist of the rule on contracts with a cross-border interest is that public authorities must comply with the rules and principles of the TFEU whenever they conclude public contracts that fall within the scope of this Treaty.

These rules include the free movement of goods (Art.34), the freedom of establishment (Art.49), the freedom to provide services (Art.56), and the general EU law principles of non-discrimination and equal treatment and proportionality that derive from therein.[15]

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[10] Chapter IV, Dir.2014/24/EU
[11] Commission delegated regulations (EU) 2017/2367; 2017/2366; 2017/2365; 2017/2364
[12] 'Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives' (2006/C 179/02)
[13] OECD (2010), 'Public procurement in EU Member States – The regulation of contract below the EU threshold and in areas not covered by the detailed rules of the EU directives', SIGMA Papers, No.45
[14] Case C-597/03*, (Commission v Ireland)*; for a critique see, Telles, 'The good, the bad, and the ugly: the EU's internal market, public procurement thresholds, and cross-border interest' (2013), P.C.L.J, 43(1), 3-25.
[15] 2006/C 179/02, (n.12) at 1.1.

The CJEU has a developed a set of basic standards and principles for the award of public contracts which derive directly from the TFEU rules and are founded and interpreted upon the public procurement directive rules.[16]

These are the principles of equal treatment and non-discrimination on grounds of nationality that imply a positive obligation of transparency.[17]

Besides the free movement rules, the TFEU provides other rules that control the contractual function of public authorities.

These are the rules of State aid control (Art.107). The main rationale for controlling the use of national State aid measures at the European level is the potentially negative repercussions of national subsidies on EU market integration.[18]

State aid rules in the context of public contracts are applicable in various situations, the most common of which is aid granted in an indirect or disguised way.

This means that the aid does not embrace positive benefits, such as subsidies, but instead it includes State interventions that, in various forms, mitigate the charges, which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are of the same character and have the same effect.[19]

[16] Ibid.
[17] Case C-324/98, (*Telaustria*). For a general analysis on this issue, see Dragos & Caranta, 'Outside the EU procurement directive - Inside the treaty?' (DJØF Publishing, 2012); Treumer & Werlauff, 'The leverage principle: secondary community law as a lever for the development of primary community law", (2003), E.L. Rev., 28(1), 124-133; Brown, 'EU primary law requirements in practice: advertising procedures and remedies for public contracts outside the procurement directives' (2010), P.P.L.R., 5, 169-181; Brown, 'Seeing through transparency: the requirements to advertise public contracts and concessions under the EC Treaty' (2007), P.P.L.R., 1, 1-21; Brown, 'A matter of principle(s) – The treatment of contracts falling outside the scope of the European Public Procurement Directives' (2000), P.P.L.R., 1, 39-48; Hordijk & Meulenbelt, 'A bridge too far: why the European Commission's attempts to construct an obligation to tender outside the scope of the Public Procurement Directives should be dismissed' (2005) P.P.L.R., 3, 123-190; Hamer, 'Requirements for contracts outside the directives' in Trybus, Caranta & Edelstam (edition) 'EU public contract law: public procurement and beyond' (Bruylant, 2010)
[18] Ganoulis & Martin, 'State Aid Control in the European Union - Rationale, Stylised Facts and Determining Factors', INTERECONOMICS, November/December 2001, 289-297
[19] Case C-387/92, (*Banco Exterior de Espana*); Case C-39/94, (*SFEI*)

These various forms of indirect State aid can take place both at the procedural stage as well as during the execution of the contract.[20]

For instance, in the procurement stage, unlawful State aid can take place when a contract is concluded on terms that are excessively favourable to a contractor.

In addition, and despite compliance with the public procurement rules, in a concluded contract excessive favourable terms can take the form of tax exemptions or advantageous provisions in the contract that have not been foreseen in the tender.[21]

Unlawful State aid can also take the form of a direct financial aid that has been conferred to an economic operator, which in turn, uses this financial advantage to submit a tender in condition unattainable for competitors that have not received this financial aid by the State. The EU directives explicitly prohibit this type of aid.[22]

Another set of rules related to the internal market objective which, however, are not particularly relevant in controlling public authorities conduct are the EU competition rules and Article 106, 101 and 102 TFEU.

Article 106 is concerned with controlling the potential anti-competitive and discriminatory behaviour of public undertakings - i.e. undertakings over which public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership[23] - and undertakings which the State has granted special or exclusive rights that do not apply to others, such as a legal monopoly over the provisions of a particular service.

[20] See inter alia on a discussion of the interplay between state aid and public contracts: Doern, 'The interaction between EC rules on public procurement and State aid' (2004), P.P.L.R., 3, 97-129); Sanchez-Graells, 'Public Procurement and State aid: Re-opening the Debate?' (2012) P.P.L.R, 6, 205-212; Nicolaides & Schoenmakers, 'The concept of advantage in State aid and Public Procurement and the Application of Public Procurement Rules to Minimise Advantage in the NEW GBER', (2015), EStAL, 143; Olykke, 'A state aid perspective on certain elements of Article 12 of the new Public Sector Directive on in-house provision', (2015), P.P.L.R., 1, 1-15

[21] Case SA.28876 (2012/C) (ex 2011/N) (ex CP 202/2009) – Greece Container Terminal Port of Piraeus & Cosco Pacific Limited, rejecting the existence of unlawful State aid on the facts

[22] Dir.2014/24/EU, Art.69(2)

[23] Dir.2006/111/EC, Art.2

In the context of public contracts alleged violations of Art.106 can take place through various channels. For instance, these include State measures that allow unlawful procurement procedures and practices from these undertakings to take place.[24]

Further, since these undertakings usually exercise their special rights through contracts with the State, a violation might exist if they have not been chosen pursuant to a public procurement procedure.[25]

With regards to the application of Art.101 (that prohibits restrictive agreements between (public) undertakings) and Art.102 (that prohibits (public) undertakings from abusing their dominant position), these will rarely operate in the context of public contracts, particularly when it comes capturing the potential anticompetitive behaviour of public authorities.[26]

This is because, in *FENIN*,[27] *AOK*,[28] and subsequent cases,[29] the EU Courts took a rather restrictive approach on what constitutes an economic activity and consequently establishes a public authority as an undertaking for the purposes of EU competition law.

Article 101 will only come into play if, first, an anti-competitive agreement is established and, second, the purchasing activity was made for a use of an economic nature that is separable from the social objective that the purchase was made for.[30]

Similarly, Article 102 will only take effect if a public authority enjoys a dominant or monopsony power position and abuses its position and, second, the purchasing activity was made for a use of an economic nature such as for onwards selling and not to pursue a general interest objective.[31]

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[24] Arrowsmith, (n.1) p.320
[25] Case C-280/00, (*Altmark Trans GmbH)*
[26] Sanchez-Graells, 'Public procurement and EU competition rules' (2nd edition, OUP, 2015); Oxford Centre for Competition Law and Policy, 'Competition and Public Procurement – An Overview', CCLP (S) 23.
[27] Case T-319/99 (*FENIN*)
[28] Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, (*AOK Bundesverband and Others*)
[29] For instance, Case C-113/07 (*Selex Sistemi Intgrati Spa*)
[30] *AOK* [63]-[65]
[31] *FENIN* [36] and [37]

Therefore, unless a public authority is acting as an undertaking pursuing contracts of a commercial nature, the EU competition rules do not apply to them.

The fact that EU competition rules *per se* rarely apply to the contractual activity of public authorities does not mean that EU law does not provide rules that capture anticompetitive behaviour on their part.

The 2014 directives have listed competition as a general principle,[32] and have set an explicit requirement that the design of the procurement shall not be made with intention of artificially narrowing competition.

Additionally, the directives include various provisions that seek to ensure that public contracts are not structured in a way that restricts competition. For instance, they provide for contracts to have a certain maximum duration.[33]

However, as the author intends to demonstrate elsewhere,[34] there is a discrepancy between the impact of these violations and violations of competition law have on the effects of a contract.

When a clause or an agreement as a whole of an ordinary contract violates competition rules, that illegal clause or the agreement as a whole is automatically void.[35]

In contrast, as it is explained at IV.2.A below, violations of the public procurement rules by public authorities, including violations that potentially restrict competition and may be unlawful under competition rules, do not, generally have any effect on the contract or a term of it.

[32] Dir.2014/24/EU, Art.18; Dir.2014/24/EU, Art.36(1). The concessions directive does not provide for this principle.
[33] See, for instance, Dir.2014/24/EU, Art.77, Art.33, Dir.2014/23/EU, Art.18.
[34] Provisional title: 'Ineffective contracts in EU economic law: A comparison between the EU competition & public procurement rules'.
[35] Article 101(1) TFEU

III. Control, review and enforcement mechanisms

This section outlines the relevant control and enforcement mechanisms applicable to public contracts under the EU law regime. It explains the institutional (III.1.) and the ad hoc/judicial review (III.2.) mechanisms respectively.

III.1. Institutional review mechanisms

As noted at chapter 2, independent institutions reviewing the legality of a decision to conclude a contract may have various benefits both in terms of preventing the formation of unlawful contracts as well as remedying the effects of an unlawfully concluded contract.[36]

At the EU level, such a mechanism is performed by the EU Commission. The Commission's power in relation to the enforcement of the EU public procurement rules is in substance the same as its powers in relation to the enforcement of any other EU law obligation.[37]

Under Article 258 TFEU if the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it may notify it of the alleged infringement and allow it to submit its observations.

Under this process, aggrieved suppliers can notify the Commission which only under its own initiatives can conduct an investigation for any breaches.[38]

This, in turn, can save costs for the aggrieved firm as the Commission will bear the expense and can potentially preserve anonymity thus, protecting disappointed firms which are reluctant to be seen to 'bite the hand that feeds' for fears of retaliation.[39]

[36] Ch.2-III.2
[37] Delsaux, 'The role of the Commission in enforcing EC public procurement rules', (2004), P.P.L.R, 3, 130-152.
[38] Case T-126/95 (*Dumez v Commission*)
[39] Delsaux, (n.37), p.132

The Commission will deliver a reasoned opinion setting out a time limit for compliance.[40]

If the Member State in question does not comply with the order, the Commission may bring the case before the CJEU. If the CJEU agrees with the Commission's finding, the Member State must take the necessary measures to comply with the judgment.[41]

If the Member State fails to comply with the court order, the Commission may again bring a case before the CJEU.[42] The CJEU may then may order a lump sum or penalty to be paid by the Member State for non-compliance.[43]

The current position of the Commission in relation to the use of its enforcement powers under Article 258 is that it first seeks to prevent infringements by reinforcing co-operation with the Member State in question.[44]

It pays special attention to particularly serious infringements brought to its knowledge, and when a specific case is brought to its attention that raises a general problem of application, it checks the situation and initiates proceedings in respect of all similar infringements.[45]

Serious infringements include, for instance, not launching a call for tenders for the main project works, signing an international agreement, or unlawfully using the negotiated procedure without prior publication of a notice.[46]

[40] In the context of public procurement see, Case C-243/89, (*Commission v Denmark*); C-21/88 *(Du Pont de Nemours Italiana SpA)*
[41] Art.260(1) TFEU
[42] Art.260(2) TFEU
[43] In the context of public contract violations see Case C-70/06, (*Commission v Portugal*); Case C-503/04, (*Waste case*); see also, "Communication from the Commission: updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice in infringement proceedings", (2016/C 290/02)
[44] Recently, the Commission published a Communication, 'Helping investment through a voluntary ex-ante assessment of the procurement aspects for large infrastructure projects' COM (2017) 573 final, in which it encourages national contracting entities to use a voluntary ex-ante mechanism to raise questions and receive an assessment of mainly large infrastructure project's compatibility with the EU regulatory framework before taking important steps.
[45] 'Communication from the Commission: Public Procurement in the European Union', Brussels, 11.03.1998, COM (1998) 143 final at 2.2.
[46] C-503/04, (*Waste case);* Case C-601/10, *Commission v Greece*

The Commission has used the procedure under Article 258 TFEU and for cases where a contract has come into being and due to these enforcement powers, an executory contract was set-aside.

In *Commission v Germany C-503/04* (hereafter *Waste* case), the CJEU ruled that Germany's failure to terminate a contract, which pursuant to an action under Article 258 the Court had previously determined had been awarded unlawfully, meant that Germany had failed to comply with its obligation to take the necessary measure to comply with the Court's judgment.

An action under Article 258 may have wider implications for contracts that have been concluded in breach of EU rules in light of the introduction of unilateral termination power conferred in the 2014 directives. This issue is considered further at section V.

Another enforcement mechanism available to the Commission is provided under the EU remedies directives on public procurement.[47] According to Article 3, the Commission may invoke this "corrective mechanism" when a serious infringement of EU law has been committed.

This mechanism can only be invoked when the contract has not yet been concluded and the infringement must relate to a contract that falls within the scope of the public procurement directives.

Under this procedure, the Commission can notify the contracting authority itself of the reasons that led it to conclude that a serious infringement has been committed and ask them to proceed to the correction of the breach.

At the national level, the Commission has also suggested that Member States should set up national independent oversight bodies with functions such as the power to require contracting entities to correct procedural errors.[48]

[47] Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ 2007, L335/31

[48] 'Green Paper - Public Procurement in the European Union: Exploring the way forward' Communication adopted by the Commission on 27th November 1996 on the proposal of Mr. MONTI at 3.42-3.45

However, EU law does not set any requirement for national laws to establish independent bodies performing enforcement and corrective actions whether pre or post-award.

The 2014 directives, go as far to suggest monitoring authorities with their main function being the reporting of violations to national auditing authorities, courts or tribunals and providing public information on the most frequent sources of wrong application or of legal uncertainty, including possible structural or recurring problems in the application of the rules.[49]

III.2. Judicial Review

As explained in chapter 2, judicial review refers to that process according to which third-parties can challenge allegedly unlawful decision of public authorities.[50]

This part explains the requirements that EU law imposes on the Member States in relation to a judicial review system of third-party protests.

Part (A) explains the relationship between public and private law under EU law and whether this affects the judicial review process.

Part (B) explains the system of review applicable to public contracts.

III.2.A. The distinction between public and private law

Procurement litigation may raise the issue of claims against alleged unlawful administrative actions. This issue in some jurisdictions raises *stricto sensu* the distinction between public and private law, which affects, inter alia, which courts have jurisdiction, the type of review procedures and, the body of remedies available.

[49] Dir.2014/24/EU, Title IV
[50] Ch.2-III.1

EU law is not organised according to this formality test but along the lines of the overall objective of economic integration, in other words, functionally.[51]

The rationale of the functional approach is to ensure that EU primary and secondary law applies in a uniform manner throughout the EU Member States and applies precisely irrespective of how national legal systems conceive the concepts of private and public law and their distinction.

The CJEU has emphasised that the classification given by national legal orders between public and private law bodies are irrelevant in the applicability of EU rules.[52]

In the context of public procurement rules, EU law also adopts a functional approach.

For example, the fact that the directives cover "bodies governed by public law"[53] is unrelated to the dichotomy between public and private law as it applies in the relevant national legal systems.

The objective of this doctrine is to determine the personal scope of the EU public procurement rules and does not have a national law meaning.

The important factors are that the body is established for the specific purpose of meeting needs in general interest, they have legal personality and, they are financed, for the most part, by the State.[54]

Therefore, as an analytical point, the formal distinction between public and private law is legally meaningless for the purposes of EU law as it is not concerned under which kind of procedural and substantive system public contracts are governed.

[51] See, generally, Semmelman, 'The public-private divide in European Union: Law or an overkill of functionalism', Maastricht Faculty of Law Working Paper No. 2012/12; Reich, 'The public/private divide in European Law' in Miclitz & Cafaggi, (edition), 'European private law after the common frame of reference' (Edward Elgar, 2010)
[52] See, for example, *Cases C-35/96*, (*Commission v Italy*) [40]; *C-123/83*, (*BNIC*) [17]
[53] Dir.2014/24/EU, Art.2(1)
[54] Ibid.; Cases C-44/96, (*Strohal Rotationsdruck GesmbH*); C-980/98, (*University of Cambridge*); C-470/99, (*Universale-Bau*)

On the contrary, the obligations that derive as a matter of EU law apply equally to the Member States regardless of whether these contracts are governed by public or private law.[55]

As a result, EU law has created, in some situations, an almost separate regime of judicial review system and has rendered the effects but also the debate around this distinction under national legal orders irrelevant.

This matter is demonstrated further in the UK and Greek chapters where the effect of EU law in the judicial review design is demonstrated.

III.2.B. The judicial review system

What distinguishes EU law as a legal system from traditional International law is, firstly, the doctrine of supremacy which dictates that in areas where EU law is relevant before a national court, EU law will prevail over national law and, secondly, that EU law is directly effective, which means that private individuals or entities are entitled to rely on rights that derive from EU measures before national courts.[56]

For Member States to protect rights deriving from EU law and counterweight the obstacles that the principle of national procedural autonomy raises to the protection of those rights, the EU legal system has created the principles of effectiveness and equivalence.[57]

In the context of public procurement, the EU legislator has adopted the remedies directive,[58] which sets minimum national review standards and ensures that rapid and effective means of redress are available in all EU countries when an economic operator that has an interest in a public contract

[55] See, Case C-503/04 (*Waste Case*) at [38] and the opinion of A.G. Trstenjak in that case where she rejected the defence argument that under Germany's legal system the contracting authority is bound as a party having a status equivalent to that of the contractor, by a contract under private law at [73]
[56] Case 26/62, (*Van Gend en Loos*)
[57] Cases C-33/76, (*Rewe-Zentral-Finanz*); C-106/77 (*Simmenthal SpA*)
[58] Directive 89/665/EEC (applicable for the public-sector directive); Directive 92/13/EEC (applicable to the utilities directive) as amended by Directive 2007/66/EC (the remedies directive) and further amended by Directive 2014/23/EU (The Concessions directive) Title IV.

award believes that it has been run without proper application of the EU Public Procurement Directives.[59]

According to the Commission, the remedies directive is crucial to making sure that public contracts ultimately go to the company which has made the best offer and therefore to building confidence among business and that public procurement procedures are fair and in compliance with the EU law requirements.[60]

Most of the provisions in the remedies directives are mandatory and must be turned into national law. Those mandatory provisions constitute "*minimum conditions to be satisfied by the review procedures established in the national legal systems*".[61]

Member States may introduce conditions that go beyond those laid down in the remedies directive, for instance by laying down similar or equivalent review procedures for public procurement under the EU thresholds, by granting to organisations that do not act as economic operators (e.g. trade associations) the right or capacity to bring an action or to appear before a court and by setting longer time limits for applying for review.[62]

The remedies directive provides for two broad categories of remedies. The first are pre-contractual and the second are post-contractual remedies.

Pre-contractual remedies are intended to correct the infringement of the public procurement rules in the course of the tendering procedure and, in any event before the contract becomes effective.

These include the remedy of interim measures, the remedy of setting-aside an unlawful decision, a compulsory standstill period between the award of contract

[59] On the history of the remedies directive see, Arrowsmith, 'Enforcing the Public Procurement Rules: Legal Remedies in the Court of Justice and the National Courts' in Arrowsmith (edition) 'Remedies for enforcing the public procurement rule' (Earslgate, 1992)
[60] Commission Staff Working Document 'Evaluation of the modifications introduced by Directive 2007/66/EC to Directives 89/665/EEC and 92/13/EEC concerning the European framework for remedies in the area of public procurement/Refit Evaluation accompanying the document COM (2017) 28 final (SWD (2017) 13 final)', p.12
[61] Ibid.
[62] Ibid.

and its conclusion, and the requirement to suspend the award procedure whilst an appeal is being investigated to prevent the conclusion of the contract.

The second group are post-contractual, and they also aim to correct violations that have taken place at the awarding stage, but such correction takes place after the contract has come into effect.

These provide for the ineffectiveness remedy, alternative penalties to ineffectiveness and a damages award. These remedies are discussed in detail further in this chapter.

As indicated the remedies directive only applies to contracts that fall within the substantive EU public procurement directive regime. Despite some academic debate,[63] for infringement of public procurement rules which fall outside the scope of the directive, the remedies directive requirements do not apply.[64]

Member States may choose to apply the same standards and to contracts below the procurement directives threshold and some of the EU States have adopted this approach.[65]

However, States that do not apply the remedies directive for contracts below the threshold, must still apply review procedures that provide effective judicial protection of the rights they derive from the Community legal order.[66]

They must provide for remedies that must not be less efficient than those applying to similar claims based on domestic law (principle of equivalence) and must not be such as in practice to make it impossible or excessively difficult to obtain judicial protection (principle of effectiveness).[67]

[63] Brown, 'EU Primary Law Requirements in Practice: Advertising, Procedures and Remedies for Public Contracts Outside the Procurement Directives' (2010), P.P.L.R., 5, 169-181; Treumer, 'Enforcement of the EU Public Procurement Rules: The State of Law and Current Issues' in Treumer & Lichère (edition), 'Enforcement of the EU Public Procurement rules' (DJØF, 2011)
[64] Case C-91/08 (*Wall*); 2006/C 179/02 (n.12) at 2.3.1.
[65] See, Commission, 'Economic efficiency and legal effectiveness of review and remedies procedures for public contracts' (2015), Final Study Report, Markt/2013/072/C
[66] 2006/C 179/02, (n.12) at 2.3.1.
[67] Ibid.

IV. The impact of EU law violations on concluded contracts

The section examines and explains the impact that violations of EU law have on concluded contracts.

Following the framework of systematic analysis submitted in chapter 3, this section examines, first, the impact of violations related to the procedure of concluding a contract (IV.1 & IV.2) and violations related to the subject matter of the contract (IV.3).

Some preliminary points should be noted from the outset.

First, it is submitted that from a *lex lata* point of view, EU law violations do not, generally, affect the validity of concluded contracts. There are very few exceptions to this.

The first exception is the ineffectiveness remedy as provided by the remedies directive. This seems to be the only remedial tool provided under EU law which third-parties - namely aggrieved competitors – can use to challenge the effects of a concluded contract.

This is a well-rounded, and relatively flexible remedial tool, which aims to tackle that negative externality that is directly applicable to the economic interests of aggrieved competitors – i.e., the harm created by being deprived the opportunity to either compete for a contract, challenge a decision that leads to the conclusion of a contract, or both.

As further explained in chapters 5 and 6, the ineffectiveness remedy has a significant impact on the national legal order of some Member States in relation to a remedial tool for challenging the effects of a contract.

The second exception is provided under Article 73 of Directive 2014/24/EU and its equivalents.[68] This provision requires Member States to empower their public authorities with the option of unilaterally terminating a contract during its term

[68] Art.90 of Dir.2014/25/EU and Art.44 of Dir.2014/23/EU

when certain violations have taken place. Article 73 is discussed in more detail in section V.

The second preliminary point that should be noted is that EU substantive law is only concerned with how public authorities purchase goods, works and services. They do not restrict in any way the powers of public authorities to enter particular types of contracts.

Hence, the conceptual distinction that is made for the purposes of this thesis between violations related to the subject matter of the contract and violations related to the rules regulating the procedures of concluding a contract has no conceptual application in the context of EU law. This matter is further discussed in IV.3.

IV.1. The impact of violations related to the award procedure

As indicated above, the general rule under the EU remedies directive has been that national legal systems are free to preserve the validity of a contract, even if this has been concluded unlawfully.[69]

This position has changed after the significant amendment of the remedies directives in 2007.

More specifically, the Commission had highlighted in its preparatory work on the amendment of the remedies directives, as reflected in the 'Impact Assessment Report on Remedies (hereafter the "Impact Assessment Report")',[70] that the most important problems regarding the effectiveness of the previous remedies directive regime were:

(i) the lack of effective remedies against the practice of illegal direct awards of public contracts (i.e. contracts awarded in a non-transparent and non-

[69] See, Treumer, 'Towards an obligation to terminate contracts concluded in breach of the E.C. public procurement rules – the end of the status of concluded public contracts as sacred cows' (2007) P.P.L.R., 6, 371-386

[70] Commission, 'Impact Assessment Report – Remedies in the field of public procurement' SEC (2006) 557, Brussels, 4.5.2006.

competitive manner to a single tenderer) and (ii) the race to signature of public contracts by public authorities which, deprives economic operators participating in formal tender procedures of the possibility to bring remedies actions effectively (i.e. at a time when infringements can still be corrected).[71]

Furthermore, the Commission acknowledged that the remedy of damages was not considered a sufficient deterrence for public authorities to comply with EU rules and was not an adequate remedy for aggrieved competitors, especially in that situation where a contract had been signed.[72]

This is particularly true in the situation of an unlawful direct award since no bidding costs have incurred, and loss of profits cannot be proven in the absence of a tender procedure, which is usually the necessary element for a claimant to demonstrate the causal link between the loss and damage.[73]

As a result, the Commission introduced, in the remedies directive, a requirement for a standstill period between the award decision and the conclusion of a contract and,[74] the remedy of ineffectiveness.[75]

On the one hand, the insertion of a minimum standstill period essentially codified the CJEU judgement in the *Alcatel* case.[76] This measure aims to prevent the conclusion of unlawful contracts without allowing a minimum pending period for this to be challenged.

On the other hand, the aim of the ineffectiveness remedy is to provide an effective sanction against illegal direct awards of contracts[77]and tackle the inefficiency of the damages remedy in such situation by requiring such contracts to either lose or limit their initial effects.[78]

[71] Ibid. at 1
[72] Ibid. at 4.3.
[73] Lichère, 'Damages for violation of the EC public procurement rules in France' (2006), P.P.L.R., 4, 171-178, 174-175
[74] Dir.2007/66/EC, Art.2a
[75] Art.2d
[76] Case C-81/98 (*Alcatel*) at [43]
[77] According to the CJEU, a direct award is the most serious violation of EU public procurement law. See, C-26/03 (*Stadt Halle*), [37]; Dir.2007/66/EC, Recital 13; See also, European Court of Auditors, 'Special Report No/2015: efforts to address problems with public procurement in EU cohesion expenditure should be intensified'.
[78] Dir.2007/66/EC, Recital 21.

The ineffectiveness remedy is a real novelty for EU rules, going against the sanctity of a contract.[79] The purpose of this remedy is to create an effective way to restore competition to those economic operators that have been deprived unlawfully the opportunity to compete.[80]

Indeed, the primary purpose of this measure is to provide an effective remedial tool to aggrieved competitors for those violations that cannot practically be remedied before the conclusion of a contract (i.e. a direct award and deprivation of challenging an award decision).

This is an important remark, which as will be explained further, has wider implication in understanding the limited scope of this remedy.

Ancillary to this primary purpose, it could be argued, that the ineffectiveness remedy creates a deterrent effect against serious illegal conduct such as bribery, fraud and other forms of corrupt related conduct.[81]

In fact, the Impact Assessment Report makes extensive reference to the objective of preventing corruption, as well as, the correlation of illegal direct awards and the risk of illegal and corruptive practices in procurement activities of public authorities.[82]

Additionally, although this remedy aims to address the potential unlawful conduct of public authorities, its effects, i.e. the cancellation or limitation of a contract (IV.2.C.), may also produce substantial risks and costs for the private contractor.

[79] Clifton, 'Ineffectiveness – the new deterrent: will the new remedies directive ensure compliance with the substantive procurement rules in the classical sectors?' (2009) P.P.L.R., 4, 165-183; Golding & Henty, 'The new remedies directive of the EC: standstill and ineffectiveness' P.P.L.R., 2008, 3, 146-154; Struckmann & Hodal, 'Private Enforcement of Contract Ineffectiveness: A Practitioner's Point of View' (2014), EPPPL, 1, 27-35

[80] Dir.2007/66/EC, Recital 21

[81] It is generally accepted that a remedies system, which is designed to safeguard transparency and competition, will effectively tackle corrupt behavior. See, "Guidebook on anti-corruption in public procurement and the management of public finances: Good practices in ensuring compliance with Art.9 of the UN convention against corruption", (2013), UNODC in collaboration with IACA.

[82] SEC (2006) 557, (n.70) at 4.1.

Hence, in this context, it may be argued that this remedy aims to deter and condemn serious illegal activity in the private sector – such as collusive practices or bribery, which often result in illegal direct awards.

The judicial influence for the introduction of this remedy can be traced to the saga of case *C-503/04* (Waste Case). In this case, the CJEU held that contracts which are the result of illegal direct awards and whose effects restrict the fundamental freedoms of the internal market are unlawful under EU law.[83]

Therefore, for such contractual relationships not to create a *fait accompli*, the only means to counter their effects is by setting them aside.

As the Advocate General had suggested in this case, the EU law principle of effectiveness cannot be exhausted upon the conclusion of a contract and it persists until the contract has been performed or ends in some other way.[84]

It is submitted, that the conditions for the ineffectiveness remedy are the only available grounds according to which, aggrieved suppliers may challenge the effects of a contract.

It also a measure, which as will be demonstrated in chapters 5 and 6, has had a significant impact on the design of the post-contractual remedies system on some EU Member States.[85]

The next parts of this section (IV.2.) examine in detail various aspects of this remedy.

It explains the type of violations that may trigger this remedy, the parties that may challenge the effects of a contract according to this remedy, and the safe harbour mechanisms that may allow a contract to go ahead regardless of the finding of a violation, as well as what are the EU law requirements regarding the treatment of consequential matters arising from an ineffectiveness declaration.

[83] At [33]
[84] Opinion of AG Trstenjak delivered on 28th of march at [76]
[85] See also Treumer & Lichère, (n.63)

A lot of the analysis conducted in the next section is relevant for the case studies of the UK and Greece.

IV.2.A. Condition for ineffectiveness

Article 2d (1) of the remedies directive provides that Member States shall ensure that a contract is considered ineffective by an independent review body if any of the following three violations occur:

(a) If a contracting authority has awarded a contract without prior publication of a contract notice in the Official Journal of the European Union without this being permissible in accordance with Directive 2004/18/EC.

(b) When the automatic suspension requirement has been infringed or when the mandatory standstill period has been infringed,[86] provided that these infringements are combined with an infringement of the EU directives, that these infringements have also deprived the economic operator who applied for review to pursue pre-contractual remedies, and that these infringements have affected the chances of the economic operator to obtain the contract.

(c) Where the standstill period has not been used for placing above threshold call-off contracts or agreements further to a dynamic purchasing system and the call-off rules for such contracts have been breached.

Regarding the first type of violation, as already suggested, illegal direct awards are the type of breach that the ineffectiveness remedy aims to combat. Hence, any contract awarded without competition that cannot be lawfully justified is subject to be declared ineffective by a national review body.

The remedies directive provides at recital 15 that possible justifications for a direct award may include the exemptions in Articles 10 to 18 of Directive 2004/18/EC,[87] the application of Article 31 of that Directive which refers to the

[86] The mandatory standstill period is 10 or 15 calendar days according to the means of communication used by the awarding authority (Art.2a (2))

[87] These exceptions refer to defense procurement that is subject to Article 296 TFEU and contracts that are excluded from the scope of the directives such as contracts awarded pursuant to

exhaustive conditions for the use of the negotiated procedure without publication of a contract notice and, when there is a lawful "in-house" contract award according to the interpretation of the CJEU.[88]

It is important to highlight that recital 15 does not make any reference to the lawful modification of contracts as a possible justification for a direct award. This stems from the fact that the 2004 directives did not include provisions on under what circumstances a contract may be modified.

However, the 2014 directives now provide for an exhaustive list on how a modification of contract should be conducted[89] and explicitly provides that any modification within the meaning of the directives should be published at the Official Journal of the European Union.[90]

The question then is whether unlawful modifications of contracts fall under the category of unlawful direct awards and, hence are subject to an ineffectiveness claim?

The most probable answer is that unlawful modifications do constitute unlawful direct awards that require a new award procedure.[91] Hence, such modifications may be challenged under the ineffectiveness remedy.

The second type of violation that may lead to ineffectiveness is when an awarding authority breaches the requirement of the standstill period or the automatic suspension requirement, and such breaches have affected the chances of an aggrieved tenderer to challenge the awarding decision.

The third ground for challenging the effects of a contract under the ineffectiveness remedy is when a contract based on a framework agreement or a dynamic purchasing system is awarded in violation of the necessary

international rules, or contracts requiring special security measures or service contracts awarded based on exclusive rights and specific exclusion service contracts.
[88] Case C-107/98, (*Teckal Srl*); Art.12 of Dir.2014/24/EU
[89] Dir.2014/24/EU, Art.72; Dir.2014/25/EU, Art.89; Dir.2014/23/EU, Art.43
[90] Art.73(1)§2
[91] See, Simovart, 'Old remedies for new violations? The deficit of remedies for enforcing public contract modification rules' (2015), UrT, 1, 33, 34-36; Simovart, 'Enforcement of Ineffectiveness of unlawfully modified public contracts' (2016), Juridica International, 24, 43-54

competition requirements provided that the derogation from the standstill period has been invoked.[92]

Having explained the type of violations that the remedies directive prescribes as being subject to an ineffectiveness claim, the next issue that needs to be addressed is whether any other violations may be subject to an ineffectiveness claim.

It is submitted that as a matter of EU law, no other violations may give rise to a challenge to the effects of a contract. Article 2(7) of the remedies directive makes it clear that the effects of an unlawfully concluded contract shall be determined by national law.

There has been some interesting academic debate on whether other violations may subject a contract to an obligation from Member States to terminate it.

Professor Treumer has convincingly argued that serious violations which undermine competition constitute reasons where an obligation to terminate an existing contract may materialise.[93]

Such serious violations include an award in violation of the award criteria, when conflict of interests can be demonstrated, when unlawful State aid is involved in the transaction, or when a contractor has unduly influenced the decision-making process of an awarding authority by participating on technical dialogues prior to the submissions of bids.[94]

Indeed, as further discussed at section V, some of these violations may raise the issue of unilateral termination of an existing contract by the public authority itself.

[92] The application or not of the standstill period requirement for contracts based on framework agreements or dynamic purchasing systems is a complicated matter. On the one hand, the imposition of a mandatory standstill obligation may have an impact on the efficiency gains intended by these procedures. On the other hand, the derogation from the standstill period may create the risk that the award decision is not communicated to unsuccessful tenders, hence, preventing them from effective challenges.
[93] Treumer, (n.69), p.p. 378-380
[94] Ibid.

However, such violations do not constitute grounds on which aggrieved competitors may challenge the effects of a contract.

Professor Arrowsmith has argued that the EU principle of effectiveness may require a general exception enabling a challenge to the effects of a concluded contract by third-parties when the contractor knows or, perhaps, clearly should have known, that the contract he was entering may have been unlawful.[95]

This obligation arises because the inability of the courts to set-aside a concluded contract limits the provisions of an effective remedy. Arrowsmith argues that this inability is acceptable to protect the interest in legal certainty of the private contractor, but such an interest cannot exist where that contractor is aware of the breach.[96]

However, the reality is that the EU remedies directive has excluded the assessment of such subjective elements of fault in the operation of the ineffectiveness remedy and the available remedies in general.

Additionally, the scope of the remedies directive is only limited to violations relating to the awarding authority and does not extend its applicability to the assessment of the conduct of a contractor.

Furthermore, the European legislator has limited the obligation of Member States to allow the challenge to the effects of a contract by third-parties, to those violations that have deprived aggrieved competitors of either the opportunity to compete for a contract or challenge a decision to award a contract.

Any other violation relating to the procurement procedure but for the ones captured by the ineffectiveness remedy, in theory at least, may be remedied before the conclusion of the contract. Hence, the remedy is very limited in scope.

[95] Arrowsmith, 'The Law of Public and Utilities Procurement', (2nd edition, 2005), p.1426
[96] Ibid.

Conversely, however, it may be argued that some type of violations may arise after a contract is concluded which may equally obstruct competition and deprive economic operators of the opportunity to compete.

For instance, this may be the case when entering into a restrictive long-term agreement with one supplier, which as result may deprive others of a market opportunity.[97]

Such a potential violation on the part of a public authority may be captured by Article 101(2) TFEU, which provides that agreements or clauses in the agreement that may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market are automatically void.

However, as explained at II.2, the EU competition rules do not, generally, apply to public authorities and, certainly, the ineffectiveness remedy does not provide the option to challenge concluded contracts for violations of this type.

Another important matter to clarify is whether the obligation for the ineffectiveness remedy extends also to contracts below the EU threshold.

Considering that most of the requirements laid down in the remedies directives are not very detailed, it may be argued that Member States could hardly satisfy the principle of effective judicial protection by providing remedies more limited in scope for contracts falling outside the scope the directives.[98]

However, it seems that the requirement of the ineffectiveness remedy is not extended to contracts below the EU threshold.

In *Case C-91/08*,[99] which was a fast follow up on the *Waste* case and concerned subsequent amendments to a service concession, which at the time did not fall

[97] For example, such agreement prohibited by the EU directives are entering into contracts based on framework agreements for the duration of more than 4 years (Art.33 (1) of Dir.2014/24) and Art.18(1) of Dir.2014/23 which states the duration of concessions shall be limited in order to avoid market foreclosure and restriction of competition. Consequently, the contracting authority shall estimate the duration on the basis of the works or services requested.
[98] Caranta, 'The Borders of EU Public Procurement Law' in Dragos & Caranta, (edition), 'Outside the EU Procurement Directive - Inside the Treaty?' (DJØF,2012) p.55
[99] Case C-91/08 (*Wall*)

under the directives, clarified that there was no duty to declare a contract ineffective or require its termination in every case of an alleged breach of transparency and equal treatment flawing from Art.49 and 56 TFEU.

In such cases, it is for the domestic system to regulate the legal consequences, subject to the requirements of effectiveness and equivalence.[100]

IV.2.B. Procedural issues: review body, standing and time limits

The remedies directive states that ineffectiveness must be considered by a *"review body independent of the contracting authority or that ineffectiveness is the result of a decision of such review body…"*[101]

It also states at recital 13, that "*ineffectiveness should not be automatic but should be ascertained by or should be the result of a decision of an independent review body*".

Regarding who has standing to challenge a contract under the ineffectiveness remedy, the general standard provided under the remedies directive is that the challenge procedure is available, under detailed rules which the Member States may establish, at least "*to any person having or had an interest in obtaining a particular contract and who has been, or risks being harmed by an alleged infringement*".[102]

Hence, the minimum standard on who can establish a legal interest and apply for review is that of all potential suppliers with an economic interest in the contract.

It also leaves open the possibility to national laws to allow other third parties such as organisations representing suppliers, institutional bodies, or even the public at large, which may not have a direct economic interest in the contract, but wish to challenge an unlawful decision, for instance, on grounds of legality.

[100] Ibid., [65]
[101] Art.2d
[102] Art.1(3)

However, this is not the case for the second ground that may trigger ineffectiveness, where an infringement of the standstill obligation or the suspension requirement must also affect the chances of the tenderer applying for review to obtain the contract.[103]

In practice, the standard of proof required under this condition is very high and may deprive many aggrieved suppliers of bringing claims for ineffectiveness.

A more interesting question is how far the contracting parties can also raise the ineffectiveness grounds to potentially escape a bad bargain.

It is submitted that as a matter of EU law the two contracting parties cannot rely on the remedy of ineffectiveness. The remedies directive is designed to protect the interest of aggrieved competitors and nothing further.

Finally, the remedies directive sets out minimum time periods that national laws need to follow to bring an ineffectiveness claim.

These are 30 calendar days with effect from the day following the date on which the contracting authority published a contract award notice in the OJEU, provided that this notice includes justification of the decision of the contracting authority to award the contract without prior publication of a contract notice.[104]

If there is no notice, the time period is extended to 6 months with effect from the day following the date of the conclusion of the contract.[105]

In *MedEval*,[106] the CJEU suggested that the 6-month limitation on challenges based on ineffectiveness is justified on the ground of legal certainty.

This time bar, however, may prove highly restrictive for aggrieved competitors since if there is not award notice they might not be able to have knowledge of the particular contract.[107] This is particularly true for suppliers from other Member States who may have wanted to compete for the relevant contract.

[103] Art.2d(b)
[104] Art.2f(1)(a)
[105] Art.2f(1)(b)
[106] Case C-166/14
[107] Bulgaria seems to be the only country that has extended this time limit to 1 year. See, MARKT/2013/072/C. (n.65) p.17.

Also, the argument of legal certainty is not necessarily justifiable since, as is explained below, the remedies directives provide for discretionary safe harbours that may allow the contract to go ahead even if the alleged violations have occurred.

IV.2.C. Consequences of ineffectiveness

The result of a contract being rendered ineffective is that the rights and obligations of the parties under that contract cease to be enforced and performed.[108]

The remedies directive states that national laws may provide for either the retrospective cancellation of all contractual obligations (*ex nunc*) or the limit the scope of cancellation to those obligations that still have to be performed (*ex tunc*).[109]

In this latter case, national laws shall also provide for the application of alternative penalties.[110] These alternative remedies must be effective, proportionate and dissuasive. They shall be either the imposition of fines on the awarding authority or the shortening of the duration of the contract.[111]

Regarding the imposition of alternative penalties, the remedies directive confers a wide discretion on national review bodies to take into account all the relevant factors, including "*the seriousness of the infringement and the behaviour of the contracting authority"*.[112]

What is meant by these terms is not defined in the directive. It may refer to an obligation by the national review body to assess the conduct and motive on part of the awarding authority, i.e., whether it entered the contract in *bona fide* and

[108] Dir.2007/66/EC, Recital 21
[109] Art.2d(2)
[110] Ibid.
[111] Ibid.
[112] Ibid.

diligence and, whether there was some sort of justification for the unlawful action.

This may be the case, for instance, where the authority made an unintentional breach due to the difficulty of assessing whether a direct award was permissible in the circumstances.

It could also be interpreted as a requirement for contracting authorities to take the necessary steps before entering the contract, such as seeking legal advice on whether a direct award was permissible in the circumstances.

The remedies directive makes clear that damages will not constitute an appropriate alternative penalty.

This position departs from the previous position of the remedies directive where the impact of breaches of EU law on a concluded contract was for national laws to decide and the only available remedy post-award was that of damages.

IV.2.D. Discretionary safe harbours from ineffectiveness

In order to ensure the proportionality of the sanction of ineffectiveness and secure legal certainty, the remedies directive provides the option for review bodies to maintain the effects of the contract if they find after having examined all relevant aspects that *"overriding reasons relating to the general interest require so"*.[113]

In such case, Member States shall provide for the alternative penalties - described in the previous section - instead of ineffectiveness.[114]

Hence, they shall provide for the shortening of the duration of the contract and/or the imposition of fine on the awarding authority.

[113] Art.2d(3)
[114] Ibid.

In this respect, it is submitted that the imposition of a fine does not seem to be a proportionate alternative remedy since such a measure can only create a burden to the public purse and does not seem to serve any deterrent purpose.

Indeed, as was argued at chapter 2, economic incentives are not the most suitable means to deter public authorities from entering proscribed transactions since they do not usually operate in a market environment.[115]

The remedies directive does not give an indication of what the term *"overriding reasons of general interest"* encompass. It only provides the negative obligation of what should not constitute overriding reasons relating to a general interest.

These are economic interests directly linked to the contract concerned.[116] It states that these could include the costs resulting from the delay in the execution of the contract, the costs resulting 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 ineffectiveness.[117]

Additionally, it states that economic interests in the effectiveness of the contracts may only be considered as overriding reasons if in exceptional circumstances ineffectiveness would lead to disproportionate consequences.[118]

There are two interpretative ambiguities in these provisions. The first is the definition or test of what should constitute overriding reasons of general interest.

The remedies directive does not make any reference to what meaning this may have. It has been suggested that general interests that may prevent the application of the ineffectiveness could refer to test that would take into account the "paramount importance" of the subject matter of the contract.[119]

[115] Ch.2-V.2
[116] Art.2d(3)
[117] Ibid.
[118] Ibid.
[119] Golding & Henty, (n.79), p.151

For instance, this might include a contract to preserve all or part of an important sporting or cultural event such as the building of an Olympic Stadium. Another example is a contract tackling an immediate threat to the environment or wildlife, or a contract for clean-up services in the aftermath of a serious oil spillage that could endanger a local community if not addressed immediately.[120]

It seems that the EU legislator deliberately aimed to provide national review bodies and courts with a certain degree of flexibility which will allow them to take individual circumstances into account when defining overriding reason of general interest. Nevertheless, as with any other general exceptions to EU free movement rules, this exception should also be interpreted narrowly.[121]

The second ambiguous aspect in these provisions is the absence of a definition of what kind of external economic interests can lead to disproportionate results and the complete exclusion of economic interests linked to the contract to constitute overriding reasons of general interest.

It is difficult to imagine many cases in which overriding reason in the general interest will not involve economic interests and that those economic interests will not in some way be linked directly to the contracts.[122]

Indeed, costs relating to launching a new procurement procedure or costs of legal obligation resulting from ineffectiveness could potentially be regarded as factors which would justify disproportionate results, despite the fact that they are linked to the contract. Such costs may have an impact on the public purse.

In addition, costs incurred by third parties, such as subcontractors, are also excluded as these are directly linked to the contract and despite having disproportionate results for a number of economic operators.

[120] Ibid.
[121] Case 120/78, (*Cassis de Dijon*)
[122] Golding & Henty, (n.79), p. 151

However, it is submitted, that any issue of liability that may arise between the parties involved in the contract should not constitute overriding reasons and the remedies directive correctly adopts such a strict approach.

Otherwise, it might open a floodgate of derogations from the general rule that would result in the remedy having no actual effect.

It should be mentioned that directive 2009/91/EC (defence directive) – that also provides rules for review proceedings, almost identical to the remedies directive – gives a more specific description of what may constitute overriding reasons of general interest.

Article 60(3) provides that "*'in any event, a contract may not be considered ineffective if the consequences of this ineffectiveness would seriously endanger the very existence of a wider defence or security programme which is essential for a Member States security interests".*

The opening words *"in any event"* make it clear that the limitation on economic interests, whether linked to the contract or not, will not apply, and in this situation, national courts should not declare a contract ineffective.

However, this is subject to the limiting expression that *"the danger must be serious"* and the relevant programme that may be affected by ineffectiveness must be *"wider"*.

Professor Trybus emphasises this means that in the course of a review procedure, a national court will have to take degrees of danger and the size of the programme into account, which is a potentially difficult task, and criticises the lack of clarification from the Commission on this matter.[123]

[123] Trybus, 'Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context' (CUP, 2014), p.479

IV.2.E. 'Absolute' safe harbours from ineffectiveness

As explained above, the remedies directive provides national review bodies with the discretion of allowing a contract to go ahead regardless of the finding of a violation that leads to ineffectiveness when overriding interests of general interest so require.

In addition to this, the directive provides for an absolute exception from ineffectiveness. Art.2d (4) states that Member States may provide that a contract is safe from ineffectiveness after an unlawful direct award when the following criteria are cumulatively satisfied:

(i) the awarding authority considers that it is permissible to award a contract without prior publication of a contract notice, (ii) it has published in the OJEU a voluntary *ex ante* transparency notice (VEAT)[124] which includes at least the description of the subject matter of the contract and a justification of the decision to award a contract without prior publication and, (iii) the contract has not been concluded before the expiry of the mandatory standstill period of 10 days with effect from the day following the publication of the VEAT notice.[125]

This exception attempts to create a balance, on the one hand, between the legal uncertainty that interference to a contract may create both for the parties involved in the contract as well as (potentially) for the beneficiaries of the contract and, on the other, the protection of the interest of aggrieved competitors that have been unlawfully deprived of the opportunity to compete.

This exception also reveals a lot about the nature of the ineffectiveness remedy. It reinforces the argument submitted at IV.2.A., that the remedy's only concern is to tackle the potential harm created to third-party competitors by being deprived of the opportunity to either compete or challenge a decision of a public authority prior to the conclusion of the contract.

[124] Art.3(a)
[125] Art.2d (5) provides the safe harbour measure for a contract based on framework agreement or on dynamic purchasing system.

Such potential deprivations will not take place when the awarding authority has published its intention to sign the contract, this is communicated, and a standstill period that will allow potential challenges to take place.

Hence, in return, these safe harbour provisions shield a contract which is the result of a direct award from the risk of being rendered ineffective and provides contracting authorities with a safety zone.

These safe harbour provisions raise interpretative ambiguities some of which were raised before the CJEU in *Fastweb* (*C-19/13*).[126]

In particular, the first condition states *"...if the contracting authority "considers"[127] that the award of a contract without prior publication of a contract notice… is permissible in the circumstances"*.

What follows inductively from this is the question of what margin of discretion does a contracting authority enjoy. The wording 'considers' suggests that it has an ample of discretion whether it is permissible to derogate from the rules.

As a consequence of this ambiguity, the second condition raises the question of what exactly a justification for the VEAT notice entail.

Would a justification that a direct award was permissible in the circumstances simply because the contracting authority 'considered' that this was the case, although this award was unlawful be sufficient to satisfy this condition?

The CJEU in Fastweb held that the that *'justification'* required under the VEAT notice (second condition) must disclose '*clearly and unequivocally*' the reasons that moved the authority to *'consider'* (first condition) it legitimate to award the contract without prior publication of a contract notice, so that interested persons are able to decide with full knowledge of the relevant facts whether they consider it appropriate to bring an action and for national review bodies to be able to undertake an effective review.[128]

[126] This is the only case in which the CJEU considered the ineffectiveness remedy provisions
[127] The equivalent wording is used under the French (*"estime"*); the Greek (*"κρίνει"*) and; the Italian version (*"ritiene"*)
[128] C-19/13 (*Fastweb*) [48]

It emphasised that the national courts are under a duty to determine whether a contracting authority *'acted diligently'* and whether it could '*legitimately hold'* that the conditions for choosing the award method of the negotiated procedure without prior publication of a contract notice were satisfied.[129]

On this point, the Advocate General had a different view.[130] In his opinion, he made a distinction between, on the one hand, an error of law that was made in good faith and, on the other, an error of law that was made deliberately.

In the first situation, the domestic courts should maintain the effects of the contract to preserve the desired balance between the interests of various parties. In the second scenario, the infringement must be penalised, and the contract should be rendered ineffective.

The CJEU seems to have suggested is that the wording *'considers'* refers to a requirement for contracting authorities to *'act diligently'.* What the Court may be implying here is that authorities must take great care in reaching the conclusion that a direct award is permissible in the circumstances.

For example, if an authority is relying on the ground that, for technical reasons or reasons connected with exclusive rights, only one party is capable of performing the contract, it might be expected to make enquiries in the marketplace and possibly to consult an independent expert, in order to verify that no other supplier could perform the contract.[131]

IV.2.F. Ineffectiveness declaration: EU law requirements for addressing consequential matters

The question that is addressed in this section is whether there are any specific requirements imposed by EU law regarding the remedial aftermath of an

[129] Ibid. [50]
[130] Opinion of AG Bot at [87-93]
[131] Brown, 'When will publication of a voluntary ex ante transparency notice provide protection against the remedy of contract ineffectiveness? Case C-19/13 Ministero dell'Interno v Fastweb SpA' (2015), P.P.L.R., 1, 10-16

ineffectiveness declaration between the contracting authority and the private contractor.

The remedies directive clearly provides that the consequences of ineffectiveness are to be determined by national law.[132]

However, recital 21 states that the objective to be achieved where Member States lay down the rules which ensure *"that a contract shall be considered ineffective is that the rights and obligations of the parties under the contract should cease to be enforced and performed"*.[133]

In addition, the recital states *"that the consequences concerning the possible 'recovery' of any sums which may have been paid, as well as all other forms of possible 'restitution', including 'restitution in value' where 'restitution in kind' is not possible are to be determined by national law".*[134]

Furthermore, in the Impact Assessment Report, the Commission states inter alia that *"…in extreme cases where such obligations* (referring to transparency and the standstill obligation requirement) *are not respected the Awarding Authority acting in bad faith and the Court then decides to render the contract unenforceable the consequences of such unenforceability may be mitigated: for example, 'restitution' in value (avoiding the destruction of what has been performed) is possible."*[135]

Similarly, in the proposal of a revised remedies directive,[136] the Commission stated that the consequences of an illegal contract, including the *'recovery'* of any sums that may have been paid by the contracting authority, are to be determined by national courts.[137]

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[132] Art.2(d)(2)
[133] See on a discussion about the functions of recitals in the EU legal order, Klimas & Vaiciukaite, 'The Law of Recitals in European Community Legislation' (2008), J.I.C.L., Vol.15/1.)
[134] Case C-19/13 (*Fastweb*) at [21]
[135] SEC (2006) 557, (n.70), at fn.43
[136] Proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC CEE with regard to improving the effectiveness of review procedures concerning the award of public contracts COM (2006) 195 final at [13]
[137] Ibid., Recital 13

The terms 'restitution' or 'recovery' do not have a technical legal meaning since EU law does not provide for a uniform law of obligations.

However, what these terms clearly and emphatically suggest is that a party to a contract that has been declared ineffective should not be able to enforce rights under the contract which may cover expectation losses.

Instead, what it seems to be suggested by the wording of recital 21 and the Impact Assessment Report is that the contracting parties should be able to reverse any enrichment that they have gained from each other.

The wording *"restitution in value where restitution in kind is not possible"* clearly has its influence on the concept of unjust enrichment or some other similar doctrine with an analogous effect.[138]

Indeed, the Commission highlighted in the Impact Assessment Report that in the event of an ineffectiveness declaration, the winning bidder would lose the profit unduly expected from the project and the costs that have incurred to secure the contract.[139]

It further stated that for this reason the winning bidder could be compensated by the authority for costs relating to the performance of the contract and referred to the rules on unjust enrichment as an example.[140]

It is submitted that a remedy based on restitution should clearly be the case since the *ratio legis* of the ineffectiveness, as an EU law concept, is both to restore competition in relation to a particular contract and, it may be argued, that it aims to restore competition in public contract market more generally.[141]

[138] See, Dickson, 'Unjust enrichment claims: a comparative overview' (1995) CJL, 54(1), 100-126
[139] SEC (2006) 557 (n.68), p.35
[140] Ibid.
[141] For national law perspectives on consequential matters arising from ineffective contracts see, Arnould, 'Damages for performing an illegal contract: the other side of the mirror - comments on the three recent judgments of the French Council of State' (2008), P.P.L.R., 6, 247-281; Halonen, 'Shielding against damages for ineffectiveness: the limitations of liability available for contracting authorities – a Finnish approach' (2015), P.P.L.R., 4, 111-121; Treumer & Lichère (edition), (n.63) See also chapters 5 & 6.

By returning the market to the *status quo ante*, this purpose is achieved. Hence, a contractor should be able to recover on the basis of what he has performed and has benefited the public authority.

Additionally, as explained above, the ineffectiveness remedy aims as an ancillary purpose to deter parties from entering certain proscribed transactions. Hence, any remedial measure should be limited to restore the position of a contractor and nothing further.

Such a potential limitation on contractual rights may be costly to a contractor who might need to check that the contracting authority has properly complied with all tendering and other procedural requirements.

With the exception that, generally, contractual rights should not be enforced when an ineffectiveness order is declared, EU law does not set any other positive or negative obligations that national laws need to follow.

Also, EU law does not preclude national laws to be able to review subjective elements of faults under some principle of civil liability of public authorities.

In fact, the violations that can trigger ineffectiveness, as with any other violation of the procurement directives are *a priori* attributable to the public authority that awards the contract.

Violations of EU law by public entities may raise the issue of liability of the State under some tortious ground. In such a case, compensation under a civil liability doctrine may be granted to a contractor.

By the same token, EU law does not preclude the option for national laws to deny any form of remedy to a contractor. For instance, this may occur because, under national law, parties entering an unlawful contract in bad faith are barred from any form of recovery.

IV.3. The impact of violations related to the subject matter of a contract

As was argued at chapter 2, there are stronger policy grounds for rendering a contract unenforceable when the subject matter of the agreement is unlawful than when there has been some form of irregularity relating to the procedure of concluding a contract.[142]

In the EU context, such a distinction has no application.

On the contrary, EU rules on procurement mainly regulate the awarding stage and to some limited extent the performance of a contract. Neither the TFEU rules and principles nor the EU directives restrict in any way the capacity of public entities to enter contracts.[143]

Indeed, EU law does not, in any way, limit the contracted-for-activities of public authorities, neither does it set limitations on their powers to contract.

This should not come as a surprise as it is not the purpose of EU law to set requirements on Member States for what purpose their public authorities should contract.[144]

Hence, since EU law does not restrict the power of public authorities to enter into specific contracts neither does it restrict the object of the contractual-for-activity, any attempt to artificially examine violations related to the subject matter is not appropriate.

V. Unilateral remedying of EU law violations

As already submitted, the only ground according to which third-parties may challenge the effects of a concluded contract are those provided under the EU ineffectiveness remedy.

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[142] Ch.2-II

[143] The directive 2014/24/EU defines procurement contracts as the "*acquisition… by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose*."

[144] Subject to the condition these contracts are not funded or co-funded by the EU budget where usually authorisation is needed by the EU institutions (notably the Commission). See, Regulation (EU) No 1303/2013.

This does not mean that other violations of EU law may not affect the contract. In fact, certain violations of the EU directives may result in a contract being terminated unilaterally by the public authority pursuant to Article 73 of Dir.2014/24/EU.

This section examines this type of violations according to which public authorities can intervene to the contract unilaterally.

It is submitted, that no other violations may as a matter of EU law affect the contract.[145]

V.1. Unilateral termination of a contract under the Directives

The 2014 directives have included a provision (Art.73 of Dir.2014/24/EU)[146] which requires the Member States to empower their contracting authorities, under their national laws with the option of unilaterally terminating a contract during its term at least under the following three situations:

(a) when the contract has been subject to a substantial modification as this is defined in the 2014 directives, (b) when the contract has been concluded with a supplier who should be disqualified from the awarding process due to convictions of a criminal nature as these are defined in EU law instruments, and (c) when the contract should not have been awarded to the contractor in view of *'serious infringement'* of the obligation under the Treaties and the directives that has been declared by the CJEU in a procedure pursuant to Article 258 TFEU.

According to the 2014 directives, the rationale behind the adoption of this measure is that contracting authorities are sometimes faced with circumstances that require the early termination of public contracts in order to comply with obligations under EU law in the field of public procurement.[147]

[145] It was carefully considered whether from a *de lege lata* point of view other violations could affect the contract. It was debated whether the rules on recovery of State aid could dictate such a result. It was concluded that they do not. The author intends to demonstrate this further on an individual paper.
[146] The equivalent provisions of the other two directives are Art.90 of Dir.2014/25/EU and Art.44 of Dir.2014/23/EU
[147] Recital 112, Dir.2014/24/EU

While such a remedial measure is in the right direction since it allows contracting authorities to correct their own violations after a contract comes into effect, it does not address any procedural issues on how this remedy is supposed to operate. These issues are to be determined solely by national laws.

Hence, the situation under this corrective tool is very different from the ineffectiveness remedy, under which detailed provisions set the procedural requirements that national laws need to follow.

Additionally, the EU legislator does not explain convincingly the rationale behind the reason why in the aforementioned violations the contracting authorities should have the right (rather than the obligation) to terminate an existing contract and why other violations should not necessarily constitute reasons to terminate an existing contract.

Moreover, it is not clear why the only option for a contracting authority is to terminate a contract, instead of providing other remedial alternatives such as the shortening of the duration of the contract.

This section analyses respectively the three grounds of Article 73 of Dir.2014/24/EU. It first examines Article 73(c) and moves on to examine, Article 73(b) and Article 73(a).

Finally, it looks at whether EU law sets requirements in relation to how consequential matters are to be treated in case of termination.

The following analysis is particularly relevant for the case studies of Greece and the UK.

V.2. Unilateral termination pursuant to Art.73(c)

The last provision - unlike the other two that are permissive – has a mandatory effect. This is due to the fact that it concerns a violation that has been declared under Article 258, which Member States have to comply with pursuant to Article 260.

The purpose of this provision seems to be to ensure that a duty of a Member State to terminate a contract is fulfilled as quickly as possible and avoid any possible cumbersome procedural issues that may be imposed under national law.

An issue that requires some consideration is what amounts to a 'serious infringement'[148] that may lead to an obligation to terminate a contract.

Following the ruling of the CJEU in *Waste* (*C-503/04*), which concerned a decision under Article 258, a 'serious infringement' will constitute any violation that restricts the fundamental freedoms of the internal market, in that case, the fact that an unlawful direct award had the effect of restriction other economic operators from providing the particular service.

What other violation will constitute a 'serious infringement' is to be seen. The Commission, and subsequently the CJEU, have a margin of discretion to interpret this based on the general principles of EU law, particularly those related to the obstruction on the functioning of the internal market.

As it was submitted above, Professor Treumer has put forward the suggestion that 'serious breach' constitutes any violation that influences the outcome of competition and that termination of an existing contract seems relevant when a tender should have been excluded because of technical dialogues prior to the submission of bids, or when a tender should have been rejected because it did not comply with tender conditions.[149]

What seems to be certain is that a *'serious infringement'* would most probably be regarded by the CJEU any violation of the other two explicit reasons for termination as provided in the Article at hand - namely, violations with regards to the modification of contracts[150] and the entering to a contract with a provider who should have been disqualified from the awarding process.

[148] The proposal for the 2014 directive (COM (2011) 896) did not refer to the wording '*serious infringement'* rather it stated *"…a Member State has failed to fulfil its obligation under the Treaties…"*
[149] Treumer, (n.69)
[150] See case C-601/10 (*Commission v Hellenic Republic*)

This argument, in turn, raises the concern on whether, in fact, the provisions of Article 73 are facultative or in effect contracting authorities are under an obligation to terminate a contract when the prescribed violations take place.

V.3. Unilateral termination pursuant to Article 73(b)

Article 73(b) provides that when a contract is concluded with a supplier who should be disqualified from the awarding process, due to convictions of a criminal nature - as these are defined in the relevant EU instruments and are related to corruption, fraud, money laundering, terrorist offences and child labour[151] - contracting authorities have the discretion under their national law to unilaterally terminate a contract.

This corrective action aims, among others, to mitigate the vulnerability of public contracts to criminal and corrupt conduct.[152] It is also in line with provisions of the European Charter of Fundamental Rights.[153]

Moreover, the fact that mutual recognition of judgments and judicial decisions related to criminal matters is a requirement under EU law[154] could result in this sanction having as an effect the absolute exclusion from the public contract market of giant corporations which viewed bribery as a business strategy.

However, the explicit grounds of disqualification that may lead to unilateral termination are very narrowly limited only to the aforementioned grounds. It is not clear why, for instance, entering a contract with a provider who should be disqualified from the tendering procedure due to breaches of obligations

[151] Dir.2014/24/EU, Art.57(1); Dir.2014/23/EU, Art.38(4).
[152] See, Commission: EU anticorruption report, Brussels 3.2.2014 COM (2014) 38 Final. See on the issue of corruption and disqualification measures: Williams-Elegbe, 'Fighting corruption in public procurement: A comparative analysis of disqualification or debarment measures' (Oxford: Hart, 2012); 'Anti-corruption measures in the EU as they affect public procurement' (2014), P.P.L.R., 4, 95-99; 'The mandatory exclusions for corruption in the new EC Procurement Directives' (2006), E.L. Rev, 31(5), 711-734; Gabriel, 'Corruption crimes in relation to public procurement' (2012) CRIM.
[153] Charter of Fundamental Rights of the European Union (2000/C 346/01), O.J. C364/1, see, for instance, Article 24 & 32 on child labour protection.
[154] Article 82(1) TFEU and Communication from the Commission to the Council and the European Parliament - Mutual recognition of Final Decisions in criminal matters COM/2000/0495 final.

relating to the payment of social or security contributions are not stated as grounds that could lead to the unilateral termination of a contract.[155]

Evidently, Article 73 does not provide an exhaustive list and national laws can opt to add further grounds for disqualification which could also lead to termination on the condition that they are proportionate and in compliance with the principles of equal treatment and transparency.[156]

The main criticism of Article 73(b) lies in the lack of detailed provisions. For instance, provisions that would indicate under what circumstances an authority should be more likely to decide to terminate a contract would enhance legal certainty and deterrence.

Arrowsmith has suggested that consideration of termination in this context involves balancing the relevant policy considerations in light of the principle of proportionality.[157]

The considerations are, on the one hand, the objectives of the provisions and consideration of equal treatment in the prior exclusion of other economic operators who have relevant convictions and, on the other, the potential disruption in service delivery that may result from termination.[158]

V.4. Unilateral termination pursuant to Article 73(a)

Article 73(a) provides for the possibility for a public authority to terminate an executory contract when there has been a substantial modification, which would have required a new procurement procedure pursuant to Article 72.

[155] Dir.2014/24/EU, Art.57(2). Contributions on tax revenue should be given important weighting on the award criteria, as they comprise value for money in the procurement.
[156] Case C-213/07, (*Michaniki AE*) Case C-376/08, (*Serrantoni Srl*)
[157] Arrowsmith, (n.1) pp.1289-1290
[158] Ibid.

Without getting into much detail,[159] Article 72 aims to prohibit direct awards through the back door, which would undermine the general principles of equal treatment, transparency and competition.

However, the 2014 directives do not refer to the remedies directive and ineffectiveness. Instead, they have set a requirement for Member States to empower their contracting authorities with the option (not the obligation) of unilaterally terminating a contract to apply also in the situations where the contract has been subject to a substantial/material modification.

Although, as noted, the violations that can trigger the unilateral termination under Article 72 are not exhaustive, it is not clear why the violation of material modification is singled out from other violations that do not follow the requirements for competition.

More specifically, why are the unlawfulness of direct awards under other circumstances not explicitly stated as grounds according to which a contracting authority may terminate a contract?

Clearly, every award that undermines competition constitutes a serious violation that may effectively be rectified by a contracting authority without the need of a legal challenge.

Additionally, it is not clear which part of the contract should be terminated. Should this include the unlawfully modified part or the whole agreement? It is suggested that, most likely, the directive refers to the modified part as this is the violation that it aims to tackle.

[159] There is a vast literature on the issue of modification of contracts under the 2014 Directives. See inter alia, Olivera, 'Modification of Public Contracts: Transposition and Interpretation of the EU Directives', (2015), EPPL, 1, 35-49; Racca & Perin, 'Material Amendments of Public Contracts during their terms: From violations of competition to symptoms of corruption' (2013), EPPPL, 4, 279-293; Hartlev, Liljenbøl, 'Changes to existing contracts under the EU public procurement rules and the drafting of review clauses to avoid the need for a new tender' (2013) P.P.L.R, 2, 51-73

V.5. Consequential matters arising from termination: EU law requirements

Although some general principles of EU law, such as that of legitimate expectations and legal certainty, may require to some extent some positive action on the part of the Member States in certain situations,[160] EU law refrains from providing a counter-factual of compensation that Member States need to follow in that case where the contractual effects are overridden due to an EU law violation.

Hence, for instance, when termination of a contract is deemed to be a requirement due to an EU law violation, such as in the case of Article 73, national laws may opt to regulate consequential matters are they see fit.

However, as with the ineffectiveness remedy, any form of redress must not circumvent the objective that the termination requirement aims to achieve.

Putting this proposition in the context of Article 73, it may be argued that any form of redress must in principle be based on restitution, that is, a contractor must not be able to recover anything further than the value of what has been performed and has benefited the public entity.

Such remedial basis is suitable for the purpose of restoring competition for a particular contract, and in the public contract market more generally.

As argued above, a form of redress based on restitution serves the purpose of the EU ineffectiveness remedy, whose main purpose is to capture direct awards.

By the same token, in principle, the same form of recovery should apply at least for unlawful modifications, as such conduct constitutes an aspect of an unlawful direct award and consequential matters should be treated alike.

[160] See for example, the requirement of Member states to make restitution to individuals and businesses when there have been tax levies in violation of EU law (Case 199/82 (*San Giorgio*)). See generally, Jones, 'Restitution and European Community law', (Mansfield Press, 2000).

In any event, apart from this potentially positive obligation, EU law allows Member States to regulate consequential matters arising from termination as they see fit.

VI. Alternative remedies to aggrieved competitors

As submitted above, the remedy of ineffectiveness may only be triggered in limited situations that create a *fait accompli* to the right of aggrieved suppliers to challenge a contractual decision prior to contract award.

This is so for any other serious violation that undermines competition such as when a contract is awarded in violation of the award criteria, or when conflict of interests can be demonstrated, or when the winning economic operator has unduly influenced the decision-making process of the contracting authority due to the participation in technical dialogues prior to the submission of bids.

As submitted above, Professor Treumer has described these as violations where an obligation to terminate the contract appears to be particularly relevant.[161]

Indeed, these violations undermine the outcome of competition for the award of public contracts in a similar way as a direct award does.

However, as also submitted, these violations, unlike a direct award, do not create a *fait accompli* from being challenged prior to the conclusion of a contract.

Hence, when a contract is concluded in violation of an EU law requirement, and the ineffectiveness remedy does not capture such violations, aggrieved suppliers may only claim for a damages award.[162]

[161] Treumer, (n.69)
[162] Article 2(7) Dir.2007/66/EC

This section briefly describes the procedural requirements for damages claim, the conditions that claimant must prove to be granted an award, and the scope of damages under EU law.[163]

Regarding the procedural steps, the remedies directive provides a very light regime for damages claims as compared to ineffectiveness claims. As the CJEU mentioned in *MedEval* case,[164] the EU legislator placed greater importance on the requirement of legal certainty about actions for an ineffectiveness declaration than for an action for damages.

In fact, the only main requirement that the remedies directive provides is that a procedure for damages should be subject to the principles of effectiveness and equivalence.[165]

The remedies directive states that Member States may provide that, where damages are claimed on the ground that a decision was taken unlawfully, the contested decision is to be first set-aside by a review body.[166]

In *MedEval* the CJEU stated that the option of setting aside a decision before allowing a damages claim is subject to the requirement of effectiveness.[167]

Regarding the conditions that need to be satisfied for a claim to be successful, the remedies directive provides no specific requirements, while the jurisprudence of the CJEU has provided contradictory views on this matter.[168]

[163] See generally on damages claims: Schebesta, 'Damages in EU Public Procurement Law' (Springer, 2016); Fairgrieve & Lichère (edition), 'Public Procurement Law: Damages as an effective Remedy' (Hart Publishing, 2011); Arrowsmith, (edition), 'Remedies for enforcing the public procurement rules - Public Procurement in the European Community: Volume IV', (Earlsgate Press, 1992)
[164] Case C-166/14 at [40]
[165] Art.1(1); Cases C-470/99, (*Universale-Bau*); C-327/00 (*Lammerzahl*)
[166] Art.2(6)
[167] Case C-166/14 [43]
[168] This is at least the view of some authors such as Professor Caranta, 'Many different paths, but are they all leading to effectiveness?' in Treumer & Lichère (n.61). On a different view, see Sanchez-Graells, 'You Can't Be Serious: Critical Reflections on the Liability Threshold for Damages Claims for Breach of EU Public Procurement Law After the EFTA Court's Fosen-Linjen Opinion', NJEU, forthcoming

More specifically, in *Strabag*,[169] it ruled that the remedies directive must be interpreted as precluding national legislation that makes the right to damages, for an infringement of public procurement law, conditional on proof of fault.[170]

However, in *Spijker,*[171] it ruled that the remedies directive does not address the conditions under which a public authority may be held liable and that the damages provision gives concrete expression to the principle of State liability.[172]

The Court went on to say that, in the absence of EU provisions in this area, it is for the legal order of each State to determine the criteria based on which damages arising from an infringement of EU law in the award of public contracts must be determined and estimated.[173]

It seems that the interpretation in *Spijker* is the position that the EU legislature intended in the first place. In the Impact Assessment Report, the Commission had considered the option of changing the underlying philosophy of the remedies directive and relaxing the condition on damages in some Member States that require an aggrieved supplier to provide proof that he had a serious chance of winning a contract.[174]

However, it acknowledged that such change may directly touch upon the national law principles governing liability and it may also have an adverse effect on the public budget.[175]

Finally, in relation to the extent of damages that an aggrieved supplier may be able to claim, the remedies directive also does not provide directions on this matter.

[169] Case C-314/09
[170] Ibid [45]. In *Fosen-Linjen AS v AtB AS* (E-16/16) the EFTA Court also seem to adopt the view of the CJEU in Strabag. It claimed that a simple breach of public procurement law is sufficient to trigger the liability of the contracting authority to compensate, provided that the other conditions for the award of damages are met, in particular, the existence of a causal link.
[171] Case C-568/08
[172] Ibid., [86-87]
[173] Ibid., [88]
[174] SEC (2006) 557, (n.70), p.26
[175] Ibid.

One view that has been put forward - based on more general EU law principles concerning the protection of individuals whose rights have been infringed – is that where a claimant is a supplier who would have won the contract had the rules been followed (the causation requirement), the damages remedy must provide compensation in some way for the profits lost from failing to obtain the contract.[176]

However, this view is not without objection, since, as noted, the CJEU in *Spijker* held that the issue of the extent of damages is a matter for national laws to determine subject to the principles of effectiveness and equivalence.

This seems also to be the view of the Commission, which, in the Impact Assessment Report, justified the fact that it did not set a counterfactual for the assessment of damages on the basis that this may affect the public budget.[177]

In conclusion, it may be argued that, compared to the ineffectiveness remedy, the remedy of damages is not equally robust since it does not provide for a uniform approach across Member States.

Consequently, different conditions may need to be fulfilled for an applicant to be eligible for a damages award and the scope of this award may vary between jurisdictions.

This, in turn, potentially undermines the role of damages as an effective remedy (as opposed to ineffectiveness) for aggrieved suppliers who may have unlawfully been deprived of the award of a contract.

[176] Arrowsmith, (n.95), p.1422
[177] SEC (2006) 557, (n.70), p.26

VII. Concluding remarks

This chapter examined the position of EU law in relation to the impact of its violations have on concluded contracts.

It was suggested that, generally, EU law infringements do not set a requirement for any impact to an already concluded contract.

The only exception to this is under the EU ineffectiveness remedy as provided in the remedies directive and the unilateral termination remedy under the 2014 directives.

Regarding the ineffectiveness remedy, it was found that this may only operate after an aggrieved competitor protest when serious violations adversely affect competition and equal treatment for the award of a contract.

This remedy is well rounded and proportionate. It attempts to create a balance between the aforementioned objectives, on the one hand, and legal certainty between the contracting parties and the public interest in uninterrupted service delivery.

However, it may be argued that, in net, the balance leads towards the legal certainty objective and that of uninterrupted service delivery as the remedy is very limited in scope and provides for various safe harbour provisions.

Additionally, it may be argued that the remedy creates a gap between the objectives that it aims to achieve and the means that it prescribes.

In particular, while contract awards without competition is probably the most legitimate ground for allowing the challenge on the effects of a contract; yet, other violations that significantly influence the outcome of competition may also be subject to such challenge.

Such violations, for instance, could include technical dialogues prior to the submission of bids, where conflict of interests can be demonstrated, or when unlawful State aid is found in the transaction.

However, its moderate approach must be understood within its limited scope, that is, it only aims to tackle that potential harm which is directly linked to the deprivation of the opportunity of a company to compete or challenge the award decision.

In theory, at least, all other violations may be remedied before the conclusion of the contract.

It was also examined whether EU law sets a specific pattern in relation to how consequential matters are to be treated in the case of an ineffectiveness order.

It was submitted that EU law does not set a specific remedial pattern that national laws need to follow. However, it may impose some negative obligations to ensure that the objective of the rule is not circumvented.

It was argued, in this respect, that the *ratio legis* of the ineffectiveness remedy requires consequential matters to be treated by a remedy based on restitution, that is, financial relief based on what has been performed and has benefited the public authority.

Indeed, it was shown that this basis of remedy was the intention of the EU legislator and it complies with the rationale that the ineffectiveness is designed to restore competition both around a contract, and the public contract market more generally.

This chapter also examined that unilateral termination power as provided by Article 73 of the 2014 directive. It was suggested that this unilateral termination power is very generic and provides little guidance to public authorities on how to use it.

It was also noted that the violations that are explicitly provided as grounds for termination are not adequately justified.

Finally, damages claim requirements were examined. It was explained that the scope and conditions of a damages award are not regulated at the EU level,

which may render the effectiveness of this remedy not particularly strong as compared to the ineffectiveness remedy.

Chapter 5

United Kingdom (The Law of England & Wales)

I. Introduction

This chapter examines the position of the law of England & Wales[1] regarding the situation where a public contract has been entered into unlawfully, that is, in violation of those rules that regulate the contractual activity of public authorities. It examines both the domestic rules applicable and the impact of EU law on this particular matter.

An examination of the English legal system is particularly topical, inter alia, because it represents the most influential common law system, but also for the reason that its approach has been directly affected by the impact of external regulation (that of EU law).

This chapter is organised as follows. Section II provides a brief explanation of the substantive framework applicable to public contract, section III explains the review mechanisms that are available, section IV examines the impact of violations of the public law rules on contracts, section V examines the extent of unilateral intervention of public authorities on unlawfully concluded contracts, section VI looks at the alternative remedies available to third-parties, section VII concludes.

[1] Many of these rules also apply to Northern Ireland and Scotland, but the details may differ because of the complexities of the devolution settlement and because of certain differences between Scottish law and the law in the other UK jurisdictions.

II. The substantive legal framework

The substantive legal framework applicable to the contractual function of public authorities in the UK is composed by (i) public law principles, (ii) legislative instruments that apply to public authorities and cover their procurement functions, and (iii) the EU rules and general principles as discussed in the previous chapter.[2]

II.1 The application of traditional public law principles

In the absence of a written constitution and a codified system of administrative law, public law has been developed in the jurisprudence of the courts in the form of general principles.

These have been "codified" in the milestone case of *Civil Service Unions v Minister for the Civil Service (GCHQ).*[3]

The public law general principles can be broadly defined in the following: (a) illegality (b) irrationality or *Wednesbury*[4] unreasonableness, and (c) the ground of procedural impropriety which entails the common law requirement of natural justice, legitimate expectations and the rule against bias.[5]

All the above grounds are similar in nature. They generally aim to make sure that public entities which by their very nature exercise "special powers" will act in the public interest and not for any improper or unauthorised purpose.

In the performance of their contractual function public authorities also exercise "special powers", i.e. powers and responsibilities that have no parallel in the private setting and require, in theory at least, higher standards of control.[6]

[2] See for a detailed account Arrowsmith, 'The Law of Public and Utilities Procurement: Regulation in the EU and the UK' (Volume I, 3rd edition, Sweet & Maxwell, 2014), chapters 2-4
[3] *[1985] 1 AC 374*
[4] *Associated Provincial Picture Houses Limited v Wednesbury Corporation [1948] 1 KB 223*
[5] See generally, Wade & Forsyth, 'Administrative Law', (11th edition, 2014, OUP)
[6] For a different view, see, Oliver, 'Common Values and the Public-Private Divide' (Butterworths, 1999); Oliver, 'What if any, public-private divide exists in English Law?' in Ruffert, 'The Public-Private Law Divide: Potential for transformation?' (BIICL, 2009)

Traditionally, however, English Courts have shown reluctance to apply to this function the general rules of public law that apply to other activities, and instead, treat the contractual function of public authorities as a matter for the private law of contract.

This reluctance to apply the public law principles - and consequently, the judicial review procedure and remedies that stem from these principles[7] – has been justified based on the absence of some "sufficient public law" element in the contractual function.[8]

This view has been strongly disputed in literature.[9] Most notably, Professor Arrowsmith has argued that it is not in principle appropriate to exclude contracts from the operation of the general public law principles regardless of the fact that contractual liability is governed by the ordinary private law.[10]

She has argued that there are many reasons to impose higher standards on the government in its dealings with others and that the application of public law doctrines is needed to protect the wider public interest.

She has further argued that the continuing searching by the courts for "a sufficient element of public law" is artificial and that public law doctrines should apply because of the nature of the body making the decision, notwithstanding the fact, that the application of judicial review can be limited by specific policy factors such as where there is a more appropriate remedy.

However, the quest for some sufficient public law element has been abandoned in some cases and procurement decisions have been reviewed.[11]

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[7] On judicial review, see III.2.B.

[8] See notably, *R v The Lord Chancellor, Ex parte Hibbit and Saunders and Another (1993), Times, 12 March 1993 per* Rose LJ; R *v East Berkshire Health Authority, ex parte Walsh [1985] 1 Q.B.* 152. See further III.2.A.

[9] Arrowsmith, 'Government contracts and public law' (1990), LS, 10/3, 231; 'Judicial review and the contractual powers of public authorities' (1990), LQR, 106, 277; 'Protecting the interest of bidders for public contracts; the role of the Common Law' (1994), C.L.J., 53/01, 104-139; Bailey, 'Judicial review of contracting decisions' (2007), P.L., 444-463; Davies, 'The Public Law of Government Contracts', (OUP, 2008)

[10] Arrowsmith (1990), LS, (ibid); Arrowsmith (1990) LQR, (ibid)

[11] See for example, *R v Lewisham Borough Council ex p. Shell U.K [1988] 1 All E.R.; R v Enfield London Borough Council, ex p. Urwin [1989] C.O.D. 466;* See also on this issue, Arrowsmith, (1994), (n.9); Aspey, 'The search for the true public law element: judicial review of procurement decisions' (2016), P.L., 35-53; Neil, 'Procurement Challenges and Scope of Judicial Review' (2016), J.R., 17:1, 61-69.

The issue of the applicability of public law grounds and its implications regarding the availability of judicial review proceedings is further discussed in III.2.A.

II.2. Parliamentary Acts

Various legal instruments regulate the function of public authorities and control their contractual activities.

These include legal instruments specifically applicable to local authorities. The most important of which are: The Local Government Act 1972, 1988 and 2000, the Local Government (Contracts) Act 1997, and the Localism Act 2011.

In addition, the National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013[12] (the NHS Regulations) regulate the procurement of the public health sector in the UK.

There are also some other statutory instruments that also control the contractual function of public authorities both at central and local level. These include the Public Services (Social Value) Act 2012, the Deregulation and Contracting Out Act 1994, the Freedom of Information Act 2000, the Equality Act 2010 and the Environmental Protection Act 1990.[13]

Finally, the Human Rights Act 1998 which implements the European Convention for the Protection of Human Rights and Fundamental Freedoms also has an application, albeit a limited one, to the contractual function of public authorities.[14]

II.3. EU rules

The Public Contracts Regulations 2015 (PCRs),[15] the Utilities Contracts Regulations 2016 (UCRs),[16] and the Concession Contracts Regulations 2015

[12] SI 2013 No. 500
[13] See generally, Arrowsmith (n.2), chapter 2
[14] Ibid., pp. 128-135
[15] SI 2015 No. 102
[16] SI 2016 No. 274

(CCRs)[17] are the legal instruments that have implemented the 2014 directives in the national legal order. Additionally, the Defence and Security Public Contracts Regulations 2011 (DSPCR)[18] has implemented the defence directive.

These legal instruments have almost identical provisions with their EU equivalents and constitute the most comprehensive set of legal rules in the field of public contracts.[19]

These Regulations apply only to contracts within the field of application of the directives, i.e. to contracts above the EU threshold.[20]

In addition to these Regulations, public authorities are subject to the general EU law principles of equal treatment, non-discrimination and transparency.

These principles also supplement the inapplicability, in some instances, of the traditional public law principles since they cover to a large extent the same grounds. In fact, the courts have highlighted, in some instances, the analogy between public law principles and these EU law principles.[21]

It should be noted that the UK has expressed its commitment to leave the EU by March of 2019.[22] How far this will affect the current public contract regulation in the UK is not clear hitherto and will very much depend on the trade arrangements agreed between the UK and the EU.[23]

[17] SI 2016 No. 273
[18] SI 2011 No.1848
[19] The United Kingdom has traditionally followed a "copy-out approach" to the transposition of E.U. Directives. See, Sanchez-Graells, 'The Implementation of Directive 2014/24/EU in the UK', to be published in Treumer & Comba (edition), 'Modernising Public Procurement – The Approach of EU Member States, (Edward Elgar, 2018)
[20] Reg.5
[21] See for instance, *BY Development Ltd v Covent Garden Market Authority [2012] EWCH 2546 (TCC); Woods Building Services v Milton Keynes Council [2015] EWHC 2011 (TCC); Smyth v Secretary of State for Communities and Local Government and Others [2015] EWCA (Civ) 174*– In these cases the Court of Appeal affirmed that the "manifest error" test derives from EU and is equivalent to the English law test of "Wednesbury unreasonableness".
[22] The European Union Withdrawal Bill (HC Bill 5) Public Bills Before Parliament 2017-2019. UK Parliament. Retrieved 22 July 2017
[23] Arrowsmith, 'The impact of Brexit for public procurement law and policy in the United Kingdom' (2017), P.P.L.R., 1, 1-33; Arrowsmith, 'Consequences of Brexit in the area of the public procurement' April 2017 European Parliament, D.G. for Internal Policies – Policy Department A: Economic and Scientific Policy, IP/A/IMCO/2017-27; Dawar, 'Brexit and Government Procurement' 10 March 2017, UKTPO Briefing Paper; Telles & Sanchez-Graells, 'Examining Brexit Through the GPA's Lens: What Next for UK Public Procurement Reform?' (2017), P.C.L.J., 47, 1-33

Safe is to say that the Regulations will not be abolished any time soon and will continue to apply until the UK formally leaves the EU (which is expected to be May 2019 with an additional two years transition period).[24]

Yet, post-Brexit, there might be implications in relation to the scope of the Regulations (e.g. how far equal treatment will still apply). Additionally, the potential ending of the CJEU jurisdiction may have consequences on the interpretation of some of the Regulations by national courts.[25]

III. Control, review and enforcement mechanisms

This section explains the relevant control, review and enforcement mechanisms. It is organised in the same systematic manner as in the previous chapter.

It first examines the functions of institutional review mechanisms and then moves on to describe the judicial review processes.

III.1. Institutional review mechanisms

The UK does not provide for some institutional mechanism that will review the legality of a contract whether pre – or post-award.

More specifically, such mechanisms are limited and the bodies performing them have no enforcement powers. For instance, the National Audit Office (NAO) may review the procurement practices of certain public bodies[26] but has no enforcement powers in relation to correcting errors in the procurement, whether pre – or post-award.[27]

[24] Draft Agreement (Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 19th March 2018) which provides at title VIII that the EU procurement rules, general principles, and review procedures will apply to the UK during the transition period.
[25] The most recent White Paper, 'The future relationship between the United Kingdom and the European Union' CM9593 at [111] suggests that the UK intends to develop its own procurement policy.
[26] See for instance, Report by the Comptroller and Audit General, "Crown Commercial Service", NAO, HC 786, Session 2016-17, 10 January 2017
[27] For a detailed description of audit review in local authorities see, Sharland, 'A practical approach to local government law', (2nd edition, OUP, 2006), chapter 24.

The Audit Commission that used to conduct audit reviews to local authorities and which, in fact, has challenged in the past decisions of such authorities under the judicial review process[28] has now been abolished.[29]

The only exception of an institutional body with enforcement powers is the NHS regulator called Monitor. However, Monitor may investigate and exercise enforcement powers in relation to alleged breaches of the NHS Regulations 2013, which applies solely to the National Health Services sector.

Monitor may exercise its powers to prevent/or remedy breaches of the NHS Regulations.[30] It may *motu proprio* investigate whether a relevant body has failed to comply has failed to comply with a requirement imposed by Regulation 10 regarding anti-competitive behaviours.[31]

Pursuant to Regulation 15, Monitor may direct an NHS body to address breaches of the Regulations. Such directions include the withdrawal or the variation of the tender invitation.

However, it cannot direct a relevant body to hold a competitive tender for a contract.

Pursuant to Regulation 14, it may also declare a contract or a term of a contract ineffective. In considering whether to make a declaration of ineffectiveness there must be a violation of specific Regulations.[32]

These Regulations prescribe the rules on advertisement, conflict of interests, awards without competition, rules on the qualification of providers, and rules on anti-competitive behaviour.

[28] *Hazell v Hammersmith and Fulham London Borough Council [1992] 2 A.C.*
[29] See for further information here: https://www.gov.uk/government/organisations/audit-commission [last assessed 30-09-2017]
[30] See for a detailed account of Monitor's functions: Monitor, 'Enforcement Guidance on the Procurement, Patient Choice and Competition Regulations', available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/283508/EnforcementGuidanceDec13.pdf [last assessed 01-12-2017]
[31] Reg.13
[32] Reg.14(2)(b)

In addition to the existence of a violation, Monitor must also consider if the breach or the potential breach has been "sufficiently serious".[33]

The effects of ineffectiveness and the type of assessment that Monitor conducts to decide what remedial action to impose are considered in detail in section IV.3.

III.2. Judicial Review

Judicial review refers to that process according to which third-parties can challenge on an ad hoc basis allegedly unlawful decision of public authorities.

This part explains the judicial review system applicable to public contracts.

Firstly, it explains the relationship between public and private law in relation to government contracts and how this affects the judicial review process.

Secondly, it describes the traditional judicial review system under English law.

Thirdly, it describes the special review system applicable to contracts that fall within the application of EU law.

Fourthly, it describes the special regime that exists under the NHS Regulations.

III.2.A. The distinction between public and private law

The English legal system does not make a conceptual distinction between public law and private law contracts that is apparent in some continental law jurisdictions.[34] Instead, it is the ordinary law of contract that regulates contracts between public authorities and private individuals.

The absence of public law has wider implications in the regulation and the institutional setting in which public contracts operate.[35]

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[33] Reg.14(3)(b)
[34] For example, in France, Belgium, Luxembourg and Greece. See further Ch.6-111.2
[35] See generally: Boyron, 'The Public-Private Divide and the Law of Government Contracts: Assessing a Comparative Effort' in Ruffert (edition) (n.6) Davies, 'English law's treatment of government contracts: the problem of wider public interests' in Freedland & Auby (edition) 'The Public Law/Private Law Divide: Une entente assez cordiale? - La distinction du droit public et du

One such implication is the unavailability of the judicial review process according to which third-parties may challenge allegedly unlawful decisions of public authorities.

For a long time, there has been a tendency to see contracts as a purely private matter and to assume that contractual activities are not subject to review.[36]

The starting point is that in the absence of statutory underpinning or some other "sufficient public law element" public law principles do not apply and, consequently, neither does the judicial review procedure.[37]

The sufficient public law element is easier to be satisfied when the authority is acting under statutory powers.[38] Hence, decisions that are outside the power given by legislation, and for the purposes contemplated by the relevant legislation satisfy the public law element requirement.[39]

Conversely, if a contractual decision is not statutorily underpinned then it is not clear whether it is reviewable or not.[40]

In some cases, the courts have indicated that a public law element may also sometimes exists without statutory underpinning. Instead, the public law element may be impliedly attributable to the nature of the decision.[41]

However, in some other cases, the courts have ignored the quest for some public law element and have reviewed decisions on judicial review grounds.

Hence, for instance, in *R v Lewisham London BC ex parte Shell UK,*[42] the High Court held that public authorities may not exercise procurement powers in a

droit privé: regards français et britanniques' (Oxford 2006); Freedland, 'Government by Contract and Public Law' (1994) PL 8; Harlow, 'Public and private law: definition without distinction' (1980), MLR, 43(3), 241; Mitchell, 'The Causes and Consequences of the Absence of a System of Public Law in the United Kingdom' (1965) PL 9

[36] Arrowsmith (1990) LQR (n.9)

[37] See on an analysis: Arrowsmith (n.2), p.p. 117-124

[38] See for example, *R v Hibbit ex parte the Lord's Chancellor's Department, The Times, March 12, 1993; Mass Energy v Birmingham City Council,1994 Env LR 298, 306-307; R (on the application of Molinaro) v Kensington and Chelsea RLBC [2001] EWHC*)

[39] *Hazell v Hammersmith and Fulham London Borough Council [1992] AC 1; Credit Suisse v Allerdale Borough Council [1997] QB 306, CA; A-G Fulham Corporation [1921] 1 Ch 440.*

[40] Arrowsmith (n.2) pp.118-122

[41] *R v Bristol City Council ex parte D.L. Barrett (2001) L.G.L.R. 11*

[42] *[1988] 1 All E.R. 938*

way that it involves a violation of the implied principle of procedural impropriety.[43]

As explained at III.2.C, the uncertainty surrounding the issue of the availability of judicial review proceedings on contractual decisions has to some extent been reconciled with the implementation of the EU regime on remedies.

III.2.B. The public law system of judicial review

A public authority, whether a statutory corporation, governmental department, or local authority has a variety of statutory powers and duties to perform.

Judicial review represents the mean by which the courts control the exercise of such power and duties.

The rules governing the procedure for judicial review are codified under section 31 of the Senior Courts Act 1981 (SCA) and Part 54 of the Civil Procedure Rules (CPRs).

Judicial review proceedings take place in the Administrative Court that is part of the Queen's Bench Division of the High Court.[44]

For an action of judicial review to take place a claimant must raise an issue of 'public law'.[45]

As noted, there is no precise definition of what a public law issue encompasses in the context of contracting decisions.

This ambiguity, in turn, creates interpretational problems regarding the applicability of judicial review proceedings on contracting powers.

However, as noted above, there have been cases where the courts have allowed review proceedings without reference to the need of any public law element

[43] See also *R v Enfield London BC ex parte Unwin [1989] C.O.D*
[44] CPRs, Pt.51.1
[45] The CPRs, Pt.54.1(2)(a) states that *'judicial review is concerned with the lawfulness of (i) an enactment; or (ii) a decision, action or failure to act in relation to the exercise of a public function*'.

and it seems that the decision to allow review is assessed on a case-by-case basis.[46]

Regarding the remedies available under judicial review these are the following:

(a) quashing order (*certiorari*) which quashes an unlawful decision by a public authority;[47] (b) a prohibiting order which is a pre-emptive remedy in the sense that it prevents a body from acting unlawfully in the future;[48] (c) a mandatory order (*mandamus*) which compels a public body to act;[49] (d) an injunction which can compel a body to perform a duty or conversely restrict the performance of an unlawful act;[50] (e) a declaration, which is a non-coercive remedy as it simply represents a formal statement of the law by the Court;[51] and (f) damages which is not a free-standing remedy as it must be combined with one of the above when it is sought in judicial review proceedings and it must be based on a substantive ground.[52]

In relation to who has standing in review proceedings, the pool of potential claimants is relatively wide.[53]

Firstly, eligible to apply for review are those individuals who have been directly affected by a public law decision of a public authority (for example due to a financial loss).[54] Secondly, also eligible are individuals with a "genuine constitutional interest".[55]

[46] *In R (Tucker) v DG of National Crime Squad [2003] EWCA Civ 57* Baker LJ stated that '*the boundary between public and private law is not capable of precise definition, and whether a decision has a sufficient public law element…is often as much a matter of feel as deciding whether any particular criteria are met'*.
[47] SCA, s.29; CPRs, Pt.54.2
[48] SCA, s.29; CPRs, Pt.54.2
[49] SCA, s.29; CPRs, Pt.54.2
[50] SCA, s.37; CPRs, Pt.54.3
[51] SCA, 31(2)
[52] CPRs, Pt.54.3(2)
[53] *R v Inland Revenue Commissioners Ex parte National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617.*; SCA s.31(3)
[54] *R v Secretary of State for Health, ex parte United States Tobacco International Inc [1992] 1 QB 353*
[55] *Ex parte Rees-Mogg [1994] QB 552*

Thirdly, groups and organisations representing the wider public interest or the interest of specific groups such as professional bodies and trade unions have also potentially standing.[56]

Fourthly, in the context of public contracts and other activities where the public purse is involved, external public auditors are also eligible to challenge an alleged unlawful awarding or performance decision based on the ground of preventing unlawful public expenditure.[57]

It should be noted that the judicial review is a highly discretionary remedial process.[58] Permission to seek review and the grant of a remedy may be refused if, for instance, there is an appropriate alternative remedy or if it would create inconvenience to the administration or third parties.[59]

III.2.C. Review under the EU framework

The rules for seeking review for those contracts that fall within the EU threshold are provided by the various Regulations implementing the EU public procurement rules.[60] The Regulations are very detailed regarding the procedures and remedies available and they incorporate the provisions of the remedies directive.[61]

Proceedings must be brought before the High Court of England & Wales,[62] a forum for review that is very expensive to use in often amounting to several thousand pounds and in some lengthy and complex cases to over half a million.[63]

[56] *R v Inspectorate of Pollution and another, ex parte Greenpeace Ltd (No 2) [1994] 4 All ER 329*
[57] *Hazell v Hammersmith and Fulham LBC [1992] 2 AC 1*
[58] CPR, Pt.54.4
[59] CPR, Pt.54.11A(ai); SCA, s.31(3F).
[60] For the purposes of simplicity only the relevant provisions of the PCR will be referenced but the same rules apply under the UCRs and CCRs
[61] PCRs, Part 3, Regs.85-104
[62] Reg.91(2)
[63] Arrowsmith & Craven, 'Public procurement and access to justice: a legal and empirical study of the UK system; (2016), P.P.L.R., 6, 227-252

As with the remedies directive, the available remedies under the PCRs are divided between pre-contractual and post-contractual.

The first category includes the setting aside of an unlawful decision, an order for an authority to amend any document, and the award of damages.[64]

In the case where the contract has been entered into the available remedies are those of the EU ineffectiveness, and alternatively or additionally, the award of damages.[65]

In relation to who has standing for review, the position under the PCRs is that action is available by any economic operator, which, in consequence of a breach suffers, or risks suffering, loss or damage.[66]

This means that only "*intended or actual contractors*"[67] have standing for review, but not third-parties who might not have a direct financial interest in the contract but, might nevertheless, wish to challenge an unlawful decision, for instance, on grounds of legality.

Yet, in some instances, the courts have allowed judicial review proceedings to take place and for violations of EU rules, in which case, as noted above, the pool of claimants is much wider.

A notable example of this is the case of *Gottlieb*[68] where the High Court ruled that a taxpayer who was also a City Councillor had a legitimate interest in seeking to ensure that an elected authority of which he is a member complies with the law, spends public funds wisely, and secure through open competition the most appropriate scheme for his city.[69]

[64] Reg.97
[65] Reg.98
[66] Reg.91
[67] Reg.2
[68] *R (on the application of Gottlieb) v Winchester City Council [2015] EWHC 231*
[69] Ibid., [151]

However, this case seems to be an exception to the general rule that judicial review cannot supplement the already adequate review framework of the PCRs.[70]

III.2.D. Review under the NHS Regulations

There is a special review regime applicable to NHS authorities under the NHS Regulations. As explained at III.1 above, this regime provides for an independent review body called Monitor, which apart from its *ex officio* powers to investigate alleged violations, it may also do so after a third-party complaint. Complaints are not limited to suppliers but include patients.[71]

The remedies that Monitor can enforce are:

(i) To direct the relevant NHS authority to address breaches of the requirement of the Regulations. If the authority does not comply with the direction, Monitor can withdraw or vary the tender invitation.[72]

(ii) In a case in which a contract has been entered into, Monitor can either declare it ineffective or vary the contract to remedy the breach.[73]

However, the Regulations state that if a claim has been filed before the High Court under the PCRs, Monitor cannot conduct investigations and consequently, it cannot order the above sanctions.[74]

In addition, the Regulations state that a claimant who has brought an action for damages under the PCRs, cannot also bring an action for damages under s.76 (7) of the Health and Social Care Act 2012.[75]

[70] *Cookson & Clegg Ltd v Ministry of Defence [2005] EWCA*. See, Bailey, 'Judicial review and the public procurement regulations' (2005), P.P.L.R., 6, 291-312
[71] Reg.13
[72] Reg.15
[73] Reg.14-15
[74] Reg.13(3)
[75] Reg.17

What is not clear from the Regulations is whether the system of remedies before Monitor excludes the possibility of bringing judicial review proceedings to enforce the substantive rules of the Regulations.

This does not seem to be the case since there a strong presumption in English law against the jurisdiction of the court being ousted by statute and the Monitor system.[76]

It is also important to note that the NHS Regulations seem to create a two-tier system of review regarding EU alleged violations of NHS authorities.

The Advocate General in *Orrizonte Salute*[77] has suggested that for contracts that fall within the EU rules, Member States must apply the standards of the remedies directive.

It is submitted that the NHS Regulations do not undermine the applicability of the remedies directive as they only provide an alternative to litigation with equally effective remedies.

Additionally, they make clear that once proceedings under the PCRs have begun, Monitor powers automatically cease.[78]

IV. The impact of violations of public law on concluded contracts

This section examines the impact of violations of the substantive rules that regulate the contractual activity of public entities on contracts that have been concluded.

Following the systematic analysis submitted in chapter 3, this section is organised by first, examining the impact of violations related to the subject matter of the contract (IV.1.) and, second, the impact of violations related to the procedure of concluding a contract (IV.2.)

[76] *Anisminic Ltd v Foreign Compensation Commission [1968] UKHL 6*
[77] Case *C-61/14* [20]
[78] Reg.13(3)

It should be noted from the outset that the distinction between violations related to the subject matter of the contract and violations related to the procurement award procedure is of relevance in English law (and common law more generally) as these violations tend to have different effects on contracts.

In the case in which a court finds that a public entity has entered a contract which has no legal capacity under statute to do so, it will order a contract to be rendered *ultra vires* and void *ab initio* under the public law principle of illegality.

Generally, this is not the case where there has been a violation that is related to the award procedure.

However, as it is noted at IV.2 below there are some limited circumstances where such a violation may constitute reasons for a court to declare them *ultra vires* and consequently unenforceable under the public law principle of procedural impropriety.

Additionally, certain violations prescribed by statute may adversely affect the effects of a contract. These include a violation that may trigger the ineffectiveness remedy under the PCRs and the NHS Regulations.

IV.1. The impact of violations related to the subject matter of a contract

Most public bodies, whether central or local, which are not Crown agents, have been created by statute. Such bodies, in general, possess only those powers specifically conferred upon them by legislation.

When such public bodies make a decision that exceeds their powers authorised by statute then the decision is declared *ultra vires*.[79]

As Professor Davies put it, the *ultra vires* doctrine reflects *"public law's special concern with democratic accountability"*.[80]

[79] *AG v Fulham Corporation [1921] 1 Ch 440; AG v Great Eastern Railway [1880] 5 AC 473*
[80] Davies, 'Ultra vires problems in government contracts' (2006), L.Q.R., 122, 98-123

In the context of contracting, the role of the *ultra vires* doctrine is to enable the courts to check whether a public authority has the power to enter into a purported contract.

If it does not possess the necessary statutory power, then both the decision to enter the contract and consequently, the contract itself will be declared *ultra vires* and unlawful.[81]

IV.1.A. The scope of *ultra vires* contracts

Most of the litigation associated with *ultra vires* contracts involved local authorities.[82] During the 90's, there was a vast amount of litigation between banks and local authorities in relation to unlawful rate swap contracts.[83]

In the landmark case of *Hazell v Hammersmith and Fulham*[84] the House of Lords took a rather restrictive interpretation of s.111(1) of the Local Government Act 1972 (which provided that local authorities can do *"…anything…which is calculated to facilitate or is conducive or incidental to, the discharge of any of their functions"*) and ruled that rate swap transactions were not "incidental" to local authorities' powers.

Due to this narrow interpretation and the fact that when a contract is found to be *ultra vires* it must, in general, be unravelled which, in turn, creates various problems (see IV.1.B.), subsequent legislation has added to the relevant provision of the 1972 Act to explicitly provide much wider powers to local authorities which are less open to interpretation by the courts.[85]

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[81] See further IV.2.
[82] *Young v Royal Leamington Spa [1883] 8 App.Cas. 517 HoL; Hazell v Hammersmith (1992), Credit Suisse v Allerdale [1996] 4 All E.R. 129; [1997] Q.B. 306*
[83] *Re Interest Rate Swap Litigation (unreported, 28 November 1991)*
[84] *[1992] 2 AC 1*
[85] Section 2(1) of the Local Government Act 2000; section 6 of the Local Government Act 2003; Local Democracy, Economic Development and Construction Act 2009. See, Harwood, Keene, Butler-Cole, 'Statutory powers of local authorities: exercise and scrutiny', in Randall (edition), 'Local Government Contracts and Procurement' (Tottel, 2007), chapter 10

At present, the Localism Act 2011 has largely eradicated the effects of *ultra vires* for contracts with local authorities. Section 1 of the Act provides a "general power" on most local authorities to do anything that individuals generally may do.

This entails that there are no restrictions on the purpose for which a contract can be made.

However, the *ultra vires* doctrine is still relevant for many local authorities that the Localism Act does not cover. It is also applicable and relevant to other authorities created by statute which powers are explicitly restricted by legislation.[86]

While the *ultra vires* doctrine applies to local authorities and all other public bodies established by statute, it is not clear whether it applies to the contractual activity of the Crown and its agents, which historically enjoyed an unrestricted capacity to contract.[87]

The better view seems to be that the Crown agents do not normally have any independent capacity to contract unless such a capacity is clearly provided by legislation.[88]

IV.1.B. Consequences of *ultra vires* decisions on a contract

In *Credit Suisse v Allerdale*[89] the Court of Appeal ruled that a contract that is the result of an *ultra vires* decision is rendered void *ab initio* and consequently unenforceable against the public entity.

This is so regardless of whether a public authority was at fault and a contractor acted in good faith.

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[86] See Arrowsmith (n.2), p 75
[87] Turpin, 'British Government and the Constitution' (5th edition, Butterworths, 2002), p.620; *The Bankers' Case (1700)*
[88] Arrowsmith, (n.2), p.p. 71-72 based on *Town Investment v Department of the Environment [1978] AC 359.* For a different view see Davies (2006) L.Q.R. (n.80), p.p. 103-104 where she argues that there any not very significant boundaries to the Crown unrestricted contractual powers.
[89] *[1997] QB 306*

The reasoning behind this rule is that the discretion of a court in judicial review proceedings arises from the fact that public law remedies are discretionary.

Since private law remedies are not discretionary, and because an *ultra vires* decision of a public authority is void and of no legal effects, the court entertaining a claim for breach of contract (this was the claim from the contractor in this case) made in pursuance of an *ultra vires* decision has no option but to declare the contract void (i.e. with no legal effect – unenforceable from both parties).

Evidently, English law does not make a distinction between the unlawful act and the contract *per se* as it happens in some jurisdictions with a system of administrative contracts.[90]

Instead, it treats the contract and the decision as one entity. Thus, the nullification of the decision automatically nullifies the agreement, and consequently, the contract is treated as a legal nullity.

IV.1.C. Safe harbours from the *ultra vires* effects

As seen in the previous chapter, the EU system mitigates the effect of the ineffectiveness remedy by providing safeguards that will allow the contract to go ahead regardless of whether the relevant violations took place.

Despite some ambiguities on the interpretation of these rules that were discussed in the previous chapter, the relevant provisions aim creating a balance between, on the one hand, legal certainty between the parties and uninterrupted service delivery to the public, and on the other, the protection of aggrieved bidders who have been deprived unlawfully the opportunity to compete.

[90] See generally, Treumer & Lichère (edition), 'Enforcement of the EU Public Procurement rules' (DJØF, 2011)

The difference, however, between the ineffectiveness remedy and the *ultra vires* doctrine is the context in which these remedies operate.

The context is different because the *ultra vires* doctrine may operate both under judicial review proceedings brought by third-parties (see IV.1.C.), but also, the public law violation that may declare the contract *ultra vires* can be raised collaterally by either of the two contracting parties as a defence.[91]

Hence, a public entity may raise the public law violation that the subject matter of the contract was unlawful and try to evade liability under the contract.

It could be argued that in such case the public entity's action constitutes a legitimate attempt to safeguard the policy behind the rule and, consequently, protect the use of public funds for an unauthorised purpose by bringing an *ultra vires* agreement to an end.

As argued in chapter 2, violations related to the subject matter of a contract constitute legitimate reasons to bring a contract to an end and for it to be rendered unenforceable.[92]

However, rendering a contract unenforceable may prove to be harsh for a contractor, particularly when the limitations of the powers of a public entity are not defined with clarity and, hence are open to interpretation by a court.[93]

This, in turn, may create problems of commercial confidence for the private sector to engage in contracts with public entities. This factor has been acknowledged by Parliament that has repealed and improved in many instances the legislation applicable to local authorities.

Thus, as explained above, the Localism Act 2011 has significantly mitigated the operation of *ultra vires* by giving to some local bodies wide powers to enter contracts.

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[91] See, *Young v The Mayor and Corporation of Royal Leamington SpA [1882-1883] L.R. 8 App.Cas 517, H.L.; Credit Suisse QB 306*; *Westdeutsche Landesbank Giroxentrale v Islington Borough Council [1994] 1 W.L.R.*

[92] Ch.2-II

[93] This was the case in *Hazell [1992] AC1*

Additionally, section 2 of the Local Government (Contracts) Act 1997 provides that local authorities can issue certificates to the effect that a transaction is within their powers.

Contracts which meet the certification requirements of that Act will be characterised as *prima facie* within the authority's powers, and are, therefore, unlikely to form the subject matter of a private law defence.

The certification is conclusive for all proceedings except judicial and audit review. Even, however, in judicial review proceedings, the courts are given the discretion to permit the contract to continue having regard to the likely consequences of the financial position of the local authority and for the provision of services.[94]

If the Court decides that the contract should be rendered *ultra vires*, section 6 of the Act preserves certain discharge terms agreed between the parties.

These discharge terms may provide for the payment of compensatory damages (measured by reference to the loss incurred or any other circumstances) by one party to the other and/or the adjustment between the parties of rights and liabilities relating to assets or goods provided under the contract.

Further, pursuant to section 7, if the contract is held to be of no effect in law and there are no relevant discharge terms, or the court has ordered that the relevant discharge terms shall have no effect, the contractor is entitled to be paid by the local authority such sums as the contractor would be entitled to be paid if the contract had had effect until the time of the court's determination or order but had been terminated at that time by the acceptance by the contractor of a repudiatory breach of the contract by the local authority.

Section 7 is of importance as to the consequential matters arising from *ultra vires* contract discussed at IV.1.E. It requires the contract not to be rendered unenforceable *ab initio* but to be declared unenforceable prospectively.

[94] Section 5(1)

While there are safe harbours from the *ultra vires* effects for contracts with local authorities, the same does not appear to apply for contracts with other statutory bodies.

In this respect, Professor Cane has argued that as a matter of policy, a contractor should be allowed to escape an *ultra vires* contract with a government body unless, at the time the contract was made, the contractor knew or had reason to think that the contract was *ultra vires*.[95]

Professor Davies has suggested altering the test of *ultra vires* to incorporate consideration of the government's motives.[96] However, she argues, that since the *ultra vires* inquiry is usually a relatively straightforward question of statutory construction, it is difficult to see how this will be done.[97]

The European Convention on Human Rights might provide for a safe harbour from the effects of *ultra vires*, albeit not a substantial one.

More specifically, the European Court of Human Rights (ECtHR) has ruled in *Strech v UK*[98] that the effects of the *ultra vires* principle on contracts can violate protocol 1(1) of the European Convention on Human Rights (ECHR), namely, the peaceful enjoyment of possessions.

This case concerned a lease contract for which a Local Council did not have the capacity to enter, but it did promise to do so in the honest belief that it could.

The ECtHR ruled that the Council had acted under a mistaken belief, that no third-party interest was affected, and the interference with the legitimate expectations of the claimant was disproportionate.

It is not clear if this case creates a general exception to the *ultra vires* rule, nor at least for procurement contracts. The rule of *ultra vires* may well be justified in the public interest as permitted within the scheme of protocol 1 of the ECHR.

[95] Cane, 'Do Banks dare to lend to local authorities', (1994), L.Q.R. 110, 514-521.
[96] Davies (2006), L.Q.R (n.80), p. 102.
[97] Ibid.
[98] *2004 38 EHRR 12;* (*Stretch v West Dorset District Council (1998) 96 LGR 637)*

In fact, it is the purpose of the *ultra vires* doctrine to protect the public interest from the effects of the unlawful conduct of public authorities.

IV.1.D. Third-party challenges

Since a decision by a public body to enter a contract in violation of its statutory capacity has the necessary statutory underpinning, third-parties are likely to be able to challenge the effects of a contract by way of judicial review.

With regards to standing, the Court will grant leave for a judicial review application to anyone who satisfies the "sufficient interest" requirement.[99]

In the context of public contracts, the sufficient interest requirement will most likely be satisfied by aggrieved competitors, professional bodies representing suppliers, a taxpayer of a local council,[100] and institutional bodies performing audit reviews as it happened in *Hazell.*

As noted at III.2.B, judicial review proceedings require permission by the Court that has a leeway of choice and discretion to allow a claim to proceed.[101]

Remedies are also discretionary. Hence, if a remedy of rendering a decision *ultra vires* would result in adverse effects on either the general administration or third-parties (including the contractor), a quashing or mandatory order may be denied.[102]

As for the time limits, Pt.54.5 of the CPRs requires an application to be filled promptly and in any event no later than three months after the grounds to make the claim first arose.

[99] S.31(3) SCA 1981, CPRs Pt.54(1)(f)
[100] *Gottlieb (2015)* (n.68)
[101] CPRs, Pt.54.4
[102] *R v Monopolies and Mergers Commission, Ex parte Argyll Group [1986] 1 WLR 763*

IV.1.E. Addressing economic consequences from *ultra vires* contracts

As noted above, when a decision is found *ultra vires* then the purported agreement under this decision is deemed to be unenforceable against the public entity.

This is so, regardless of whether the contractor acted in good faith and in an honest belief that the contract was lawful and regardless of whether the *ultra vires* doctrine is raised as a defence in private law proceedings as it happened in *Allerdale*.

Since an executory *ultra vires* contract is unenforceable against a public authority, it is also unenforceable against a contractor. A party cannot enforce the other party's promise when its own promise is unenforceable since there is lack of consideration (i.e. failure of the expected counter-performance).[103]

Therefore, the contract is treated as void. Subject to certain exceptions provided by legislation such as section 6 and 7 of the LGCA discussed at IV.1.C above, the remedial option available to the parties in such situation is that of restitution for unjust enrichment.[104]

The next three parts of this section examine the applicability of this remedy. The first part (F) briefly describes the law of restitution based on unjust enrichment. The second part (G) examines the applicability of claims in restitution against the public authority, and the third part (H) examines the applicability of claims in restitution against the private contractor.

IV.1.F. The law of restitution based on unjust enrichment

Restitution is generally available where one party has provided some performance to the benefit of another party in anticipation of a contract being

[103] *Currie v Misa (1875) LR 10 Ex 153 (1875-76) LR 1 App Cas 554*
[104] Arrowsmith (n.2), pp. 78-82

made, but the contract is never made usually due to some vitiating factor such as an *ultra vires* decision.

Restitution may also be the subject of a remedy when there has been wrongful conduct, as when a defendant who commits a breach of fiduciary obligation may be required to disgorge the profits so acquired (the gain-based remedy).[105]

The law of restitution is not codified. Rather, it is probably one of the few areas of English law that has developed mainly in academic journals and collections of essays.[106]

It was not until the landmark judgment in *Lipkin Gorman v Karpnale Ltd*[107] that the House of Lords recognised an independent law of restitution based upon the principle that unjust enrichment must be reversed.

The English law of restitution is a complex area of law where the relationship between common law and equity has often been a significant flashpoint in the academic and judicial debate.[108]

The unnecessary complexity of this law lies mainly on the need for identification of the unjust factor based on various contractual (or more precisely), *quasi*-contractual concepts rather than simply relying on the civilian focus of "transfer without legal ground".[109]

In the context of *ultra vires* contracts with public authorities, Professor McKendrick suggests four grounds according to which a plaintiff can bring a restitutionary claim under the law of unjust enrichment.[110]

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[105] On the law of restitution see generally Birks, 'Unjust enrichment' (2nd ed., 2005, Clarendon); Birks, 'An Introduction to the law of Restitution' (Clarendon, 1985); Virgo, 'The principles of the law of restitution' (2nd edition, OUP, 2006); Burrows, 'The law of restitution', (OUP, 3rd edition, 2011)

[106] McKendrick, 'Local Authorities and Swaps: Undermining the Market?' in Cranston (edition), 'Making Commercial Law: Essays in Honor of Roy Goode' (1997, Clarendon), p.22; McKendrick, 'The battle of the forms and the law of restitution', (1998), OJLS, 8/2, 197

[107] *[1991] 2 AC 548*

[108] See indicatively, Cowan, 'Banks, Swaps, Restitution and Equity' (1993), LMLQ 300.

[109] See for a critique, Zimmerman, 'Unjustified Enrichment: The Modern Civilian Approach' (1995), 15, OJLS, 403, 416; Treitel, 'The Law of Contract' (9th edition, Sweet & Maxwell, 1995), p.950

[110] McKendrick, 'The reason for restitution', in Birks & Rose (edition), 'Lessons of the Swaps Litigation' (Mansfield Press, 2000)

These are mistake of law, total failure of consideration or absence of consideration, the void nature of the contract and incapacity

The most important of these grounds is that of mistake of law[111] and (total) failure of consideration.[112]

Mistake of law is suggested to be the strongest ground for restitution.[113] Put simply, this means that both parties entered into an *ultra vires* transaction in the mistaken belief that it was lawful and such mistake can generate a restitutionary claim.

The second ground is (total) failure of consideration. The ground of restitution, in this case, is the failure of performance on the part of the opposite party due to some vitiating factor such as that a contract was based on an *ultra vires* decision.[114]

This failure of performance has conferred a benefit to one party to the detriment of the other and the appropriate remedy in such case is restitution based on unjust enrichment.

IV.1.G. Claims in restitution against the public entity

In the context of public procurement contracts that have been rendered unenforceable due to an *ultra vires* decision of a public authority, the contractor might have provided works, services or goods for which he has received no payment in return.

In such case, courts will permit a claim on restitution based on the principle of unjust enrichment in order to restore the position of a contractor *vis-à-vis* a public authority. That is, return the parties to the original position they had been in as if no illegal contract had ever been made.

[111] *Kleinwoth Benson Ltd v Lincoln City Council [1999] 2 AC 349*
[112] *Westdeutche Landesbank Girocentrale v Islington London Borough Council [1994] W.L.R. per Lord Brown-Wilkinson*
[113] McKendrick, (n.110)
[114] Ibid.

The first issue that needs to be explained is under what form the position of the contractor will be restored.

In that situation where the invalid agreement is related to services and therefore, there is no traceable item,[115] (i.e. it cannot be identifiable since it does not consist of something tangible), the general rule is that a public authority must normally pay the money value of the benefit received on a *quantum meruit* action.[116]

In such a situation, the services constitute the benefit since they were requested when the contract was made, and it is unjust to retain it when consideration for the benefit (the payment or other benefit promised in return by the recipient) has failed.[117]

When goods or works are involved in the invalid agreement which cannot be identified, the same rule applies.[118] For instance, this may be the case for goods that have been consumed or used by the public entity, or construction works the title of which has passed to the public entity.

In the case of goods which can be identified (i.e. they have been intact from their original form), Professor Arrowsmith has commented that, in the context of *ultra vires* contracts, it would be contrary to the policy behind the rule of *ultra vires* to allow a public authority to make a payment for the goods instead of restoring them when they cannot be or are not applied for lawful purposes.[119]

She has also argued that based on the reasoning in *Young*[120] that when goods have been consumed for an unlawful purpose, no claim in restitution is possible

[115] The interrelationship of unjust enrichment and tracing have been the centre of much academic debate on whether property claims arise from unjust enrichment or whether they arise as an independent proprietary claim (see Birks, 'Property, unjust enrichment and tracing', (2001), 54/1, CLP, 231-254).
[116] Birks, 'Unjust enrichment' (2nd edition, Clarendon, 2005) chapter 8; McMeel, 'The modern law of restitution' (2000, Blackstone), 1.3.3.
[117] Arrowsmith, (n.2), p.78; *Westdeutche* [1994]
[118] Burrows, (n.105), chapter 6; McMeel, (n.116) chapter 12
[119] Arrowsmith (n.2), p.80
[120] *Young v The Mayor and Corporation of Royal Leamington SpA [1882-1883]*

as this would require payment for something the authority was forbidden to purchase.[121]

To this end, it is important to highlight that there has been some judicial and academic debate on whether there is a special defence according to which a court could deny restitution altogether claiming such remedy will infringe the policy behind the rule of *ultra vires,* that is - to prevent public funds from being paid out in a manner contrary to that permitted in legislation.[122]

This will be the case when a contractor will not be entitled to the value of the works, services or goods performed because legislation prohibits entering into an agreement in the first place and, hence, any purchase is *prima facie* for an unlawful purpose.

In *Young,* the House of Lords held that there could be no claim for works against a public entity when a contract was invalid for breach of a statutory requirement to fix the corporate seal.

The purpose of the statutory requirement, in *Young*, was to ensure that proper attention was given to the decision to contract and protect the public entity against entering improvident contracts.[123]

As Professor Arrowsmith has suggested, the rule in *Young* seems to be applicable *a fortiori* where the contract is one that a public authority has no power to make at all, or which it has no power to make for a purpose for which was made.[124]

[121] Arrowsmith (n.2), p.80
[122] See Arrowsmith, 'Ineffective transactions and unjust enrichment: a framework for analysis' (1989), LS, 10/3, 231-244; Arrowsmith, 'Ineffective transactions, unjust enrichment and problems of policy' (1989), LS, 9, 307-322; Arrowsmith, 'The impact of public law on the private law of contract' in Halson's (edition), 'Exploring the boundaries of contract' (Dartmouth, 1996); Burrows, (n.105), pp. 514-517; McCamus, 'Restitutionary recovery of money paid to a public authority under a mistake of law' (1983), UBCLR, 17, 273; Virgo, (n.105) pp. 400-402
[123] Arrowsmith (n.2), p.79
[124] Ibid.

A defence on public policy grounds where, on the correct construction of a statute or regulation, recovery in restitution would be contrary to the objective of the statute has been considered in various instances by English Courts.[125]

In Canada, the Supreme Court in *Air Canada v British Columbia*[126] suggested that a special defence of "disruption of public finances" should be recognised as a bar to a restitutionary claim.[127]

The position that seems to have prevailed in English courts, however, is that legislation delimiting the scope of a public authority's power to contract should not generally be interpreted as requiring a restitutionary claim to be denied on policy grounds.[128]

For example, the Court of Appeal in *Haugesund Kommune*[129] confirmed that financial payments provided to a public authority in pursuit of swap arrangements could in principle be recovered.

In the case at hand, the Court did state that English law acknowledges the non-permission of a claim in restitution as a matter of public policy but recognised that there was no authority directly to the point.[130]

Therefore, the prevailing view under English law is that restitutionary claim is allowed and a defence on public policy grounds has no general application. Even the rule in *Young* can be distinguished on its own facts as relating to a particular procedural requirement.[131]

As Professor Arrowsmith has suggested, the policy consideration of justice between the parties, the need to encourage firms to deal with the public sector, and deterrence of *ultra vires* transactions indicate that restitutionary claims should be allowed.[132]

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[125] See *Haugesund Kommuner and another v Depfa ACS Bank [2010] EWCA Civ 559 at [92]* citing the relevant cases.
[126] *(1989) 59 DLR*
[127] See also, Collins, 'Restitution from Government Officials', (1984) 29 McGill LJ 407; 'Restitution: mistakes of law and *ultra vires* public authority receipts and payments', No 227 at XI.
[128] See *Woolwich Equitable Building Sociaty v IRC [1993] AC70*
[129] *[2010] EWCA Civ 559*
[130] Ibid., [96]
[131] Arrowsmith (n.2) p.79
[132] Arrowsmith (1996), (n.122)

There is also a constitutional dimension to the requirement of making restitution to a contractor, according to which, where a public authority is not entitled to the money or any other asset which it has received, it must repay the citizen from whom it was unlawfully taken.[133]

The justification for this principle is that since the power of a public authority to demand payment or performance can only exist under the law, it follows that if the demand was made unlawfully then the public authority has no right to retain what it received and must make restitution to the citizen.[134]

It is submitted that the only possible exception (although not tested before the courts) where a defence on public policy could be applicable is where a contractor knew, or perhaps ought to have known that the purported contract was unlawful.[135]

Indeed, as was argued at chapter 2, such a bar on recovery may create an additional layer of deterrence against entering unlawful transactions and, hence, it seems a justifiable exception to restrict claims for recovery.[136]

A bar on recovery in such case may be justified based on mistake of law. Recovery in such case may be denied since a contractor had knowledge of the subject matter of the transaction (i.e. its unlawfulness). Thus, mistake as to the subject matter of the transaction cannot be said to have been made.[137] Consequently, restitution may be irrecoverable.

IV.1.H. Claims in restitution against the contractor

When a public authority has made some payment under an *ultra vires* contract and has received no performance in return, such payment may be recovered under the law of restitution.[138]

[133] Virgo, (n.105) p.401
[134] Ibid.
[135] Arrowsmith (1996) (n.122) p.8; Arrowsmith (1989), L.S, 9 (n.122), 314
[136] Ch.2-V
[137] See generally Burrows, (n.105), chapter 9
[138] Arrowsmith (n.2), p.80

Traditionally, the basis of restitution for *ultra vires* payments was incapacity.[139] Incapacity in this context means that the body making the contract had no capacity to enter in the first place, and consequently make any payment.

However, it has been stated that with regards to a public body making an *ultra vires* payment, the policy behind restitution is mainly to protect the public against the abuse of public funds.[140]

The main case on point is *Auckland Harbour Board v R*[141] where the Privy Council held that money paid by the Ministry of Railway's *ultra vires* was recoverable.

Presumably, the ministry paid the money under a mistake (i.e. entered into the transaction in the mistaken belief that it was valid), but this decision was based on the policy of protecting public funds and thereby recognised that the *ultra vires* nature of the payment itself justified restitution.[142]

Professor Arrowsmith has argued that the ground of mistake may deprive a public authority of a successful recovery claim if it knows about the mistake in the first place.[143]

In this respect, she argued that by denying restitution might deter *ultra vires* transactions, and hence safeguards public funds in the longer term.[144]

However, this policy-motivated argument for denying restitution as a deterring factor may not be appropriate for public authorities.

As was argued at chapter 2, economic incentives are not the most suitable means to deter public bodies entering unlawful transactions and other sanctions of criminal or civil law nature against the individuals responsible for the violation provide more effective deterring methods.[145]

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[139] Burrows, (n.105), p.517
[140] Ibid.
[141] *[1924] AC 318*
[142] Burrows, (n.105), p.518
[143] Arrowsmith (n.2), p.81
[144] Ibid.
[145] Ch.2-V.2

Another possible defence that may deprive a public authority of a successful claim in restitution is that of "change of position".[146]

The defence is available to a person whose position has changed in such a way that it would be inequitable in all the circumstances to require him to make restitution.[147]

The detail and scope of the defence remain to be worked out on a case-by-case basis.[148]

However, this defence will not be available to a contractor who has changed his position in bad faith, as it is the case when the defendant has paid away the money received with knowledge of the facts entitling the claimant to relief.[149]

Further, the mere fact that the contractor has spent the money does not *per se* render it inequitable that he should be required to repay. He must do something with the money in good faith that would not have done but for the money being advanced under what was, in fact, an invalid contract.

Additionally, the expenditure must be linked to the money received under the *ultra vires* contract. Hence, it must not be incurred in the ordinary course of things.[150]

Finally, a party may not use this defence to the extent that reliance is incurred on anticipated payments, as opposed to actual receipt since this would involve reliance on void transactions.[151]

It is not clear how this defence would ever succeed in an *ultra vires* public contract agreement. It could be argued that one instance where this defence could be considered is where the contractor used the unlawful payment to hire additional personnel or the acquisition of material particularly for the execution of the *ultra vires* agreement.

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[146] *Baylis v Bishop of London [1913] 1 Ch 127;* See generally Burrows (n.105) pp. 524-550
[147] *Lipkin Gorman [1991]*
[148] Ibid.
[149] Ibid.
[150] Ibid.
[151] Arrowsmith, (n.2.), p.82 citing *inter* alia *South Tyneside BC v Svenska International [1995] 1 All E.R. 545, QBD*

However, in general, this remedy will have limited possibilities for success, as its scope is relatively narrow.

IV.2. The impact of violations related to the award procedure

As noted above, English law makes almost a conceptual distinction between violations related to the subject matter of a contract (i.e. when the performance of a contract is unlawful) and violations related to the procedure of concluding a contract (i.e. violations related to the award of an otherwise lawful contract).

As already explained, in the first case the violation will most likely result in a contract to lose its effects and treated as void and unenforceable.

In case of procedural violations, on the other hand, a contract is generally not affected. However, there are two exceptions to this.

The first is that some procedural violations may be regarded as a public law violation and may be quashed as *ultra vires.*

As explained below, the *ultra vires* doctrine has limited scope in the context of procedural violations.

The second exception is when legislation prescribes that certain violations may impact the effects of a contract.

The most notable legislative instruments in this respect are, first, the Regulations that implement the EU rules, and require the EU remedy of ineffectiveness and, second, the NHS Regulations that as already explained and analysed further below, provide for a remedy of the ineffectiveness of a contract.

These exceptions are examined separately below.

IV.2.A. The impact of public law violations

In *Allerdale,*[152] the Court indicated that a distinction should be drawn between a contract which is beyond the powers of a public authority and a contract which could have been lawfully entered but was the result of a decision made for an improper purpose.

A contract of the latter type should be unenforceable against the public authority, only if the party seeking to enforce it knew, at the time the contract was made, that it was the result of an invalid decision.

In *Mercury Energy Ltd*[153] the Privy Council held, although obiter, that public authorities' contractual decisions will be subject to an *ultra vires* policy when they have entered a contract in breach of the public law principle of procedural propriety in the narrow sense.[154]

Procedural violations of this type include transactions that involve fraud, corruption or bad faith.[155]

An example of this is when a Councillor or a Minister enters a contract for a complete improper purpose – such as their own financial gain or when they have been bribed or have entered into some other very serious illegal arrangement which has affected the chances of a contract to be awarded lawfully.

In *Bedfordshire County Council v Fitzpatrick,*[156] the High Court clearly indicated that for a contract to be subject to unenforceability due to a violation of a competitive tendering requirement, the elements of bad faith, fraud or corruption must be attributable to a public authority and not only to a contractor.

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[152] *[1996] QB. 306*
[153] *[1994] 1 WLR 531*
[154] See Davies (n.9), p.159
[155] *Cookson, [2005] EWCA*; *R (Times Supplements Ltd) v Derbyshire County Council (1990) 3 Admin LR 241*
[156] *[2001] B.L.G.R. 397, Q.B.*

The public authority must have either been part of the fraudulent or the corrupt behaviour or had knowledge that the successful contractor acted in an illegal manner.

It is only in such case that a court may find an abuse of power and, consequently, any third-party that satisfies legal standing can challenge the effects of a contract.[157]

It is submitted, that no other procedural irregularities (subject to the statutory violations discussed below) will have any impact on a contract.

The Privy Council in *The Central Tenders Board and another v White*[158] confirmed the view in *Allerdale* and *Hazell* that there is difference between a case of a procedural irregularity in the formation of a contract of a kind which a public body has the power to enter, and a case of a public body purporting to conclude a contract of a kind which it has no power to make.[159]

The Court went on to say that the courts in England and other common law jurisdictions used to categorise procedural requirements in the exercise of a statutory jurisdiction as either mandatory or directory.[160]

A breach of the former would make the act invalid, but a breach of the latter would not. But over time the distinction was found in practice to be unsatisfactory.[161]

The prevailing position seems to be that the courts in considering invalidating an act, and consequently the contract, adopt a more flexible approach, which involves evaluating the seriousness of the breach and the degree of any injustice and public inconvenience which may be caused by invalidating the act.[162]

[157] Ibid
[158] *The Central Tenders Board and Another v White [2015] UKPC 39*
[159] Ibid., [19]
[160] Ibid., [21]
[161] Ibid.
[162] Ibid., [22 -23] citing *R v Soneji [2006] 1 AC 340*

It concluded that, generally, procedural irregularities will not amount to an *ultra vires* act that may invalidate a contract and, alternative remedies, notably, damages to aggrieved third-parties under the implied contract doctrine are more appropriate when such violations occur.[163]

Another interesting case is *Charles Terence Estates Ltd v Cornwall Council*,[164] the Court of Appeal seems to take the view that, generally, where a contract is *ultra vires* in the narrow sense (i.e. outside the authority's prescribed powers), private law will recognise the defence of lack of capacity, as in *Allerdale*.

In contrast, when a public authority makes a contract in breach of internal rules and procedures, it should not be able to invoke these when they are not readily visible to the counterparty and the counterparty has acted in good faith.

This decision is interesting because, inter alia, it makes it clear that a public authority cannot raise its own public law flaws to escape a contract.

The Court, in this case, stated that it is unattractive that a public body should raise its own unlawful actions to defend a claim made against it under an agreement it has freely entered.[165]

While it recognised that public bodies may raise the public law violation when they have entered the contract in violation of their statutory powers (confirming the principle in *Allerdale*), they cannot do the same when there been an *ultra vires* action in the wider sense (i.e. decisions which are within jurisdiction/capacity but vitiated by legal error relating to the formation of a contract).

IV.2.B. The impact of EU law violations

Generally, UK has adopted a copy out approach when implementing the EU procurement directives. The remedies system is no exception to this.

[163] Ibid., [27]
[164] *[2012] EWCA Civ. 1439*
[165] Ibid., [61]

Hence, the type of violations that are subject to the EU ineffectiveness remedy is identical to the EU remedies directive.

More specifically, Regulation 99 of the PCRs provides three grounds for challenging the effects of a concluded contract under the ineffectiveness remedy.

These grounds essentially mirror the grounds that the remedies directive prescribes.

Hence, the first is when a contract has been awarded without publication of a contract notice award in violation of the relevant Regulation.[166]

The second is when the standstill obligation or the automatic suspension requirement has been breached provided that such breach deprived the economic operator of the possibility of starting proceedings in respect of that breach prior to the conclusion of the contract and has affected the chances of the economic operator obtaining the contract.[167]

In *Alstom Transport v Eurostar International Ltd*[168] the High Court ruled that the challenger did not satisfy the second ground for ineffectiveness because he was able to, and did, commence proceedings (the subject of an earlier hearing) before the contract was entered into and so had not been deprived of the opportunity to obtain the contract.

Regulation 99(5) also provides that a breach of a pre-contract interim order of the Court could also be challenged under the ineffectiveness remedy.

The third is when a contract based on a framework agreement or a dynamic purchasing system is awarded in violation of the necessary competition requirements.[169]

[166] Reg.99(2)
[167] Reg.99(5)
[168] *[2011] EWHC 1828*
[169] Reg.99(6)

It submitted that no other violation of EU law has any effect on a contract already concluded. This is so regardless of whether the contracts fall within the EU threshold and hence, subject to the PCRs, or not.

The only possible exception to this as indicated by the Court of Appeal in *Ealing v Ealing LBC*[170] is when a bad faith element is involved in the transaction.

More specifically, in the case at hand the Court suggested that when a contractor is aware of a violation of the Regulation, an application for judicial review may be allowed to enable a contract to be set aside by a third-party.[171]

This proposition was based on an argument put forward by Professor Arrowsmith that an act of setting aside a contract may be required as a matter of EU law and the principle of effectiveness therein when a bad faith element is involved in the transaction.[172]

IV.2.C. Third-parties seeking ineffectiveness

As noted, proceedings for EU law violations, including proceedings for ineffectiveness, are brought before the High Court. This follows the EU law requirement that ineffectiveness *"should not be automatic but should be ascertained by or be the result of an independent review body".*[173]

The time limits for bringing proceedings are the same with the minimum requirements provided by the remedies directive. There is a 6-month limitation period that is reduced to 30 days where a contract award notice has been published in the OJEU, the authority has informed the unsuccessful bidders on the outcome of the contract award and has given a summary of the relevant reasons.[174]

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[170] *[1999] C.O.D. 492*
[171] See for a discussion, Bailey (2005), (n.70); William, ''When is a contract not a contract? The significance of third party rights in remedies available in UK under the EU public procurement regime', (2000), P.P.L.R, 27-32
[172] Arrowsmith, 'The law of public and utilities procurement' (2nd edition, Sweet & Maxwell, 2005), p.1426. See Ch.4-IV.2.A on how far EU law requires such action.
[173] Art.2d (1); Recital 13
[174] Reg.93

Any claim brought after the 30 days or 6-month limitation accordingly will be time-barred and rejected by the court.[175]

Regarding who has standing for review, Regulation 91 provides that proceedings for any violation, including ineffectiveness, is available only to intended or actual contractors which, in consequence of a breach suffer or risks suffering loss or damage.

Additionally, for the second ground of ineffectiveness to be raised, an intended contractor will have to show that the breach of the standstill period, automatic suspension requirement or the breach of an interim order has affected his chances of obtaining the contract.[176]

It is clear from the wording of the Regulations that only third-parties with a direct financial interest in a contract can claim an ineffectiveness declaration.

In *R (Wylde) v Waverley BC,*[177] a case involving an alleged unlawful modification of contract where the VEAT notice had not been published, the Court held that the claimants who were council taxpayers did not have standing in a claim for judicial review.

The Court stated that It was consistent with the Regulations' purpose to confine standing in any judicial review claim brought outside the range of remedies available to economic operators, and by someone who was not an economic operator, to only those who could show that performance of the competitive tendering procedure might have led to a different outcome that would have had a direct impact on them.

It concluded that the claimants could not demonstrate any direct impact upon them arising from the conduct of a competitive tendering exercise. They were not economic operators, nor could they demonstrate any interest in the procurement process akin to status as an economic operator.

[175] *Alstom v Eurostar International Ltd and Siemens PLC* [2011] EWHC 1828
[176] Reg.99(5)(d)
[177] *[2017] EWHC 466 (Admin)*

Their concerns and objectives were genuine and expressed in the public interest, but together with their interest as council tax or rate payers or as members of local authorities were not sufficient to establish standing.

IV.2.D. The consequences of an ineffectiveness on a contract

As noted in the previous chapter, the remedies directive allows Member States to choose between prospective or retrospective cancellation of a contract in case of an ineffectiveness declaration.[178]

The UK has opted for the prospective cancellation.[179] Regulation 101(1) explicitly states that prospective ineffectiveness means that a contract is ineffective from the time when the declaration is made and, accordingly those obligations under the contract, which, at that time have not yet been performed, are not to be performed.

Since the PCRs have opted for prospective cancellation, the Court must also impose alternative penalties.

These are provided under Regulation 102, which states that the contracting authority must pay a civil financial penalty, the amount of which is specified in the Court order and, which is payable to Minister of the Cabinet Office who must, on receipt of the penalty, pay it into the Consolidated Fund.

IV.2.E. Safe harbours from ineffectiveness

As explained in the previous chapter, the remedies directive provides for two safe harbours from ineffectiveness.[180] The PCRs provide for the exact same provisions.

[178] Dir.2007/66/EC, Art.2d(2)
[179] Reg.101(1)
[180] Ch.4-IV.2.D; Ch.4-IV.2.E

The first safe harbour is discretionary and is based on whether some overriding reasons of general interest require the contract to go ahead.[181]

The second safe harbour provides for an absolute exception from ineffectiveness when certain post-award steps have been taken by the awarding authority, most notably, the publication of a VEAT notice.[182]

The issues around these safe harbours have already been discussed in the previous chapter and the PCRs do not add anything since they simply reiterate the relevant remedies directive provisions.

Also, the relevant safe harbours have not been raised before the Court, therefore, there is no authority to support or clarify the interpretation of some ambiguous issues discussed in the previous chapter.

IV.2.F. Addressing consequential matters

Regarding consequential matters arising from ineffectiveness, Regulation 101(3)(b) provides that the High Court may make an order that it thinks appropriate for addressing consequential matters arising from ineffectiveness.

Such an order may address issues of "*restitution and compensation as between those parties to the contract… so as to achieve an outcome which the Court considers to be just in all the circumstances*".[183]

As no ineffectiveness declaration has yet been granted, the treatment of consequential matters between the parties is an uncharted territory. The wording of the PCRs clearly gives a free reign to the Court to adjudicate as it sees fit.

However, if such claim is ever raised before the Court, it is possible that it might reason incrementally and by analogy with existing precedents concerning disputes from invalid public contracts.

[181] Reg.99(3) and (7)
[182] Reg.100(1)(b)
[183] Reg.101(4)

Additionally, the Court may have to consider whether EU law imposes any limitations on this matter.

The next two subsections examine some possible remedial solutions that the Court might opt for considering the English law doctrines and reconsiders the possible restrictions that derive from the EU ineffectiveness remedy.

IV.2.G. Claims against the public entity

The first thing to consider regarding the possible claims that a contractor may have in case of an ineffectiveness order being made is how far he has any rights under the contract.

Since an ineffectiveness order can only affect the contract prospectively, any rights under the contract before the ineffectiveness is ordered are most likely enforceable.

Hence, payments for works, services or goods provided until that point can potentially be enforced by a contractor. However, what seems not to be a potentially successful claim is one for damages for profit losses under the contract.

As noted in the previous chapter this option is precluded by the very concept of the EU ineffectiveness remedy.[184] The PCRs also stipulate that contractual rights should cease to exist after an ineffectiveness declaration is made.[185]

Yet, the possibility that the Court might order damages that cover financial losses not connected with performance should not be excluded. The wording of Regulation 101(4) allows a wide margin of discretion to the Court "*to achieve an outcome which it considers to be just in all the circumstances".*

Hence, for instance, if a contractor had asked an authority whether the contract had to be tendered and the authority had erroneously denied this possibility, it

[184] Ch.4-IV.2.C; IV.2.F
[185] Reg.101(1)

could be possible that the Court grants an economic loss remedy based on a tortious ground.

This could be done either by reference to general common law doctrines, such as the tort of misfeasance in public office or the law of negligent misstatement (or misrepresentation) or by simply exercising its discretion set forth in the PCRs.

If a tort claim is the ground of redress, damages will aim to put the claimant back in the position held before the tort was committed by making good any losses caused.[186]

In the context of ineffectiveness, that would be any expenses relating to the performance of that contract, including possible investments for the execution of that contract.

As argued at chapter 4, the possibility of compensation based on tortious liability is not precluded by the EU ineffectiveness remedy, which does not touch upon subjective elements of fault.[187]

In any event, what seems to be likely is that restitution in value for any performance provided in return for which a contractor did not receive any payment will be ordered by the Court based either on the principles of restitution as discussed above or by simply exercising the discretion provided in the PCRs.

It is highly unlikely that such a claim would fail. The PCRs clearly suggest that they shall be some form of redress that would be just in all the circumstances.

There might be one exception in which the Court might consider creating a bar on a restitutionary or any other remedy. That is, when the contractor knew or perhaps should have known that he was entering an unlawful contract in the first place.[188]

[186] See on tortious remedies, Elliot & Quinn, 'Tort law' (11th edition, 2017, Pearson), ch.19
[187] Ch.4-IV.2.F
[188] See p.137 above

As argued at chapter 2, such a bar on recovery may create the right incentives and provide an additional layer of deterrence.[189] In the context of ineffectiveness, it may safeguard the effectiveness of this EU law remedy.

IV.2.H. Claims against the contractor

In that situation in which a public authority has made some advanced payments for which it received no performance in return because of an ineffectiveness declaration, the Court will most likely order recovery of such payments.

This may be done either based under the general law of restitution and by drawing an analogy with established precedents involving disputes for *ultra vires* public contracts discussed above; or by merely exercising its discretion under the wording of Regulation 101(4).

IV.2.I. Contractual provisions on risk allocation from ineffectiveness

Regulation 101(5) provides that the parties to the contract can, at any time prior to the declaration of ineffectiveness, agree by contract any provisions for the purpose of regulating their *"mutual rights and obligations"* in the event of such declaration being made.

In such event, the Court must not exercise its power to make an order under Regulation 101(3) in any way which is inconsistent with those provisions, unless and to the extent that the Court considers that those provisions are incompatible with the requirements of the ineffectiveness remedy.[190]

This approach on regulating consequential matters in case of an ineffectiveness order is particularly innovative as compared to the approach of other Member States that usually apply their standard private law rules.[191]

[189] Ch.2-V
[190] Reg.101(6)
[191] See Treumer & Lichère (edition), 'Enforcement of the EU Public Procurement Rules' (DJØF, 2011)

It encourages an ex-ante bargaining risk in the event of ineffectiveness. Hence, minimising transaction costs that may occur from litigation, and also creates certainty around the transaction.

To the author's knowledge, most of the public authorities covered by the PCRs have not inserted standardised provisions in their contracts regulating consequential matters.[192]

However, there are some public entities covered by the PCR's that do provide for such standardised provisions. For instance, the *Transport for London Standard (TFL) Contract of Services*[193] includes such provisions in clause 28.

Additionally, such standardised provisions are encouraged by the Office of Government Commerce Guidance.[194]

The issue that needs to be considered is whether such provisions are lawful under EU law and what can and cannot be done under such provisions.

It is submitted, that as a matter of principle, EU law does not exclude such provisions.

However, provisions regulating consequential matters cannot circumvent the purpose of the ineffectiveness remedy that is to restore competition around a particular contract and, more generally, in the public contract market.[195]

Hence, such provisions cannot go as far as to include compensation in the form of financial losses for obligations that have not been performed or, in fact, allow further performance of the contract.

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[192] The author checked various online sources that provide for standardised provisions on public procurement contracts. It looked at the Crown Commercial Service, Model Services Contracts, 1 April 2014 (last updated 26 May 2016) available here: https://www.gov.uk/government/publications/model-services-contract which do not provide for such provisions. Also, at the Office of Government Commerce (Archived files), Model Terms and Condition of Contracts, available here: http://webarchive.nationalarchives.gov.uk/20110602140545/http://www.ogc.gov.uk/Model_terms_and_conditions_for_goods_and_services.asp [last assessed 01.01.2018] which also does not provide such provisions. It also looked at Durham County Council Standard Terms and Conditions For Services, available here: http://www.durham.gov.uk/media/8388/Standard-Terms-and-Conditions---Services/pdf/StandardTermsAndConditionsForServices.pdf [last assessed 01.01.2018] also do not provide for such provisions.

[193] http://content.tfl.gov.uk/contract-for-services.pdf [last assessed 01.01.2018]

[194] 'Implementation of the Remedies Directive: OGC Guidance on the 2009 amending regulations Part 3: The new remedies rules' Office of Government Commerce, 18 December 2009, paragraphs 43 to 48.

[195] Ch.4-IV.2.F

To safeguard the remedy from the above potential risk, Regulation 101(6) provides that while the Court must not exercise its power to make an order addressing consequential matters when the parties have agreed to their mutual rights and obligations, yet it can exercise its power when such provisions are incompatible with the requirements of the prospective cancellation and the order of the Court.

IV.3. The impact of violation of the NHS Regulations

As explained at III.1 and III.2.D above, the NHS Regulations provide for a special enforcement regime applicable to contracts with NHS bodies.

This regime also provides under Regulation 14 for the ineffectiveness of a contract or a term and condition when certain violations take place.

Monitor, which is the enforcement body under the Regulation, has not hitherto used its power under Regulation 14 to declare any contract ineffective.[196]

In fact, the enforcement system under the NHS Regulations is not of practical significance, since no one brings cases under this system and Monitor does not exercise its powers in its own motion.[197]

The analysis below discusses the conditions that can trigger ineffectiveness (IV.3.A) as well as on the impact that this remedy has on the effects of a concluded contract (IV.3.B).

IV.3.A. Violations that may trigger ineffectiveness

Regulation 14(1) provides that a declaration of ineffectiveness (whether the whole contract or term of a contract) may take place when an NHS body has

[196] See here: https://improvement.nhs.uk/about-us/corporate-publications/publications/foi-nhsi-use-of-monitor-powers-to-declare-nhs-contracts-ineffective/ [last assessed 01.01.2018]
[197] Monitor seems to perform more of an advisory role. See Monitor, 'Annual report and accounts 1 April 2015 to 31 March 2016', Presented to Parliament pursuant to Schedule 8, paragraph 21(3)(a) of the Health Social Care Act 2012, 21 June 2016, HC 401

failed to comply with the general requirements of the Regulations, which mainly include situations that are likely to influence the outcome of competition.

Such violations include awards without competition, failure of advertising a contract, where conflicts of interest affecting the integrity of the procurement process have taken place, and where the NHS body has acted in a non-transparent and non-proportionate way.[198]

There is also a qualification that these violations are "sufficiently serious".[199]

As noted, Monitor has never exercised the power of an ineffectiveness declaration. Hence, the exact scope of this remedy can only be considered on a theoretical basis and according to the policy approach adopted by Monitor.

According to the policy paper "Enforcement Guidance on the Procurement, Patient Choice and Competition Regulations" Monitor will consider a range of factors in assessing the seriousness of the violation, including the nature and the scale of the adverse effect that a breach or potential breach has caused or may cause to health care service users.[200]

It will assess who has been or is likely to be affected, the number of healthcare service users affected or potentially affected, whether directly or indirectly, the actual or potential impact on those health care users, and the duration of any adverse effects or potential effects.[201]

It will also consider whether the NHS body's commissioner knew or should have known that its actions would risk non-compliance and whether the commissioner has previously breached the Procurement, Patient Choice and Competition Regulations.[202]

[198] Reg.14(2)
[199] Reg.14(2)(b)
[200] Monitor, Enforcement Guidance on the Procurement, Patient Choice and Competition Regulations' (n.30)
[201] Ibid.
[202] Ibid.

When deciding whether to make a declaration of ineffectiveness, Monitor will consider the effect that such a measure may have on health care services users and other third parties.[203]

It may decide not to make an ineffectiveness declaration if, for example, it concludes that it is not required to deter similar breaches or mitigate the effect of a breach, when it would have an adverse impact of health care services users, and when it would be disproportionate to the nature of the breach.[204]

In conclusion, Monitor has a wide discretion on whether to declare a contract or a term of a contract ineffective. In the exercise of determining whether such action may be taken, it will consider various factors, and it seems that ineffectiveness will only be triggered in highly exceptional situations.

IV.3.B. Consequences of ineffectiveness

Regulation 14(3) provides for the consequences of ineffectiveness. When Monitor decides to make a declaration of ineffectiveness, the contract will be considered void.

This means that the contract will no longer be valid and neither the commissioner of the relevant NHS body nor the provider will be able to enforce it.[205]

For example, if it declares that a contract awarded by a commissioner to a provider for certain services is ineffective, the commissioner will not be able to require the provider to provide the services and the provider will not be able to require the commissioner to pay it to provide the services.[206]

However, a declaration of ineffectiveness will not affect the validity of anything that has already been done pursuant to the contract, any right acquired, or

[203] Ibid.
[204] Ibid.
[205] Ibid.
[206] Ibid.

liability incurred under the contract or any proceedings or remedy in respect of such a right or liability.[207]

In conclusion, the contract or term of the contract is considered prospectively void. Any remedial rights under the contract will not be affected and it is expected that certain provisions in the contract will regulate issues of compensation in case a declaration of ineffectiveness is made.[208]

V. Unilateral remedying of public law violations

As suggested in chapter 2 the less costly and time-consuming way for a public law violation to be remedied after a contract is concluded is through the exercise of some unilateral corrective action on the part of the public authority.[209]

This section examines how far public authorities can remedy unilaterally an unlawfully concluded contract. It examines under what conditions they can 'legitimately' (i.e. will not amount to wrongful repudiation) intervene in the contract by terminating or modifying it to correct or mitigate their unlawful decisions.

It is submitted that in English law a public entity has such powers, albeit limited ones, under common law. Additionally, such powers are provided under EU law and Article 73 of the EU directive implemented by Regulation 73 of the PCRs.

The next section (V.I.) examines the common law powers and section V.2 examines the implementation of the powers conferred under Article 73 of the EU directive. Section V.3 examines how consequential matters are treated in the event of unilateral intervention to the effects of a contract. Section V.4 concludes.

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[207] Ibid.
[208] See NHS TERMS AND CONDITIONS FOR THE SUPPLY OF GOODS (CONTRACT VERSION) clause 34 available here: https://www.gov.uk/government/publications/nhs-standard-terms-and-conditions-of-contract-for-the-purchase-of-goods-and-supply-of-services [last assessed 01.01.2018]
[209] Ch.2-III.2

V.1. Common law powers

Historically, the government enjoyed some special powers vis-à-vis the other party to the contract.[210] This special position is justified by the fact that the government must always act in the public interest.

Hence, contracts cannot hamper its freedom to exercise discretionary powers when this interest requires so.[211]

The usual measure when exercising such discretionary powers was to discharge the contract at an early stage.[212] The unilateral termination of a contract, however, is not without limits.

The courts have made it clear that such measure could only be used very restrictively and only in those situations where the government is acting in the general public good and is a necessary measure of a general kind that affects the nation as a whole.[213]

As the courts have put it, the power to unilaterally terminate a contract does not mean that the government can escape from any contract which it finds disadvantageous by saying that it never promised to act otherwise but for the public good.[214]

Consequently, in practice, any legitimate unilateral intervention to the effects of a contract mainly depends upon whether contractual provisions have been made in this respect.[215]

It is, in fact, the case that the general principles of the law of contract do not give to public bodies the power to unilaterally intervene in a contract by early terminating or modifying it.[216]

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[210] See generally, Turpin, 'Government Contracts' (Penguin Books, 1972)
[211] *R v IRC ex.p. Preston (1983); Town Investments (1978); Crown Lands Commissioners v Page (1960)*
[212] See, Turpin, (n.210), chapter 8
[213] *Page (1960)*
[214] Ibid.
[215] Turpin, (n.210), p.241.
[216] Trybus, & Craig, 'Angleterre et pays de galles/England & Wales' in Noguellou & Stelkens edition, 'Droit compare des contrats publics/Comparative law on public contracts' (2010, Bruylant), p.350

Diachronically, such contractual provisions regulating legitimate unilateral intervention have always been included in government contracts, under the term "break clauses" and they seem to still be present today.

Some anecdotal evidence from standard model terms and conditions of contracts for government bodies suggests for the insertion of "break clauses" which allows for early termination in the discretion of a governmental body as a precautionary measure in case of changes on government policy or when other unexpected events might require it.[217]

Such clauses have been described by the Office of Government Commerce (now the Crown Commercial Service) as very important and should be included as a precautionary measure as changes on government policy or other unexpected events might require a public entity to terminate the contract.[218]

However, more recent model contract terms do not seem to provide for clauses of such wide scope,

The Crown Commercial Service (CCS) Model Service Contract terms refers to "termination for convenience clauses" according to which a public entity can terminate the contract at any time but makes only explicit reference to termination due to the violations of Article 73 of the EU directive without providing other explicit grounds upon which unilateral termination may legitimately occur.[219]

In any event, common law powers are restricted and unilateral power can better be exercised according to contractual clauses agreed upon by the parties. The exact scope is not completely defined since it depends on each individual contract.

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[217] See for example, See OGC (Archived files), Model Terms and Conditions of Contracts, available here: http://webarchive.nationalarchives.gov.uk/20110602140545/http://www.ogc.gov.uk/Model_terms_and_conditions_for_goods_and_services.asp [last assessed 01.10.2017] clause H3

[218] OGC (Archived files), Guidance notes on goods and services explaining clause H3 available as above [last assessed 01.10.2017]

[219] CCS, Model Services Contracts, 1 April 2014 (last updated 26 May 2016) clause 33 available here https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/731710/Model_Services_Contract_v1.04__E_W___1_.pdf [last assessed 01.10.2017]

The scope of this research does not provide for a quantitative analysis on how far public contracts in the UK contain such clauses and what situations do they cover.

V.2. Unilateral termination pursuant to PCR 73

Regulation 73 of the PCRs has transposed the EU law requirement of empowering contracting authorities at every level to terminate an existing contract.

Regulation 73 did not opt to include other violations that could give the right to a contracting authority to terminate an existing contract.

Hence, the three violations that allow unilateral termination are the following: (i) the unlawful modification of contract, (ii) a contract that has been concluded with a contractor who should have been disqualified from the awarding process, and (iii) the contract should not have been awarded due to a serious violation of EU law.

Two things should be noted about this unilateral power. The first is that Regulation 73(1) makes it clear that it is up to the discretion of a contracting authority to terminate a contract or not. Public authorities can simply refrain from exercising such power even if the relevant violations have taken place.

The second is that Regulation 73(3) clarifies that when provisions for termination are not provided within the terms of the contract, such power shall be an implied term of the contract.

In other words, Regulation 73 overrides the absence of express contractual terms by providing a statutory basis for such unilateral power to be exercised.

V.3. Consequences of unilateral termination

This subsection explains the type of compensation that a contractor will be entitled to in case of a legitimate unilateral termination to the contract.

As noted, the clearest grounds - provided by recent model terms - according to which public authorities can unilaterally remedy a violation are those provided under Article 73 of the EU directive.

In a case where a contracting authority has exercised this power, Regulation 73(2) provides that consequential matters should be treated by express contractual provisions.

Therefore, to ascertain possible approaches addressing consequential matters, these standard model contract terms should be examined.

The CCS Model Services Contract provide in clause 34.3 provides that that in case a contracting entity terminates the contract due to a violation found by the CJEU pursuant to Art.258 TFEU then it shall pay the supplier compensation under the "termination payment" and the "compensation payment". These payments shall be the sole remedy.

These types of payments are provided in a different document that is labelled as "combined schedules".[220] The calculation of these types of payments are complex but, putting it broadly, the amount of compensation should generally cover, at least to some extent, unexpected losses occurring because of the termination.

Covering unexpected losses to a contractor due to early termination for a violation by a public entity that could not be foreseen ex-ante does not raise any problems of compatibility with the EU policy behind Article 73 of the directive. This would be the case for termination pursuant to a serious violation of EU law as declared by the CJEU.

[220] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/526359/Combined_Schedules__Model_Services_Contract__v1.04.pdf [last assessed 01.10.2017]

However, this amount of compensation may be problematic when an unlawful modification of a contract has occurred. In such an event, as already argued in the previous chapter, the violation is akin to a direct award and any compensation should, in principle, satisfy the *ratio* of the EU ineffectiveness remedy.[221]

Hence, the cost of termination in such case should lie where it falls. The CCS Model Services terms do, in fact, make a distinction as to how consequential matters are to be treated when an unlawful modification has taken place and provides at clause 34.5 that in such case the cost of termination should lie where it falls.

As for the second violation under Regulation 73 regarding that situation where the contract has been entered into with a provider who should have been excluded from the procurement process due to a conviction of a criminal nature, the CCS terms do not provide how consequential matters are to be treated.

This seems to be the kind of violation under Article 73 that could *a priori* create a bar to any form of financial compensation. Arguably, any contractor would be aware of his disqualification and any attempt to contract may be effectively deterred by such measure.

Having looked at how consequential matters may be treated for termination pursuant to Article 73, the next issue is to look at is what happens when termination is based on common law powers and the break clauses.

Historically, such clauses would address consequential matters. The usual practice was that there was a standard clause for compensation of the contractor, in a measure less than that of contractual damages.[222]

As Mitchell has highlighted it would be inappropriate to attach liability in contractual damages to action taken a matter of necessity in the public interest,

[221] Ch.4-V.6
[222] Turpin, (n.210), p.244

and a more limited duty to compensate the other contracting party for loss actually sustained in preferable.[223]

As explained, the most recent model contract terms by the Crown Commercial Service do not address this matter. However, the older model contract terms and conditions version by the Office of Government Commerce do so.[224]

According to this latter model contract, clause H3 provides that in case of an early termination under a breach clause, the contractor is only entitled to compensation based on services performed in accordance with the contract up to the date of termination.[225]

VI. Alternative remedies to aggrieved competitors

This section examines the type of alternative remedy that is available to third-parties, notably aggrieved competitors, in that situation where the contract has been entered and there is no possibility of challenging the effects of such contract.

In such situation, aggrieved competitors with a direct financial interest to the contract may claim for a damages award.

The remedy of damages is usually available under explicit provisions in the statutory instruments regulating the award of public contracts. This is the case, for instance, for EU law violations under the PCRs, or for violations of the Local Government Act 1988.

A remedy of damages may also be available under common law rules.

This section outlines the type of violations that can trigger the remedy of damages as well as the scope of a damages award available to third-parties.

[223] Mitchell, 'The contracts of public authorities: a comparative study', (1954, LSE), pp. 228-231.
[224] (n.217)
[225] Similar approach is provided under the TFL standard contract terms, (n.193) at clause 27.

It first examines the remedy of damages in the context of the PCRs and then briefly examines this remedy under the common law rules and other legal instruments.

VI.1.A. Damages claims under the PCRs: Conditions

Regulation 98 regulates the type of remedies available when the contract has been entered into. It provides for the ineffectiveness remedy as described above and for the award of damages.

As noted in the previous chapter, EU law does not set with clarity whether a damages award should be available for all violations or whether it is subject to a requirement of showing a sufficiently serious breach under the doctrine of State liability.[226]

The domestic approach in the UK regarding this matter is that for EU law violations, there must be a sufficiently serious breach, as per the *Francovich* conditions.

More specifically, the Court of Appeal in *Energy Solutions EU Limited v Nuclear Decommissioning Authority*[227] held that violations under the PCRs should be recoverable as of right where any breach can be shown to have caused loss and it does not depend on the gravity of breach or any such factor.

This case reached the Supreme Court which overturned the decision of the Court of Appeal.[228] It held, inter alia, the PCRs do not go further than EU law requires by conferring a power to award damages in respect of loss or damage suffered by an economic operator in the case of any breach, as opposed to only a "sufficiently serious" breach.

[226] Ch.4-IV
[227] *[2015] EWCA Civ. 1262*
[228] *Nuclear Decommissioning Authority v EnerySolutions EU Ltd (now called ATK Energy EU Ltd) [2017]*

VI.1.B. Damages claims under the PCRs: Scope

The PCRs does not provide explicit provisions regarding the scope of a damages award. Since, however, such claim can be categorised as one in tort for breach of statutory duty, an aggrieved supplier may claim for loss suffered.[229]

In *Harmon CFEM Facades (UK) Ltd v The Corporate Officer of the House of Commons*[230] the High Court held that damages under this principle were available under either (i) "loss of chance" or (ii) "full lost profits".

For loss of chance to be recoverable an economic operator must probably show a substantial chance that it would have been awarded the contract if the breach of duty had not occurred.[231]

He would then be able to recover any "profit" – in the sense of any difference between expenditure on the contract and the price that would have been obtained – which it would have made on the contract, discounted to reflect the value of the chance.[232]

A claim for the recovery of tender costs is also available to the extent that had the tenderer won the contract then he would have recovered the costs of tendering from the amounts paid under the contract.

Accordingly, such a claim is relevant only if nothing is awarded in respect of loss of gross margin.[233] Additionally, such claim could also possibly succeed in that case in which the claimant can show that he would not have tendered at all had the rules been followed.[234]

[229] See Arrowsmith (2005), (n.172), p.1379
[230] *[2002] 2 L.G.L.R. 372*
[231] Arrowsmith, (2005) (n.172) p.1422
[232] Ibid.
[233] *Harmon [2002] 2 L.G.L.R. at [18]*
[234] Arrowsmith, (2005), (n.172) p.1423

VI.2.A. Damages claims for public law violations: Conditions

There is no general right to damages for a person suffering loss due to an unlawful administrative action.[235]

Where there is a breach of statutory duty, damages may be claimed for loss suffered under the tort of breach of statutory duty.[236]

However, it is not every breach of statutory duty which gives rise to a cause for an action in damages.[237]

This depends on whether the courts consider that the legislature intended that compensation should be an available remedy in a particular case.[238] Courts will rarely find such an intention, especially for breach of public law duties.[239]

However, damages are available under the tort of misfeasance in public office. Such tort occurs when a holder of public office who knowingly acts illegality and, either knew or should reasonably have known that third parties would suffer loss as a result.[240]

In the context of public contracts, under this tort action, damages may be given for loss suffered from a legal violation during a contract award procedure by a public authority, when the authority knows that it is violating the law, and also when the authority appreciates that its action may violate the law but disregards the risk.[241]

Furthermore, some statutes expressly provide for a right of damages in case of a breach.

For instance, s.19(7) of the Local Government Act 1988, gives a right to damages for a breach of the duty of local authorities not to have regard to certain "non-commercial" considerations in awarding contracts.[242]

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[235] Ibid., p.1329
[236] Ibid.
[237] Arrowsmith, 'Civil Liability and Public Authorities' (Earlsgate, 1992), chapter 7
[238] Ibid p.201-204
[239] Ibid p.202
[240] Ibid pp.226-234
[241] Arrowsmith (2005), (n.172) pp.1380
[242] Ibid., pp.98-102

Additionally, Regulation 75 of the Health and Social Care Act 2012 provides for the possibility of an action on damages where the NHS Regulations have been breached.

Finally, an action for damages may be based on breach of an implied contract. The implied contract doctrine is a common-law concept with particular significance in regulating public tendering in some common law jurisdictions such as Canada and Australia.[243]

The leading authority is *Blackpool and Fylde Aero Club c Blackpool Borough Council*[244] where the Court of Appeal held that public authorities inviting tenders and prescribing procedures for their submission accepts the obligation to consider all the bids submitted in accordance with the rules prescribed in the tender document and failure to do so constitute a breach of contract.

The breach of contract in *Blackpool* was implied by law based on a specific relationship between the parties rather than on a specific agreement between those parties on the facts.[245]

The exact nature of the implied contract doctrine and the point at which contractual obligations arise are not clear.[246] It seems that it imposes an obligation to public authorities to consider tenders and to do so in good faith.[247]

However, it is not clear how far there is an obligation to consider all tenders in fair transparent and equal manner, and breach of such obligation may give rise to a breach of an implied contract.[248]

[243] Arrowsmith, (1994), (n.9), p.137; Seddon, 'Government Contracts: Federal, State and Local' (4th edition, FD, 2009), pp. 326-342. See, *Hughes Aircraft Systems International v Air Services Australia [1997] F.C.R. 151*
[244] *[1990] 3 All E.R. 25; [1990] 1 W.L.R. 1195*
[245] Arrowsmith (n.2), p.136
[246] Ibid., pp 138-143
[247] Ibid.; see *JWB Group v Ministry of Justice [2012] EWCA Civ. 8*
[248] See the courts views in *JWB Group*, ibid and those in *White*, (n.158)

VI.2.B. Damages claims for public law violations: Scope

When a tortious ground is successfully raised for a violation of a public law rule, the scope of damages is the same as described at VI.1.B above.

The exception to this is when legislation prescribes for a different scope. For instance, section 19(8) limits the scope of damages to the expenditure reasonably incurred by a tenderer for the purpose of submitting the tender.

Hence, under this provision, a damages award only covers the cost of tendering and a claimant may not claim for loss of chance or full lost profits.

As for the implied contract doctrine, the scope of damages is to be determined by the loss of chance principle described at VI.1.B above.[249]

Although the underlying principle is different (a contractual basis as opposed to a tortious basis), a breach of an implied contract will give the same result as a tort claim for non-compliance with public law rules: damages will be given to put the aggrieved supplier in the position in which it would have been if there had been no breach of the procedural obligation in question.[250]

VII. Concluding remarks

The examination of UK law reveals many interesting findings.

First, it was noted, that English law draws an almost conceptual distinction between violations related to the subject matter of a contract and violations related to the award procedure of concluding a contract.

In the former case, the courts have in various instances declared that a contract that has been the result of an *ultra vires* action by a public authority is automatically unenforceable.

[249] Arrowsmith (2005), (n.172), p.1385
[250] Ibid.

With regards to the violations related to the contract award procedure, English law, generally, allows such contract to go ahead. It was explained that there are two potential exceptions to this rule.

The first is when a breach of the public law principle of procedural propriety in the narrow sense is found. This means that the transaction must have involved bad faith or some other improper purpose on the part of the public authority.

Such an act will be rendered *ultra vires*. Consequently, so will the contract. The impact of this is to render the contract invalid.

The second exception is when legislation prescribes that certain violations can have an effect on a contract. The most notable examples of this rule are the EU ineffectiveness remedy under the PCRs and the ineffectiveness remedy under the NHS Regulations.

Regarding the EU ineffectiveness remedy, it was explained that the PCRs do not add anything sufficient in the wording of the remedies directive.

Regarding the remedy of ineffectiveness under the NHS Regulations, it was shown that this is a highly discretionary remedy which Monitor may trigger or not according to the circumstances. It was explained that this remedy has not operated in practice.

Second, it was examined was how consequential matters are regulated in that case in which a contract is rendered void.

In the context of *ultra vires* contracts, it was shown that the default remedy is that of restitution based on the law of unjust enrichment. This remedy is available to both parties and, generally, it will not be denied.

In the context of the EU ineffectiveness, the PCRs has opted for prospective termination. The PCRs confer a wide power of discretion to the High Court to decide on consequential matters as it sees fit.

It was suggested that the Court would have to consider the rationale of the ineffectiveness remedy, which is to restore the level playing field and hence,

some losses based on the contract will evidently have to be absorbed by the contractual parties.

Third, it was examined, how far and which third parties can challenge the effects of a contract. It was explained the conceptual problem that exists under English law of rendering contractual decisions subject to judicial review.

In particular, it was explained that there are no strictly defined conditions that will render a contract reviewable on public law grounds as the courts have exercised a margin of discretion to decide on this matter and their decisions have often been unclear.

It was also explained that on the condition that a public law matter is successfully raised – the pool of successful challengers is not limited to aggrieved competitors, but a wider pool of third-parties can challenge the legality of a contract.

Conversely, under the EU ineffectiveness remedy the spectrum of third-party potential challengers is limited to actual or potential bidders.

In respect to rights of aggrieved competitors, it was also examined the type of remedy available to them to when either they cannot challenge the effects of a contract or such remedial measure is not effective.

It was explained, that the remedy of damages is available in such situations. A damages remedy may be available under statutory provisions or under common law rules.

The scope of damages depends on the type of violation that is raised. When legislation does not prescribe such scope, then the usual method of calculating damages for breach of statutory duty will apply.

Finally, this chapter examined how far public authorities that are party to a contract may unilaterally intervene to the contract to correct a public law violation.

To this end, it was suggested that such overriding power has a very narrow scope under common law rules.

Unless such terms are expressly provided in the contract or are implied by legislation, any attempt to intervene to the contract unilaterally may raise an action for wrongful repudiation and consequently contractual breach.

Consequential matters in case of a legitimate unilateral termination also depend on the express terms of a contract. The examination of some model contracts for the public sector seems to suggest that, generally, compensation is calculated based on performance and not the value of the contract.

Chapter 6

Greek law

I. Introduction

This chapter examines the position of the law of Greek law regarding that situation where a public contract has been entered unlawfully - that is, in violation of those rules that regulate the contractual activity of public authorities. It examines both the domestic rules applicable and the impact of EU law on this matter.

The examination of Greek law is interesting both from a doctrinal perspective (i.e. (i) a civil law system with a distinct system of administrative contracts and (ii) the interaction between EU and national law) and due to the socio-economic characteristics in which the public contract market operates (e.g. phenomenon of corruption and favouritism) which may often lead to the conclusion of unlawful contracts.

The chapter is organised in the same systematic manner as the previous chapters. First, it introduces briefly the substantive legal framework. Second, it introduces the external enforcement mechanisms. Thirdly, it analyses the impact of the public law violations on concluded contract. Fourthly, it explains the scope and availability of unilateral intervening powers to remedy unlawfully concluded contracts. Fifth, it examines the alternative remedy available to aggrieved competitors when the effects of an allegedly unlawfully contract cannot be challenged.

II. The substantive legal framework

The substantive legal framework applicable to the contractual function of public authorities is composed by (i) public law - provisions of the Constitution and the general principles of administrative law, (ii) the EU rules and general principles as discussed in chapter 4, and (iii) various other 'specialised' legal instruments regulating the procurement function public authorities.[1]

II.1. Constitutional and administrative law restrictions

Constitutional provisions set out explicit limitations regarding the contractual capacity of public authorities.

Article 14(9) prohibits public authorities from entering contracts with economic operators whose owner, partner, main shareholder or management executive is the same as that of a media undertaking. This prohibition is extended to any form of intermediaries, such as spouses, relatives or financially dependent persons or companies.

L.3310/2005, (as amended by L.3414/2005) implements the application of this Constitutional provision.

Moreover, Article 98(2) requires public contracts of a high value to be reviewed by the Court of Auditors.

Additionally, Article 5(1) requires the State to protect the economic rights of individuals, including the right to enter into contracts with public authorities.

In addition, Article 57(α) prohibits the assignment of public contracts to economic operators, whose owner, partner or main shareholder is associated with a member of the parliament.

Similarly, Article 81(3) of the Constitution as implemented by Article 18(2) of L.1558/1985, prohibits the assignment of public contracts to economic

[1] See for a full account: Raikos, 'Δίκαιο Δημοσίων Συμβάσεων' (2014); Tomaras, 'Οι διοικητικές συμβάσεις', (2009)

operators, whose owner, partner or main shareholder is associated with a member of the central government.

Finally, Article 32(9) of the Parliamentary Regulations requires the Parliament to be informed of every contract made on behalf of ministries or State-owned enterprises whose value is above 20 million Euros.

General administrative law principles and legal instruments also constitute part of the substantive legal framework of public contracts.

More specifically, the general principle of legality imposes a limitation according to which public authorities are bound to contract *secundum legem,* i.e. only if the law provides for the possibility to contract.[2]

Hence, unlike private individuals, whose only limitation in contracting is when the law prohibits doing so, public authorities are only entitled to enter into a contract where the law so allows and for the purpose that it does.[3]

For instance, L.2362/1995 (as amended by L.3871/2010) - which regulates public finances and public spending and provides at Articles 79 to 84 strict requirements for contracts of a certain value (<€2.500) - states at Article 79 that public authorities are not allowed to tender contracts which would impose obligations on the administration if this possibility is not provided for by some general or specific provision of law and if the contract does not serve a purpose provided by law.

Moreover, administrative law instruments prescribe that public authorities must have the competence to contract, that they must follow procedural and substantive legal requirements, and cannot use their public law powers for improper purposes.[4]

[2] Moukiou, 'Η αρχή της νομιμότητας και οι συμβάσεις του δημοσίου και των ΝΠΔΔ' Διοικητική Δίκη, (1997) pp. 288-299
[3] Lazaratos, 'Η ευθύνη απο διαπραγματεύσεις στις δημόσιες συμβάσεις – Με αφορμή τις ΣτΕ-451/2013, 1943/2013' (2015), p.21
[4] PD-18/1989

II.2. EU rules

The legislation implementing the EU rules was amended in August of 2016 to incorporate and implement the rules of the 2014 EU directives and to consolidate and reform the legal framework on public contracts.

The current legal instruments in force are L.4412/2016 which implements Directives 2014/24/EU and 2014/25/EU, L.4413/2016 which implements Directive 2014/23/EU, and L.3978/2011 which implements Directive 2009/81/EC.

These legal instruments provide rules both for the award of the contract as these are mainly stipulated in the directives but also detailed rules regarding the execution and management during the life cycle of the contract.

These legal instruments have amended and simplified to an important extent the previous complex and cumbersome regulatory framework.[5] They have done so in many respects, including - as it is examined later below – in relation to the review system.

Finally, the EU general principles also constitute part of the substantive legal framework, especially the requirement of equal treatment of economic operators from the other Member States.

II.3. Specialised legal instruments

Public contracts in Greece were regulated by various legal instruments which made the system complex and cumbersome.

Most of these legal instruments have now been amended by the 2016 rules described above as part of the reform and modernisation program.

[5] According to an OECD report, the complex regulatory framework has been one of the main reasons of inefficient public expenditure in Greece: OECD (2014), 'Measurement and Reduction of Administrative Burdens in Greece: Final Report Public Procurement'. Similar remarks have been made by the EU Commission (2016): EU Commission, 'Public procurement – study on the administrative capacity in the EU: Greece Country Profile'

However, there are still some of these legal instruments in force, such as L.3580/2007 and L.2955/2001 that regulate healthcare sector procurement, and L.3463/2006, which is a codifying Act regulating the conduct of the municipalities and local authorities and includes rules for their procurement function.

III. Control, review and enforcement mechanisms

This section outlines the relevant control and enforcement mechanisms applicable to public contracts and is organised as follows: first, it examines the applicable institutional centralised review and control mechanisms and then examines the judicial review procedures.

III.1. Institutional review mechanisms

It should be emphasised from the outset that traditionally there has been a strong tendency in Greece to overregulate the contractual function of public bodies and establish various impartial mechanisms in order combat phenomenon of corruption and favouritism in the public contract market.

One of the results of this overregulation is the establishment of two different review mechanisms for public contracts. One of these is semi-judicial in nature and is performed by the Court of Auditors, while the other is administrative in nature and performed by the Single Public Procurement Authority.[6]

These review tools are considered a method to respond to intentional or unintentional irregularities that appear frequently within the Greek administration.

The scope and function of these bodies are examined separately below.

[6] The National Council for Radio & Television also has a review function but is not examined here due to limits of space and its insignificant impact in practice.

III.1.A. Court of Auditors

Article 15 of L.2145/1993 first introduced an optional pre-contract review mechanism regarding the legality of high-value public contracts by the Court of Auditors (hereafter CoA). The fact that this review mechanism was not mandatory at that time has been criticised in literature.[7]

The need for more transparency in the management of public spending required the review to become a compulsory process.[8] Hence, Article 8 of L.2741/1999 amended the previous regime to establish a mandatory review process for high-value public contracts and to broaden the pre-contractual review powers of the CoA.[9]

To establish the mandatory nature of this review procedure, Art.8(1) of L.2741/99 provides that omitting to submit a public contract before the CoA results in the contract being rendered automatically void.[10]

Moreover, Article 98(2) of the Constitution states that the auditing process for "high-value"[11] contracts made by the State or a legal entity equivalent to the State is mandatory.

The reasons for establishing this mechanism at the Constitutional level are political. Mainly, it responded to the wish of Parliament to minimise the negative public opinion that contracts were often the result of illegal activity.[12]

The scope of the CoA pre-contractual review is relatively broad.[13] The CoA primary function regarding public contracts conducts is to review the lawfulness of public finances aspects of a contract.[14] It is also responsible for reviewing

[7] Karavokiris, 'Ο προσυμβατικός έλεγχος νομιμότητας απο το Ελεγκτικό Συνέδριο', (2008)
[8] Tomaras, (n.1) p.96
[9] While "high-value" contracts are subject to a compulsory pre-contractual review process (see below), lower value contracts are subject to a discretionary review process pursuant to Article 14(2) of L.2702/1999
[10] See also L.4129/2013, Articles 35(1) & 36(4)
[11] The exact amounts are defined in L.4129/2013. Works and Services: 1.000.000 Euros. For co-funded projects (EU funds) 10.000.000 Euros.
[12] Balta, 'Ο προοληπτικός έλεγχος των συμβάσεων δημοσίων έργων, παροχών υπηρεσιων και προμηθειών απο το Ελεγκτικό Συνέδριο' (2005)
[13] It has been described as "maximalistic" and going beyond the purpose of the powers conferred by the Constitution, Milioni, 'Το Ελεγκτικό Συνέδριο. Σύγχρονες τάσεις και εξελίξεις', (2012), σ. 201
[14] Delli, 'Το εύρος του προσυμβατικού ελέγχου νομιμότητας απο το Ελεγκτικό Συνέδριο' (2013)

the legality of the various procurement decisions leading to the conclusion of a contract.[15]

The CoA must conduct the review and reach a decision within 30 days from the date that the relevant documents are submitted.[16]

Its review decisions are not subject to challenge before the jurisdiction of the Supreme Administrative Court - the Council of State.[17]

III.1.B. SPPA

L.4013/2011 established the creation and operation of the Single Public Procurement Authority (SPPA), whose main function has been to submit a comprehensive plan for the reform of the public procurement legislation.[18]

The SPPA's responsibilities include managing central government procurement of works, supplies and services, providing policy advice to the legislature, and providing guidance to awarding authorities on the application of procurement law and regulation.[19]

Furthermore, the SPPA is responsible for reviewing the legality of all contracts signed by public authorities under the negotiated procedure without publication of a contract notice.[20]

Its decisions regarding the use of this procedure are binding to public authorities and constitute an executable administrative act that can be challenged in an annulment action.[21]

[15] Ibid
[16] L.4129/2013, Art.32(6)
[17] Art.98(3) of the Constitution, *ΣτΕ*-1139/2008
[18] See for more detail, Explanatory report of L.4013/2011 (only available in Greek).
[19] EU Commission, 'Public procurement – study on the administrative capacity in the EU: Greece Country Profile' (2016), 221-227; Venetsanaki, 'Η ενιαία ανεξάρτητη αρχή δημοσίων συμβάσεων: πανάκεια της παθογένειας της δημόσιας διοίκησης ή αναγκαιότητα των καιρών' (2013); Raikos, (n.1) pp. 521-544
[20] Art.2, L.4013/2011
[21] Raikos, (n.1) p.530

The requirement to submit the decision to use the negotiated procedure before the HSPPA constitutes a 'mandatory requirement of law' and failure to do so has as a result, the contract being rendered invalid.[22]

III.2. Judicial review

This section outlines the judicial review system of challenges to decisions of public authorities.

Stemming from a long tradition where public contracts were treated as a matter of public law, Greece provided a complex system of review both regarding procedural and substantive law aspects.

However, recent developments in the law have simplified the process of challenging contractual decisions of public authorities.

For the purposes of simplicity, and to provide a clear outline on how the judicial review system operated and the impact of the recent legal developments, this section is organized as follows.

Firstly, it briefly analyses the distinction between public and private law in the regulation of public contracts.

Secondly, it examines the framework provided by L.3886/2010, which was the domestic law that implemented the EU remedies directive of 2007 and has been for many years the most important and frequently used legislative instrument on ad hoc enforcement.

Thirdly, it explains the procedures applicable to public law contracts that are governed by public law (administrative contracts).

Fourthly, it looks in some detail the changes introduced by section IV of L.4412/2016 and their impact on the system of judicial review. It is explained

[22] See further section IV below.

that these changes have changed drastically the landscape of the challenges system for most types of public contracts for works, goods and services.

III.2.A. A distinction between public and private law

Under the Greek legal system, the contractual function of public authorities and consequently the remedial system that covers it is generally governed by public law.

However, not all contracts made by public authorities are governed by public law. The Greek administrative legal system - influenced by the French administrative law system - makes a distinction between administrative law contracts that are governed by public law principles and public contracts that are governed by private law. The latter type of contract is much less common.

It is of a public nature (administrative contract) if the following cumulative criteria are met:[23] (i) it is concluded between a State body or a local authority or on behalf of such entities, on one hand, and private individuals, on the other hand (the functional criterion (I)), (ii) the subject matter of the contract must aim to serve the public interest (the purposive criterion), and (iii) it provides for an exceptional contractual legal regime (*régime exorbitant*), that confers on the public body a predominant position *vis-à-vis* the contractor (the functional criterion II).[24]

If the above criteria are not cumulatively met, then the contract is to be considered of private law nature and falls under the ordinary private law rules.[25]

For enforcement purposes the categorisation to public-administrative contracts and public-private contracts is of particular practical importance because the nature of the contract will consequently affect which Court will have jurisdiction

[23] See indicatively Council of State decisions: *ΣτΕ-5067/1995; 5895/1995; 1886/1996; 3486/1996; 4014/1996.*
[24] Koutoupa-Rengakos, 'Enforcing the Public Procurement Rules in Greece', in Arrowsmith, (edition), 'Remedies for Enforcing the Public Procurement Rules', (1993), chapter 12
[25] Under the French system of *les contrats administratifs* the criteria do not have to be cumulative, but the first criterion must be combined with one of the other two. See, *Richer, 'Droit des contrats administratif', (*L.G.D.J, 2016*)* pp. 120-123

to adjudicate (i.e. administrative courts or ordinary civil courts) and it will also affect the type of law that will apply (i.e. administrative law or private law) which subsequently defines the type of procedure that is followed and the remedies that are available.

This type of fragmented dualistic system between public and private law has been highly criticised in the literature.[26]

However, it should be noted here and is discussed in more detail below, that section IV of L.4412/2016, which provides the rules on enforcement procedures and remedies, explicitly states at Art.345 that the provisions of section IV apply to all disputes that arise during the award procedure of a contract, as well as in disputes arising from modification of contracts, with a predicted value of <60.000 euros (excluding VAT) and irrespective of the nature of the contract.

Moreover, Art.3(2) of L.4412/2016 explicitly provides that it covers all contracts made by public authorities, regardless of whether these contracts aim to fulfil a public interest or not.

Thus, for the purposes of L.4412/2016, the distinction between contracts governed by public, private or EU law is negated, and the only criterion is that of the economic value of a contract. For contracts below the prescribed value, the distinction between public and private contracts is still applicable.

III.2.B. Review under L.3886/2010

The review framework provided by L.3886/2010 was the most important system of enforcement and where a considerable number of claims have been brought.

A brief explanation of this review system is particularly important to understand the changes that L.4412/2016 have introduced.

[26] Remelis, 'Διοικητική αρμοδιότητα και ιδιωτικό δίκαιο' (2006)

(i) scope

Article 1(1) provided that any dispute that arises and which relates to any stage prior to the conclusion of a public contract of works, goods, and services and is subject to Directives 2004/17/EC and 2004/18/EC, falls under the scope of this law.

Article 1(2) further ads that L.3386/2010 also covers disputes regarding the award of framework agreements, concession contracts and the award of contracts under a dynamic purchasing system regardless of the value of these contracts.

Early literature has debated whether, in fact, the wording of this provision meant that L.3886/2010 applied equally to violations above and below the EU threshold.[27]

The position that prevailed in jurisprudence was that L.3886/2010 only applied to contracts that fall within the relevant EU threshold.[28]

This dual system of remedies has been criticised for being unconstitutional.[29] It is also true that a two-layer review system was unnecessary and had no real justification, especially since L.3886/2010 was designed to provide more effective judicial protection than the one that existed prior to its introduction.

(ii) procedures and remedies

Article 2 of L.3886/2010 provides the types of judicial protection. It states that *"any interested party.... is entitled to claim according to the relevant provisions of this law temporary (interim) judicial protection, annulment of the unlawful act of the contracting authority or of the concluded contract and damages"*.

[27] Vlachopoulos, 'Οψεις της δικαστικής προστασίας ενώπιων του ΣτΕ: το παράδειγμα του Ν.2522/1997 για τα δημόσια έργα', (1998)
[28] *ΣτΕ-710/2008; ΣτΕ-378/2007; ΣτΕ-77/2005; ΣτΕ-374/375/2005; ΣτΕ-399/2005; ΣτΕ-13/2016*
[29] Vlachopoulos, (n.27) pp. 50-62

This section analyses and explains briefly how interim and permanent protection are applied under L.3886/2010. The remedy of damages is explained in section IV.

(ii.a) interim judicial protection

The remedy of interim injunctions provides for temporary judicial protection against an unlawful decision of a contracting authority.[30] According to Article 5(5), for an interim injunction claim to be successful there "*must be a serious probability of infringement of EU or national law and the measure is necessary in order to eliminate the harmful results of the infringement or to prevent the harm to the interest of the claimant"*.

Jurisdiction to hear claims for interim injunctions under L.3886/2010 is assigned to the Administrative Appeal Courts of the region where the public authority is based.[31] For high value (<15.000.000€) procurement and concession contracts, jurisdiction is assigned to the Council of State directly.[32]

Before submitting a claim for an interim injunction measure, the interested party had to bring first a complaint before the awarding authority to correct the alleged breach internally.[33] This is called the "preliminary administrative stage".

The rationale of this process was to create an effective review mechanism but also to allow the case to mature prior to the judicial hearing.

However, its efficiency in practice has been debated in the literature.[34] As it is explained at III.2.E, L.4412/2016 has abolished this procedure and replaced it with an independent review body of a semi-judicial nature.

[30] Art.5
[31] Art.3; see also L.3900/2010, Art.47§4
[32] Art.3, see Mitkidis., 'Ο Ν 3886/2010 για την παροχή προσωρινής προστασίας κατά την ανάθεση των δημοσίων συμβάσεων Η δικαιοδοσία, η αρμοδιότητα και η διαδικασία επιλύσεως των διαφορών' (2011),784.
[33] Art.4
[34] Zarari, 'Η σιωπή των αρχών ως πρακτικής απόρριψης των προδικαστικών προσφυγών κατά τη σύναψη δημοσίων συμβάσεων. Πραγματικότητα – Προτάσεις' (2013)

The interested party had to bring a claim within 10 days before the courts from the time the contracting authority reaches a negative decision or omits to decide under the preliminary administrative process.[35]

The Court can grant any measure deemed appropriate within 20 days, without being limited to measures proposed by the parties.[36]

It may also order an interim injunction measure after the contract has been concluded. In such case, the appropriate measure is the suspension of the further execution of the contract before a decision for annulment is made.[37]

(ii.b) permanent judicial protection

The remedy of a *writ* for annulment provides for a permanent remedy. It should be noted from the outset that in the context of L.3886/2010 the judicial remedy of annulment is not of practical importance.

In fact, it is the interim injunction measure that was the main innovation of this law, and it is this remedy, along with the remedy of damages, which satisfied the EU law requirement of effective and rapid judicial protection.

The reality is that all claims for alleged EU law violations are settled with an interim injunction measure, which will hardly ever be quashed before the annulment Court.[38]

Nevertheless, an explanation of the annulment remedy is essential in the context of concluded contracts for two reasons. The first is that this remedy is the permanent remedy on unlawfully contested acts.

The second reason is that the structure of annulment administrative actions explains one of the most important obstacles in the Greek legal system of challenging the effects of unlawfully concluded contracts by third-parties.[39]

[35] Art.5(1)
[36] Art.5(6)
[37] Art.8(8)
[38] Vlachopoulos, (n.27) p.214.
[39] See further IV.4.A

The first thing to note is that, according to Article 95(1) of the Constitution, claims for annulment fall under the jurisdiction of the Administrative Appeal Courts and the Council of State.

The second issue that must be mentioned is that under L.3886/2010 a claim for annulment is not dependent on whether the claimant has also applied for an interim injunction measure.[40] In other words, the two different types of judicial protection can be claimed independently or in conjunction.

The next important issue to highlight is the grounds on which a contested administrative act can be annulled. These are determined in Art.48 of P.D. 18/1989: lack of competence of the authority that issued the contested act,[41] infringement of a formal requirement of the procedure,[42] infringement of mandatory law,[43] and misuse of power.[44]

The most frequent grounds invoked in the context of procurement are an infringement of substantive/mandatory law and infringement of a formal requirement of the procedure.[45]

All these grounds of annulment can fall under the category of *"...breaches of EU and national law"* which is a requirement to bring a claim for interim injunctions.[46]

Further, it is important to briefly outline the administrative act that can be contested.

Under Greek administrative law, similarly, with other jurisdiction with an analogous system, the award procedure constitutes what is called a complex administrative action, comprised of several stages.

Subject to annulment are those unilateral acts of the administration that have occurred before the conclusion of the contract and are detached from the

[40] Art.5(7)
[41] *ΣτΕ-3516/1991; 390/1997; 496/1998*
[42] *ΣτΕ-2994/1992*
[43] *ΣτΕ-765/1996; 364/1997; 1744/2000*
[44] This ground has never applied in the context of the procurement of a public contract.
[45] Koutoupa-Rengakos, 'Δημόσιες συμβάσεις και κοινοτικό δίκαιο' (1995), p.263
[46] Vlachopoulos, (n.27), p.205.

contract itself (*thèorie des actes dètachables – θεωρία των αποσπαστών πράξεων*).

These acts must be executable to be challenged, i.e. they must produce legal effects both for the administration and the individuals that can be harmed by the act.[47]

In the context of procurement, acts of this type include the contract notice terms, decisions related to the procurement procedures, and decision-related to the award of the contract.[48]

When the validity of the final act is contested, the Court can incidentally review the defects of all prior acts.[49]

Regarding who was standing for an annulment claim, any interested party who has or had an interest to be awarded the contract is eligible for an interim injunction claim under L.3886/2010.[50] This applies *mutatis mutandis* for annulment claims.

Additionally, standing for annulment and interim injunction claims is also dependent on the administrative law requirement that a claimant must establish a legitimate interest.[51]

Such a legitimate interest exists when an act of a public body causes financial or moral prejudice to any legal or real situation protected by the law, from which a person draws a benefit.[52]

According to well-established administrative law doctrines, the legitimate interest must be *'personal,' 'direct' and 'present'.*[53]

'Personal' means that there is a special bond between the claimant and the contested act or omission that separates his personal interest from the interest

[47] *ΣτΕ-435/1984*
[48] Tomaras, 'Διοικητικές πράξεις αποσπαστές απο της συμβάσεις της Διοικήσεως' (1996) pp.18-23
[49] Tomaras, (n.1) p.105.
[50] Article 2
[51] See in the context of procurement: *ΣτΕ*-213/2011 and in the context of L.3886/2010: *ΣτΕ*-1844/2013.
[52] P.D.18/89, Art.47.
[53] *ΣτΕ-213/2011, ΣτΕ-880/2016*

of the general public. This element refers to that special relationship of the claimant with the contested act that must create some form of harm.

Thus, the annulment action does not have the character of an *actio popularis*.[54] In the context of procurement it usually captures intended or actual tenderers and, in the case of direct awards, those who had the contract been published would have been eligible to compete.[55]

However, unlike the situation under interim injunction measures, legitimate interest for an annulment claim can also be granted to third parties with no direct financial interest in the contract.

Hence, for instance, the Council of State has recognised that environmental organisations that claim that the execution of the contract can create environmental issues have standing for an annulment *writ* under P.D. 18/1989.[56] Similarly, it has also allowed a claim from professional bodies representing suppliers.[57]

III.2.C. Review for administrative contracts

In the context of administrative contracts, as these have been defined above, that do not fall within the scope of L.3886/2010 (now L.4412/2016 - see below), the procedure for annulment claims is the one described above.

The main difference between the two remedial regimes lies in the procedure relating to temporary judicial protection. More specifically, Article 52 of P.D. 18/1989 provides for the suspension procedure.

This procedure provides for temporary protection in the context of administrative contracts that do not fall within the scope of the EU rules and presupposes the existence of the main action seeking a contested

[54] Georgopoulos, 'The system of remedies for enforcing the public procurement rules in Greece: a critical overview', (2000), P.P.L.R., 2, 75-93; *ΣτΕ-2913/2017*
[55] Vlachopoulos, (n.27), p.82; *ΣτΕ*-537-1943
[56] *ΣτΕ-5/2013; ΣτΕ-465/2006; ΣτΕ-298/1991; ΣτΕ-1417/1987*
[57] *ΣτΕ-489/1930*

administrative measure annulled. This is not the case under an action for interim injunctions under L.3886/2010 as explained above.

In addition, this procedure requires a potential claimant to prove that he would suffer 'irrevocable harm'.[58] For a third party to satisfy the condition of irrevocable (or irreparable harm), the harm must be direct and concrete, personal and fully proved.[59]

This condition does not satisfy the EU law requirement of review procedures available to any person having or having had an interest in obtaining the contract.

It is for the above reasons that the CJEU in the case C-236/95 ruled that Greece had to provide for another remedial tool upon which contracts that fall within the EU rules could be challenged.[60]

III.2.D. Review under L.4412/2016

Section IV (Articles 345-375) of L.4412/2016 has amended and replaced L.3886/2010 as of the 1st of January 2017. This piece of legislation has changed radically the system of challenges to contracting decisions of public entities. This section summarises the most important changes.

(i) Scope

The review framework of L.4412/2016 covers all public contracts for works, goods or services with a set value of <60.000 (€), regardless of the nature of the contract in question.[61]

Therefore, provided that it is a contract with a public authority covered by L.4412/2016, then the same review system applies.

[58] Tomaras, (n.1), p.74
[59] See Georgopoulos, (n.54)
[60] Ibid.
[61] Art.345(1)

It is submitted that this factor eliminates the complexity of the review system and provides legal certainty and simplicity for aggrieved competitors to challenge procurement decisions.

(ii) Review and remedies

The most important change that L.4412/2016 introduced is the abolition of the mandatory preliminary administrative stage (bringing complaints before the awarding authority) and its replacement with the creation of an independent review body under the title "*Independent Authority for Prejudicial Claims*"[62] (author's translation) - hereafter the ''IAPC'' that is empowered with the jurisdiction to handle at first instance all claims by third-parties.[63]

The IAPC has jurisdiction to hear claims for any alleged pre-contractual irregularities[64] as well as to order the ineffectiveness remedy.[65] It does not, however, have authority to hear damages claims that remain under the jurisdiction of the Administrative Courts.[66]

The IAPC is fully operational and has handled 291 claims during the FY 2017 and another 550 cases during the FY 2018.

It is important to stress that no challenges on the ground of ineffectiveness have been made hitherto.[67]

It is also important to highlight that this review framework still retains the process of claims for interim injunction measures and *writ* for annulment before the Administrative Courts as this was described above.[68]

Hence, in effect, it creates a two-tier system, that of prejudicial claims before the IAPC and that of judicial claims.

[62] Arts.347-359
[63] Art.360(2)
[64] Arts.366-367
[65] Art.368
[66] Art.373
[67] Last time IAPC's decisions were assessed was 01.08.2018
[68] Art.372; III.2.B(ii.b) above

Regarding judicial claims, the difference between L.4412/2016 and the previous regime of L.3886/2010 is that under the current framework claims for interim injunction and annulment can be filed against the decision of the IAPC and not against any alleged wrongful decision of the public authority.

This, in turn, means that the potential claimants are reversed. It is a public authority and an economic operator (including an actual contractor in the case of a concluded contract) who might have been affected by the decision of the IAPC that can file claims against that decision.

This two-tier review system might prove to be problematic in practice for various reasons.[69]

Some of the potentially problematic issues regarding the functions of the IAPC and the creation of a two-tier judicial protection system were raised by the Council of State in its opinion decision 13/2016.

In this case, the majority of the judges held that the formation of the IAPC is unnecessary and in some respects unconstitutional.

It is submitted that the creation of the IAPC was not solely the initiative of the domestic legislator. In fact, the entire amendment of the review system was the result of the memorandum that Greece signed with the European Stability Mechanism.[70]

The memorandum stated that the Greek authorities in collaboration with the EU Commission would assess the effectiveness of the existing remedial measures and review system and propose measures for its improvement.[71]

Therefore, the two-tier system is the result of the choice of the domestic legislator to compromise the recommendations made by the institutional lenders and the maintenance of the traditional judicial review system.

[69] See in the context of allegedly unlawfully concluded contracts IV.1.C
[70] L.4336/2015
[71] L.4336/2015 2.4.2 §3

However, it should be noted that this two-tier system is also an EU law requirement. Article 2(9) of Directive 89/665 requires that '*where bodies responsible for review procedures are not judicial in character provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body…can be the subject of judicial review or review by another body which is a court or tribunal…*'

IV. The impact of violations of public law on concluded contracts

As with the previous chapters, this section investigates the potential impact that violations of the substantive rules that regulate the contractual activity of public entities have on concluded contracts.

From the outset, it should be stated that from a *de lege lata* point of view the distinction between violations related to the procedure of concluding a contract and violations related to the subject matter of the contract is not of relevance under the Greek legal system.

What is relevant is whether a violation of "mandatory or compelling law" law has taken place.

In private law what is categorised as "compelling law" "mandatory law", rules of "public order" and constitutive forms (ad *solemnitatem*) are all those rules that are necessary to be followed for a contract to produce legal effects.[72]

This private law doctrine applies by analogy to contracts governed by public law, since public authorities are compelled to contract only for the purpose that the law allows them to do, but also according to the process that the law defines.[73]

Hence, in essence, a contract will be without any legal effect (i.e. will be null and void) if the applicable civil law would direct this result. This position is

[72] See, Stampelou, 'Ακυρότητα δικαιοπραξίας λόγω έλλειψης τύπου', (2015)
[73] Masouridis, 'Αι συμβάσεις της Διοικήσεως ενώπιον του ΣτΕ' (1959) p.233; Raikos, 'Το ένδικο βοήθημα της αγωγής στο πεδίο των διαφορών απο διοικητικές συμβάσεις' (2009), pp. 84-86

similar with the approach followed in other jurisdictions, such as, for instance, in Germany.[74]

Additionally, certain rules applicable to the procurement function of public entities provide for certain effects to the contract in case there is a violation. A notable example of this is L.4412/2016 section IV, which provides for the EU ineffectiveness remedy.

This section is divided into four parts.

The first part (IV.1) looks at the impact of violations related to the award procedure and the second examines (IV.2) the impact of a violation regarding the subject matter of the contract.

Part three (IV.3) examines the consequences that follow for the two contracting parties when the contract is rendered invalid due to a public law violation.

Part four (IV.4) examines which parties can challenge the effects of an unlawfully concluded contract.

IV.1. The impact of violations related to the award procedure

Various violations relating to the procedure of concluding a contract may have adverse effects on a contract by rendering it invalid. These violations can be broadly put into three different categories.

The first category is that of certain rules regarding the formation of a contract where, if they are breached, legislation prescribes that the agreement should have no legal effects.

For instance, Article 98(1) of the Constitution requires public authorities to submit high-value contracts for review before the Court of Auditors.

[74] Nierhaus, 'Administrative Law' in Zekoll & Reimann (edition), 'Introduction to German Law' (Kluwer Law International, 2005), p.101

To establish this mandatory procedural step, Article 36(4) of L.4129/2013 states that omitting to submit a public contract of a high value before the Court has, as a result, the contract to be rendered invalid.[75]

The invalidity is conclusive, and it cannot be remedied after the contract comes into being.[76]

In addition, certain provisions of the Constitution explicitly prohibit contracts of the State with certain economic operators.

For instance, as noted, pursuant to Article 57, public authorities are prohibited from entering contracts with economic operators whose owner, partner or main shareholder are associated with a member of the parliament and requires such contracts to be rendered invalid and unenforceable.

Another important legal instrument that provides for no legal effects to a contract is L.2362/1995 (as amended by L.3871/2010) that regulates public finances and public spending matters.

Article 83 provides very restrictive requirements regarding the use of procurement procedures.[77] In a case where these requirements are violated, Article 85 provides that this leads to the conclusive invalidity of an agreement.

Further, Article 80 of L.2362/1995 provides that public contracts need to be in written form. Article 22 of the Code of Administrative Procedure also provides this requirement.

The main argument for this mandatory formality is that public contracts must be in written form to establish that special legal regime that allows the administration to exercise special powers to serve the public interest.[78]

In case this requirement is violated then under Article 85 the contract is also subject to invalidity.[79]

[75] *ΣτΕ*-3010/2009, 3104/2013, 1297/2013, 45/2009 ΔΕΦ.ΑΘ.-6282/2013, 4203/2013, 1168/2015
[76] Raikos, (n.1) p.133
[77] *Α.Π*-1782/2014; *ΕΦ.ΛΑΡ*-29/2013; *ΠΠΡ.ΑΘ*-1347/2012
[78] Raikos, (n.73) p.94
[79] *Α.Π-91/2016*

The second category of violations which may adversely affect a contract is where there has been some violation of mandatory law as described in IV above.

In the context of public contracts, mandatory rules related to the process of concluding a contract, include, for instance, the unlawful choice of an award procedure and the requirement of the written form as described above.

Generally, whenever an essential formality of law is violated (*ad solemnitatem*) then pursuant to Article 159 of the Civil Code the transaction is invalid. Similarly, a transaction that is contrary to a provision of law is invalid pursuant to Article 174 of the Civil Code.

It is apparent that a contract is subject to invalidity/nullity when a violation of a mandatory rule has taken place and it does not matter if the parties were aware or not of the effect of such violation.[80]

Hence, the pertinent questions are how far the contracting parties can escape a bad bargain by raising these violations to avoid an otherwise contractual breach and, most importantly, how far third parties can challenge the effects of a contract under an annulment claim.

These issues are examined in IV.4 below after also illustrating the impact that violations related to the subject matter of a contract have.

The third category is that of violations of L.4412/2016, which, as already explained, is the current legal instrument implementing the EU rules.

This is the only legal instrument which explicitly provides the possibility for third-parties to challenge the effects of a concluded contract under the ineffectiveness remedy when certain violations have taken place.

It is also the current most important legal instrument regulating the procurement function of public authorities providing rules both in relation to the procurement process and the execution of a contract.

[80] Stambelou, (n.72)

The operation of the EU ineffectiveness remedy and the impact of this remedy to a contract, and consequently the contracting parties, are examined first below.

IV.1.A. The impact of violations of L.4412/2016

L.4412/2016 provides that certain violations will have as an effect the ineffectiveness of a concluded contract. The type of violations that have such an effect is explicitly stated in L.4412/2016.

IV.1.B. Conditions for ineffectiveness

According to Article 368, there are three grounds according to which third-parties can bring a claim for ineffectiveness, which – similarly with the PCRs – reflect the grounds provided in the remedies directive.

The first condition for an ineffectiveness challenge is when a contracting authority has awarded a contract without prior publication of a contract notice at the OJEU when this is not permitted under EU and national law.

Generally, L.4412/2016 sets especially strict requirement in relation to direct awards that go further than the EU law requirements.

One of these 'extra' requirements is provided by Article 118(3), which states that an award of a contract without prior publication must be combined with an *ex-ante* public notice of the intention to conclude a contract without competition.

If such notice has not been published, then the contract is automatically invalid pursuant to Article 118(4).

Possibly, automatic invalidity here means that the review body has no margin of appreciation on whether to trigger ineffectiveness or not. Once this violation has taken place, which is relatively easy to determine, then the contract must be set-aside.

The obvious and significant difference between L.4412/2016 *ex-ante* requirement and that of the remedies directive is that is that under the former publication of such notice is a mandatory requirement and not a voluntary one.

After the decision of the CJEU in *Fastweb,* this requirement may not be in line with EU law.[81]

In that case, the CJEU ruled emphatically that it would be contrary to EU law to allow national courts to declare a contract ineffective where the three conditions laid down in the safe harbour provisions are satisfied.[82]

Hence, possibly suggesting that the safe harbour provisions must adhere to the same wording of the remedies directive and national laws cannot raise the standards like Greece has done.

The second ground where a contract can be challenged for ineffectiveness is when the standstill period and/or the automatic suspension requirements have been breached.

Unlike the position under the remedies directive, L.4412/2016 (and its predecessor L.3886/2010) has not subjected these violations to the condition that they must have also affected the chances of a claimant in obtaining the contract.

However, in case 155/2012[83] and 129/2013[84] the Council of State ruled that the breach of the standstill period does not constitute itself a condition of ineffectiveness. It must be combined with some violation of substantive rules during the award procedure, which has affected the chances of the claimant to be awarded the contract.

The third ground is when a contract based on a framework agreement is awarded in breach of the requirement of reopening competition and when a

[81] Case C-19/13; Ch.4-IV.2.E
[82] Ibid. at [41] [54]
[83] *ΣτΕ*-155/2012
[84] *ΣτΕ*-129/2013

contract is awarded in violation of the relevant rules on transparency and competition for the award of a contract based on a dynamic purchasing system.

Also, a violation of a court order (either an injunction or an annulment measure) may trigger the ineffectiveness of a contract.[85]

Finally, Article 372(7) provides that if a court annuls an act or omission of a contracting authority after the conclusion of the contract, the contract is not affected, unless the contracting authority has violated an interim order of the IAPC.

It is submitted that a claim for any other violation will not affect the contract no matter how serious it is.

This is clear from the wording of Art.372(6) which provides that *"if the interested party did not claim or claimed unsuccessfully an interim injunction measure and the contract has been signed and concluded before the annulment hearing took place, then the hearing is abolished pursuant to paragraph 2 of Art.32 or P.D. 18/1989".*

The Courts have also been very reluctant to order the ineffectiveness of the contract. For instance, in case 305/2012,[86] the Council of State made it clear that the conditions for ineffectiveness are to be understood very narrowly, and that a direct award which can lead to ineffectiveness only has the meaning that is given in the EU directives.

Hence, it ruled that a contract that has been awarded through an open procedure will not be rendered ineffective, even if it has been awarded in violation of the award criteria, or if a contract contains clauses that were not available in the contract award notice.

Similar reasoning was followed in case 3404/2012[87] in which the Court stated that only the conditions set out in Article 8(1) of L.3386/2010 (the conditions

[85] *ΔΕΦΑ*-843/2005
[86] *ΣτΕ*-305/2012
[87] *ΣτΕ*-3404/2012

of the EU ineffectiveness) constitute grounds for an ineffectiveness and that any other irregularity in the decision-making process cannot affect the contract no matter how serious it is.

It is submitted, that this narrow position that has been followed by the judicial bodies will not change under the jurisdiction of the IAPC.

On the contrary, its non-judicial status will not allow this review body to broaden the condition of ineffectiveness, and it is most likely that it will be particularly careful when deciding to trigger this remedy.

In fact, a careful analysis of IAPC's decisions reveals that, so far, in its decision-making process it makes direct reference to judicial decisions and rules established thereby.[88]

IV.1.C. Review body and standing

As explained, L.4412/2016 has delegated the power of rendering a contract ineffective to the IAPC, which *stricto sensu* is a non-judicial body.

In case a challenger does not agree with the decision of the IAPC, he may challenge it before the relevant Administrative Appeal Court for an injunction measure and writ for annulment.

For concession contracts and for contracts with an estimated value of <€15.000.000, jurisdiction to hear claims for an interim injunction measure and annulment against the decision of the IAPC is assigned directly to the Council of State.[89]

Article 346 of L.4412/2016 provides that *"any interested party who has or had an interest to be awarded the contract or in consequence of a breach of EU or national suffers or risks suffering harm is entitled to bring a claim before the IAPC..."*.

[88] See indicatively decisions A27/2017; A37/2017; 152/2017; 167/2017; 188/2017 in which the IAPC makes direct reference to the decisions of the domestic Administrative Courts and the CJEU.
[89] Art.372(3)

As noted, for a protestor to establish standing he must satisfy the administrative law requirement of legal interest.[90]

When it comes to direct awards this legal interest is established to any person who can prove that had the illegality not taken place, he would have been eligible to compete.[91]

In the case 880/2016, the Council of State rejected a claim for ineffectiveness for an unlawful direct award, not because the conditions were not fulfilled, but rather because the party who brought the claim did not have legal interest.

The Council ruled that the requirement of legal interest was not satisfied since the claimant had not paid his tax obligations at the time of petition of the claim, which in any event is an exclusion ground from the awarding process if that had taken place. In other words, the legitimate interest was not present at the time of petition.

IV.1.D. Pending effectiveness or ineffectiveness

Article 369(4) provides that *"the submission of an ineffectiveness claim, suspends the further execution of the contract until the decision of the IAPC* is reached, unless, a claim from the contracting authority for temporary protection is ordered*"*.

This position is different from that under the PCRs where a contract maintains all its effect until the High Court reaches a decision with regards to the ineffectiveness of a contract.[92]

A particularly important issue to answer is what the effect on the contract is if the IAPC renders it ineffective, and such decision is successfully challenged before the Administrative Courts.

[90] III.2.5(ii.b)
[91] Vlachopoulos, (n.27), p.82; Koutoupa-Rengakos, (n.45) p.262
[92] Ch.4-IV.2.D

In this respect, Article 372(5) provides that *"if the Court orders an interim injunction measure, the body that has published the act which is suspended under this order, must comply with the order of the Court and withdraw or appropriately modify its decision".*

In the context of a 'wrongful' ineffectiveness declaration, this means that the IAPC will have to set aside its decision and declare the contract effective again until a decision for annulment is reached within the prescribed period of 3 months.[93]

Clearly, this factor may create uncertainty regarding the status of the contract during the pending period.

IV.1.E. Consequences and the discretionary safe harbours

Article 371(1) provides that if the IAPC declares a contract ineffective, the ineffectiveness has retrospective effect. In other words, the contract is treated as it never existed. Consequently, no obligations exist under such agreement.

This position should be compared with that of the PCRs which has opted to the prospective cancellation of a contract.[94]

However, Art.371(2) provides that the IAPC has the discretion to consider the circumstances - and particularly the stage of the execution of the contract, the seriousness of the infringement and the behaviour of the contracting authority – and declare ineffective only the prospective part of the contract.

In such case, the IAPC must impose a financial penalty, the amount of which cannot exceed the 10% of the value of the contract.

If the IAPC decides to opt for the prospective termination, then it must impose a financial penalty that has to be passed to the claimant.[95]

[93] Art.372(4) § 4
[94] Ch.4-IV.2.D
[95] Art.371(2)

This position of L.4412/2016 should be contrasted with that under the PCRs according to which, the civil financial penalty is payable to the Minister of Cabinet Office who must pay it into the consolidated fund, hence, circulating the amount of the financial penalty within the public purse.[96]

Moreover, the IAPC, pursuant to Article 370(1), may allow the contract to go ahead if it is satisfied that overriding reasons relating to the general interest require so.

As with the remedies directive and the PCRs, Article 370(2) states that economic reasons directly linked to the contract concerned cannot constitute overriding reasons of general interest unless ineffectiveness would lead to disproportionate consequences.

Also, as with the position of the remedies directive and the PCRs, L.4412/2016 does not lay down what conditions the doctrine of overriding reasons of general interest encompass.

In this respect, it is worth examining the judicial interpretation on this matter, and particularly, the decision 39/2015 of the Administrative Appeal Court of Piraeus that has interpreted this exception from ineffectiveness.

In this case, the contract was assigned for the supply of catering services for University students. The Court reasoned that the interest of the students for feeding overrode the interest of the claimant and the general principles of transparency, neutrality, and legality, and for this reason allowed the contract to go ahead.

It also reasoned that the contract was for a short period and that a new award procedure would have taken place on short notice.

As it was argued at Chapter 4 – IV.2.D, the fact that EU law does not prescribe what constitutes overriding reasons of general interest, allows national review

[96] Ch.5-IV.2.D

bodies a relatively free reign of interpretation, subject to the condition – as any other exception in EU law – that it should be interpreted narrowly.

It is submitted, that the facts in the case 39/2015 can constitute such overriding reasons from ineffectiveness.

It may be argued that a short-term contract, which is followed, by another fresh contract of the same subject matter could, indeed, lead to disproportionate consequences if ineffectiveness is triggered.

Moreover, it may be argued, that the catering of the students was, in fact, an overriding reason considering that any delay could have resulted in catering services not being provided during the academic term-time.

IV.1.F. Safe harbours from ineffectiveness

As was discussed at chapter 4, the remedies directives provide for a safe harbour that allows the contract to go ahead if the following conditions are cumulatively met:

(i) the contracting authority has considered that it was lawful to award the contract without competition, (ii) it has published a voluntary *ex-ante* notice of its intention to conclude a contract, and (iii) it has allowed a standstill period to operate between the publication of this notice and the conclusion of the contract.[97]

L.3886/2010 (the predecessor of section IV, of L.4412/2016) had implemented this requirement and had taken it a step further by omitting to use the wording "considered", which, as demonstrated at chapter 4, might be problematic.[98]

However, section IV of L.4412/2016 has not implemented this requirement, at least not for all types of contracts.

[97] Directive 2007/66/EC, Art.2d (4)
[98] Ch.4-IV.2.E

It only provides this exception for contracts based on framework agreements and contracts based on dynamic purchasing systems as this is described in Article 2(d)(5) of the remedies directive. It does not provide a safe harbour for other contracts that have been awarded without prior publication of a contract notice.

As was explained above, the domestic legislator has made the *ex-ante* transparency notice a mandatory requirement rather than a voluntary one.[99]

It is submitted that this is an omission, which might carry an EU law breach, particularly considering the CJEU judgment in *Fastweb* where the CJEU took a strict approach on the requirements of ineffectiveness and ruled that a contract may not be declared ineffective if the conditions laid down in the safe harbour provisions of the remedies directive are satisfied.[100]

IV.1.G. Addressing consequential matters

Article 371 of L.4412/2016 provides that where a contract is declared ineffective *"...the provisions on unjust enrichment regulate the rights of the parties. The competent Court adjudicates the relevant disputes. If the contractor knew or should have known about the ineffectiveness of the contract he is not entitled to a claim for unjust enrichment against the administration, or his claim is partially satisfied".*[101]

The law of unjust enrichment is analysed in IV.3 below, as it is the main basis for bringing claims for recovery arising from agreements which have no legal effects (i.e. are invalid).

However, some preliminary remarks should be submitted regarding this remedy in the context of the EU ineffectiveness.

[99] Article 118 See also IV.1.B
[100] *Case C-19/13* at [54]
[101] This was also the position under L.3886/2010

The first issue to issue to highlight is that the domestic legislation has correctly addressed the *ratio legis* of the ineffectiveness remedy as discussed at chapter 4.[102]

As explained further below, the effect of the remedy of unjust enrichment is to restore the position of the contracting parties to the pre-transaction stage, rather than to compensate them for any potential losses arising from an unlawful agreement that produces no contractual effects.

The second issue to highlight is that the domestic legislator has made it clear, what is the basis of a claim. It has, therefore, tacitly excluded other claims for recovery such as for the potential civil liability of a public authority.

In some member states, such bases constitute grounds according to which a contractor can claim damages in tort.

In France, for instance, the cause of ineffectiveness may lead to liability of a public authority for negligence.[103] However, under French law, this may only occur if the contractor was not aware or should not be aware of the relevant illegality.[104]

In fact, the law of unjust enrichment is also the starting point in French law for addressing consequential matters arising from an ineffectiveness order.[105]

In Greece, the domestic legislator has also excluded the possibility for the contracting parties making provisions addressing consequential matters ex-ante or for a court to adjudicate as it sees fit.

This position could be contrasted with the view under the PCR's, which, as explained in chapter 5, encourages the regulation of consequential matters to be addressed by the contracting parties.[106]

[102] Ch.4-IV.2.F
[103] Arnould, 'Damages for performing an illegal contract: the other side of the mirror-comments on the three recent judgments of the French Council of State' (2008) P.P.L.R., 6, 247-281
[104] Ibid.
[105] Ibid.
[106] Ch.5-IV.2.I

The final preliminary issue to highlight is that the domestic legislator has made it clear that disputes arising from a declaration of ineffectiveness will take place in the relevant competent Court.[107]

Hence, the parties will have to bring a different claim after the ineffectiveness remedy is triggered.

This position can be compared with the position under the PCR's where the same review body will declare the contract ineffective and address any consequential matters in the absence of express provisions by the contracting parties.[108]

The position of the PCRs, at least from a normative perspective, is more efficient as it minimises transaction costs from the potential litigation that needs to be followed for consequential matters to be addressed.

IV.2. The impact of violations related to the subject matter of a contract

As was submitted at IV above, from a *de lege lata* point of view, violations related to the procedure of concluding a contract and violations related to the subject matter of the agreement may have the same effect.

In both cases, if there is a violation of a mandatory rule, the contract is rendered retrospectively invalid.

As noted at II.1, the general administrative law principle of legality imposes a limitation, under which public authorities are bound to contract *secundum legem*, i.e. only if the law provides this possibility and for the purpose that it does so.[109]

In this respect, Article 79 of L.2362/1995 (as amended by L.3871/2010) provides that contracts which create obligations to the public administration are

[107] Art.371(1)
[108] Ch.5-IV.2.F
[109] *ΣτΕ-2123/1995*

not permitted to be made if the subject matter of such contract is not permitted from general or special provisions of law.

The principle of legality is founded upon the idea that public authorities when they contract, they act as *imperium* to serve the public interest. Hence, the scope of their contracting powers must be limited according to what the law provides.[110]

Regarding the effect that such violations may have, Article 174 of the Civil Code states that a transaction that is contrary to a provision of law is retrospectively invalid.[111]

IV.3. Addressing consequential matters from invalid public contracts

This section explains how consequential matters are regulated when a contract is deemed unlawful and invalid because there has been a violation of mandatory law on the part of a public authority,

As it was explained, violations of mandatory rules result in an agreement to be rendered invalid and without legal effects.

It is submitted that the main basis for a recovery claim is the law of unjust enrichment.

As it was also explained the law of unjust enrichment regulates consequential matters and for the event that the EU ineffectiveness remedy is triggered.

In addition to the law of unjust enrichment, in some situations, the contracting authority may also be held liable under the provision of civil liability of the State.

This section is divided into four parts.

The first part explains the law of unjust enrichment. The second part examines claims for unjust enrichment on the part of a contractor and the third part examines claims for unjust enrichment on the part of a public authority. The

[110] Moukiou, (n.2), pp. 283-290
[111] Article 180 Civil Code, Article 85 of L.2362/1995

fourth part examines the possibility of a contractor bringing a tortious claim for recovery under the civil liability of the State doctrine.

IV.3.A. The law of unjust enrichment

Articles 904-903 of the Civil Code regulate the obligations arising from unjust enrichment.[112] These provisions apply by analogy and for transactions that fall within the ambit of public law, notably in the case of administrative contracts.[113]

The fundamental provision on unjust enrichment is contained Article 904 of the Civil Code which reads that *"every person who became unjustly enriched without legal cause through another's property or at another's expense shall return the benefit. This obligation is born especially in the cases of an undue performance, a performance for a cause which did not ensue or lapsed or for an illegal or immoral performance".*

The obligation for the return of unjust enrichment is a general and an *ex-lege* obligation, i.e. a personal obligation stemming directly from the law.[114]

A claim for unjust enrichment is valid only when no other claim exists to offer relief, for the particular set of facts.[115]

Therefore, one of the most usual situations where unjust enrichment operates is when a contract is invalid, i.e. the transaction does not produce any legal effects because the law requires so. Hence, there is no legal ground which could justify a remedy in contract.

The law of unjust enrichment is not a claim for compensation, in the sense that it does not aim to restore the contractual position of either party (i.e. the position that they would have been had the contract been fully discharged), but

[112] For an English version explaining this law see, Stathopoulos, 'Contract law in Greece', (2nd edition, KLI/Sakkoulas, 2009), p.p., 243-257; for the philosophical foundations of the law of unjustified enrichment in civil law see, Zimmermann, 'The law of obligations: Roman foundations of the civilian tradition' (Oxford, 1996)
[113] Tsironas, 'Οι αξιώσεις αδικαιολόγητου πλουτισμού απο την εκτέλεση διοικητικών συμβάσεων' (2007)
[114] Karakostas, 'Αστικός κώδικας: Ειδικό ενοχικό' (2009) p.841
[115] Georgiades, 'Ενοχικό δίκαιο: Γενικό Μέρος', (2η εκδοση, 2015) pp.608-611.

rather to restore the enrichment that one party has gained on the expense or disadvantage of the other.

Hence, for instance, the Supreme Court ruled in case 361/2010[116] where a construction was completed under a contract that had no effect as the result of non-compliance with transparency tendering rules, the contractor could not claim the agreed contractual price.

However, since the State was enriched as to the expenses that it saved for the erection of the building the contractor had a claim for restitution based on Article 904 of the Civil Code.

Having outlined the basic framework, the next two sections examine the position under the law of unjust enrichment of a contractor and a public authority respectively.

IV.3.B. Claims against the public entity

It is generally accepted - both in theory and in practice - that in that situation where an agreement which is executed partially or completely but does not produce legal effects because there is a lack of legal cause, the public administration is under the duty to return any enrichment it has gained at the expense of the other party.[117]

Similarly, with the analysis conducted for the position of English law, the first thing that needs to be addressed is what a contractor may claim under the law of unjust enrichment when the subject matter of the void contract was related to the supply of goods, and which goods have been partially or completely delivered.

According to Article 908 of the civil code *"the recipient of the enrichment is obliged to return the thing received or the consideration he received for the*

[116] ΑΠ-361/2010
[117] Tsironas, (n.113), pp 35-40

thing. The recipient is also obliged to return the fruits, and everything collected from the thing".

Hence, Article 908 sets as a default position for the recipient to return in *natura* the object of the enrichment.[118] This would be the case if the goods delivered have not been consumed or damaged by a public authority.

The justification for this is that the return of the enrichment as an economic value may be particularly difficult and hence, it is generally avoided.[119]

In a case where some transaction has taken place based on an unlawful contract, or all the obligations under an unlawful contract have been performed (e.g. the contractor has delivered the agreed goods and the public authority has made the agreed payment for those goods) then if the goods can be restored, these will have to be restored as there is no legal basis for the transaction. Consequently, a public authority will recover any money paid.

The EU legislator seems to also adopt the view that in cases where a contract related to goods is rendered ineffective, restitution should be made in kind if this is possible.[120]

In those situations where the subject matter of an invalid contract cannot be reversed in *natura* - namely, when the agreement was related to services, works, or goods consumed or damaged – the contractor is entitled to the economic value of those services, works or goods.

In such cases, the courts will consider the expense that the public authority saved had the contract been valid and, on that basis, will order the financial value of the enrichment that needs to be returned.[121]

Putting it simply, the contractor will be entitled to the market value of any goods, services or works performed under the unlawful agreement.[122]

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[118] Karakostas, (n.114) p.844
[119] Stathopoulos, (n.112), p.256
[120] Ch.4-IV.2.F; Recital 21 of Dir.2007/66/EC states clearly *'recovery includes…restitution in value…where restitution in kind is not possible'.*
[121] *ΔΕΦ.ΑΘ-6282/2013; ΑΠ-361/2010*; Papachristou, 'Το αντικείμενο αξίωσης αδικαιολόγητου πλουτισμού' (2014), pp.132-141
[122] *ΔΕΦ.ΑΘ-6282/2013*

Another matter to determine is whether there are any factors that may justify the preservation of the enrichment by a public authority. Generally, as explained, whenever there is no legal basis for the enrichment (such as when an agreement is invalid), this should be reversed.

However, there are some factors that may justify the preservation of the enrichment or the claim for unjust enrichment may be partially satisfied.[123] One such ground is when the legislature designates so (*causa ex lege*).[124]

This factor of justifying an enrichment is relevant in the context of the EU ineffectiveness remedy.

More specifically, as noted, Article 371(2) provides that "*If the contractor knew, or should have known about the ineffectiveness of the contract he is not entitled to a claim for unjust enrichment against the administration or his claim is partially satisfied".*

The possible intention of the legislator for this qualification was to protect the interest of the public administration from intentional illegalities, such as collusion, corruption or other illicit practices, phenomena that are frequently apparent in the Greek public contract market.

As it was argued elsewhere, depriving a contractor of his economic rights when he has knowledge or contributed to the illegality is a measure that could create the necessary deterrent effect from entering unlawful contracts.[125]

Since no ineffectiveness remedy has been ordered in the context of L.4412/2016, it is not clear how narrowly or broadly the courts will construe this provision.

For instance, it is not clear in which circumstance a court might completely deny a claim on unjust enrichment and in which situations a claim will be partially satisfied if the contractor knew that he was entering an unlawful contract.

[123] See, Karakostas, (n.114), pp.829-831
[124] Ibid.
[125] Ch.2-V.2

Another situation where the legislature has qualified a claim on unjust enrichment is apparent in the context of L.2362/1995 (as amended by L.3871/2010), which provides at Article 85 that, if the awarding authority intentionally violated the rules and the contractor knew about the illegality or contributed towards it, then he is not entitled to any form of redress.[126]

Both examples above reveal a strong tendency of the domestic legislature to condemn intentional illegalities and protect the integrity of the public contracts market. It creates strong incentives, at least from a normative perspective, for contractors to avoid entering unlawful contracts.

The strong position of Greek law may be contrasted with some other jurisdictions. In Finland, for instance, a claim for restitution based on the law of unjust enrichment can be satisfied regardless of bad faith.[127]

In France, on the other hand, a claim for restitution may only be denied if the contractor committed fraud. However, the mere fact that the contractor was perfectly aware that the awarding authority was not complying with the applicable procurement rules is not sufficient to consider that it committed a fraud.[128]

Another situation where restitution for unjust enrichment may be denied under Greek law is when broadly put, the subject matter of the contract is unlawful.

More specifically, the courts have denied restitution where there has been an unlawful extension of a contract that has exceeded by 50% the value of the original agreement in violation of P.D. 1418/1984 and 609/1985.[129]

In these cases, while the subject matter of the contract was originally lawful, the unlawful extension of it rendered the subject matter unlawful as no funds have been authorised for this purpose.

[126] *ΔΕΦ.ΑΘ-693/2014*
[127] Halonen, 'Shielding against damages for ineffectiveness: the limitation of liability available for contracting authorities – a Finnish approach', (2015) P.P.L.R., 4, 114
[128] Arnould (n.103)
[129] ΣτΕ-749/2016; 767/2011 3091/2007

The justification followed by the courts in this line of cases is not very clear. The courts have reasoned that a contractor is under an obligation to refrain from performing any further when this would exceed by 50% the value of the original contract unless such performance is subsequently lawfully authorised in writing by the relevant public authority.

If a contractor does perform so, restitution under the law of unjust enrichment will be denied because the enrichment of the public authority had a legal ground, that of the execution of the additional works, although these were done in violation of the law.

An even wider interpretation that has been submitted by the courts is that when performance exceeds in value what is lawfully permitted, then such a violation of an explicit prohibition automatically precludes any possibility for restitution.[130]

The judge and administrative law Professor Raikos have also expressed the view that the courts should take the same approach and deny claims for recovery under the law of unjust enrichment when the contract has been concluded, in violation of the Constitutional restrictions discussed above.[131]

The reason for this, according to Raikos, is that by providing such absolute restrictions, the Constitutional legislator has condemned the legal and economic impact of such transactions.[132]

IV.3.C. Claims against the contractor

The unjust enrichment provisions apply *mutatis mutandis* to claims from public authorities. Thus, a public authority is entitled to claim any payment it has incurred for which it has received no performance in return. In such situation, a contractor would have been enriched without legal cause.

[130] *ΣτΕ- 86/2005; 578/2004*
[131] Raikos, (n.73), p.217
[132] Ibid.

Unlike, however, the position of a contractor, neither Article 371(2) of L.4412/2016, nor Article 85 of L.2362/1995 has subjected a remedy in restitution to whether a public authority had knowledge or should have knowledge of the illegality or not.

This position of the law may be problematic as it gives the public authority a leverage over the dispute and treats the contractor on an unequal basis. However, this inequality may be justified from a policy perspective on the following grounds.

One the one hand, the intention of the legislator to protect public funds in any eventuality, and, on the other, to deter the contractor from entering unlawful contracts to his knowledge.

Also, as argued at chapter 2, economic incentives are not the most suitable means to deter public authorities entering proscribed transactions because they do not usually operate in a market environment and other legal tools such as criminal or civil actions against the individual wrongdoer agents may be more appropriate.[133]

This position seems to create the right incentives for the contractor considering that Greece is a jurisdiction where political ties and corruption in the public contract market is frequently apparent.

The final issue that should be examined is if there is any defence for a contractor according to which, he is not entitled to reverse the enrichment.

It is submitted, that there is one defence according to which the contractor could potentially rely on. This defence is based on Article 909 of the Civil Code, which provides that *"the obligation to return is extinguished if the recipient is no more enriched when the claim was served"*.

[133] Ch.2-V.2

This provision encompasses the basic defence in the law of unjust enrichment, which is that the obligation of the recipient for the return of the enrichment ceases to exist if he is not any more enriched at the time of the claim.

In the context of illegal public contracts, this defence may be successful if a contractor can prove that the enrichment has been extinguished due to expenses that he would not have incurred if the enrichment had not taken place and that there was a causal link between the vanish of the enrichment and the expense.

Hence, similarly to the position of English law and the defence of the "change of position", a contractor would have to prove that he would not have incurred the expenditure in the ordinary course of things.[134]

An example of this may be where a contractor could prove that any payment made was used as an expense specifically for the execution of the subject matter of the void contract.

For instance, this could be an expense related to additional personnel or other investments that were solely made for the purpose that was agreed with the public authority.

The contract would also have to show that he acted in good faith (i.e. he was not aware or could not have known that the enrichment was unjustified and would have to be returned).[135]

IV.3.D. Civil liability of the State

In some cases, the courts have held that compensation may be granted to a contractor under a tortious claim for civil liability of the State and Articles 105-106 of the Law Introducing the Civil Code.

[134] Ch.5-IV.I.H
[135] Stathopoulos, (n.112), p.257

For instance, in case 3104/2013[136] the Council of State ruled that the contracting authority was liable under the civil liability provisions for omitting to submit the contract before the Council of State which is resulted for the contract to be rendered void.

If such claim is successful, a contract is entitled to reasonable compensation which is calculated based on the difference between the current financial position of the injured party and what it would have been had the tort not been committed.[137]

It is possible to bring proceedings in parallel for unjust enrichment and a tortious claim on damages.[138] If the amount of compensation on the ground of unjust enrichment already covers the tortious loss then no additional compensation may be obtained.[139]

It is not clear, however, how far a civil liability claim can succeed as the basis of a claim in the context of invalid public contracts due to violations of mandatory rules.

It may be argued that, when fault is found on the part of the public authority for a violation, and there is a causal link between the harm occurred to the contractor (for losing the contract) and the fault of the public authority, then civil liability may be the suitable ground for a claim.

Nevertheless, in the case of the law of civil liability of the State, there is no requirement of fault. The State is subject to a strict liability requirement.[140]

In other words, the unlawful act of a public authority will suffice, provided there is a causal link between the harm and the unlawful act.

Hence, this ground is also pertinent in situations of contracts that have been rendered invalid due to a violation of a public authority.

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[136] *ΣτΕ-3103/2013*
[137] *ΣτΕ-2803/2000*
[138] Georgiades, (n.115), p.589
[139] Ibid.
[140] Pavlopoulos, 'Αστική ευθύνη του δημοσίου κατα τους κανόνες του δημοσίου δικαίου' (2010)

Such claim, however, is not available when legislation prescribes that unjust enrichment should be the basis of a claim such as in the case of the EU ineffectiveness remedy.

An examination of cases suggests that most claims arising from void public contract come under a writ for restitution and the law of unjust enrichment.[141]

IV.4. Challenging the effects of an unlawful contract

This part explains who may be able to challenge the effects of a contract.

First, it examines how far third-parties can challenge the effects of a contract on an annulment claim.

Second, it looks at how far the contractual parties can raise a public law violation that adversely affects a contract to escape an otherwise bad bargaining.

IV.4.A. Third-party challenges

As we have already seen, third-parties with a financial interest on a contract may challenge its effects under the EU ineffectiveness remedy.

However, this seems to be only remedial tool according to which third-parties may challenge the effects of an unlawfully concluded contract.

More specifically, while the Council of State (CoS) has ruled in some cases that a legal interest to contest an unlawful act exists after the contract has been entered into and executed,[142] nevertheless, it has either dismissed an application for annulment on procedural grounds,[143] or, most importantly, has simply ruled that the annulment Court has jurisdiction to annul an unlawful act, but not the contract *per se*.[144]

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[141] This observation was made by research on the database NOMOS in which the author examined various cases of invalid/void public contracts.
[142] *ΣτΕ-3317/1991, 4474/2005, 2289/2006, 4282/2009*
[143] *ΣτΕ-3010/2009*
[144] *ΣτΕ-973/1998, 1923/2002, 3708/2008*

The reason for this position is that the CoS has adopted a highly formalistic approach to the theory of detachable acts. According to this theory, the acts of conducting the formation of a contract and the contract as such are separable entities, and it is only those unilateral acts of the administration published before[145] or after entering the contract[146] that is subject to annulment, without, however, affecting the validity of the contract.[147]

This restriction on challenging the effects of a contract by third-parties is also reflected in legislation. As noted, Article 372(7) states that "'*if the Court annuls an act or omission of the contracting authority after the contract has been concluded, this is not affected...".*

This restrictive and formalistic approach to the theory of detachable acts has been highly criticised and debated both for legal and policy reasons.[148]

From a legal perspective, not ordering the annulment of the contract, while being able to annul the unlawful award decision (which is obviously linked to the contract) may be in violation of Article 95(5) of the Constitution which requires the administration to comply with a judicial order.

The Council of State has stated in this respect that the administration is under the obligation not only to consider as legally invalid the annulled act but also to execute all those positive steps that are necessary to restore the situation in the conditions that existed prior to the annulled act.[149]

However, it did not make clear how this may be done. For *restitutio in integrum* to occur after the annulment of the act the contract will most likely need to be terminated or modified in some other way (such as by shortening its duration).

[145] *ΣτΕ-3707/1987, 4741/1998, 1677/1999*
[146] *ΣτΕ-1908/2001*
[147] *ΣτΕ-972/1998*
[148] Giannakopoulos, 'Η προστασία του ελεύθερου ανταγωνισμού κατα την εκτέλεση των διοικητικών συμβάσεων' (2006); Giannakopoulos, 'Η νέα δικονομία των δημοσίων συμβάσεων: ακόμη μια χαμένη ευκαιρεία', (2010)
[149] *ΣτΕ-2909/1994*

Additionally, Article 20(1) of the Constitution requires *"effective and drastic judicial protection"*. A judicial order that *''platonically''* remedies the wrong but does not provide any actual effect cannot be characterised as effective.[150]

Despite the theoretical considerations, it is important to examine further the approach of the courts and highlight the position of literature regarding the rights of third-parties to request the setting aside of a contract when an annulment claim on a decision to award the contract is successful.

Regarding the relevant literature, the most significant piece of work is that of the former Council of State judge, Tomaras in his book *"Administrative acts detached from administrative contracts".*[151]

By contrasting the French and Greek law approaches, he argues, *inter alia,* that it is a paradox that the administrative act in which the contract is based upon to be annulled *erga omnes,* while the contract remains unaffected.[152]

He also argues that when there is an annulment of a contested act that is provided in the contract, such as when the subject matter of the contract is unlawful, then the contract should be automatically invalid.[153]

However, he argues that such automatic invalidity should be conditional on the qualification that the contract is not executory. If the contract has started to be performed the only remedy available should be that of damages.[154]

He also argues that, while the courts have not commented on the validity of the contract, the fact that the administration is obliged to restore the conditions of the situation prior to the annulment order means that there must be some effect on the contract. He does not, however, explain how this will materialise in practice.[155]

[150] See in this respect the dissenting opinion in decision ΣτΕ-817/2010 in Dimitrakopoulos, 'Εννομο συμφέρον για αίτηση ακυρώσεως αναθέσεως δημόσιας συμβάσεως που έχει συναφθεί', (2010)
[151] Tomaras (n.48)
[152] Ibid., p.59
[153] Ibid.
[154] Ibid.
[155] Ibid., p.51

Professor Giannakopoulos has argued that both legislation and the jurisprudential approach of the courts should shift for a special remedial measure to be generated that will allow third-parties, and particularly, aggrieved competitors, to claim the invalidity of an unlawful contract.[156]

Regarding the position of the courts, the general approach is that the annulment of an executable act does not have any effect on a contract.

The Council has justified this approach based on Article 95 of the Constitution, which according to its interpretation limits its jurisdiction only to the annulment of the unilateral act, but not to the annulment of the contractual effects.[157]

The Council has gone as far as to annul terms of a contract that were based on unlawful administrative acts[158] but has not set aside a contract entirely.

What seems to have been accepted the Council is that a successful annulment action that may lead to the invalidity of a contract is where the relevant legislation breached explicitly provides for such result.

Thus, in case 3010/2009 it accepted a claim for an annulment because the public authority had omitted to place the contract before the Court of Auditors in violation of L.3310/2005 and held that such violation is punishable with the invalidity of the contract.

However, the Council based on a technicality it allowed the contract to go ahead. Hence, it is not clear, even in this case, how far the annulment of the act will lead to some adverse effects on a contact.

This position of Greek law should be, briefly, contrasted with that of France, a jurisdiction which also uses the theory of detachable acts (*l'acte detachable)* in public contract litigation, and which is in fact, the main source of influence of the Greek administrative law system.

[156] Giannakopoulos, (2006), (2010) (n.148)
[157] *ΣτΕ-2680/2010*
[158] *ΣτΕ-1908/2001*

Similarly with the position under Greek law, the traditional position of French law was that once the detachable act was declared annulled, it did not follow that the contract would be also annulled.[159]

The annulment of detachable acts had no real effect on the contract, a situation called the "*platonic*" effect of the annulment of the detachable act by *Romieu*.[160]

This approach changed after the landmark case of the C*onseil d'État* in *Tropic Travaux* in 2007.[161] According to this judgment, there is a special remedial measure open to unsuccessful competitors[162] of an awarding procedure requiring publicity and competition, which must be brought before the judge within two months after the publicity of the signature of the contract.

This special measure provides the courts with the power to declare simultaneously the annulment of the administrative act and the contract or modify certain contractual clauses that are linked to the unlawful administrative act.

The kind of breaches that will give rise to the *Tropic Travaux* claim include all serious defects such as violations of tendering rules, abuse of discretion, as well as violations regarding the capacity of a public authority to enter a contract.[163]

The judge has broad powers, if he finds the existence of defects in the administrative acts connected to the contract, to draw the consequences, considering all the interests involved: it can decide on termination of the

[159] Valadou, 'Enforcing the public procurement rules in France' in Arrowsmith (edition), "Remedies for Enforcing the Public Procurement Rules" (1993)
[160] *Martin, No.14220, GA Ad.* August 4, 1905, p.749; See further Amiel, 'Remedies in France', in Bedford & Tyrell, 'Public Procurement in Europe: Enforcement and Remedies', (Butterworths, 1997), p.131; *Lichère & Gabayet*, 'Enforcement of the EU Public Procurement Rules in France', in Lichère & Treumer, 'Enforcement of the EU Public Procurement Rules', (DJOF, 2011), p.314*; Remy, 'Les consèquences de l'annulation de l'acte dètachables sur le contrat lui ' même: une avancèe jurisprudentielle notqble; conclusions sur l'affaire Lopez* (C.E. 7-10-1994) R.F.D.A, 1994, p.1093-1094; Brisson, 'Recent changes in administrative litigation concerning contracts: on third-party remedies against administrative contracts', (2015), Montesquieu Law Review, 1.
[161] *Ce, 16 juillet 2007, Société Tropic Travaux Signalisation, No. 291645*
[162] In *Département du Tarn-et-Garonne, 2014* No. 358994 the Council identified two categories of third-party challengers: priority applicants (*requéreants privilégiés)* and ordinary applicants (*requérants ordinaires*). Priority applicants do not have to establish any interest to bring an action, their standing will suffice. Conversely, ordinary applicants (local citizens, taxpayers) must prove that their personal situation is "likely to be adversely affected in a sufficient, direct and define way" by the conclusion of the contract in question.
[163] Noguellou 'France', in Noguellou & Stelkens, 'Droit comparè des contrats publics – comparative law on public contracts', (Bruylant, 2010), p.p. 694-697

contract prospectively, change some of its clauses, continue its execution subject to regularisation measures, or merely award damages to the claimant.

Only if the defects noticed would not be a disproportionate interference with the public interest in service delivery or the rights of the contracting parties, may it decide to cancel totally or partially the contract.

Essentially, the French position on this matter provides the courts with ample powers to assess the circumstances and decide in their discretion the impact of a violation of public law on a contract, after a third-party protest.

This is an especially innovative approach which overcomes traditional institutional barriers and legal formalism.

However, Greece has not followed this approach and does not seem to intend to do so. Both the legislature and the courts have insisted on the platonic effect of the annulment of an unlawful act, without this having any effect on a contract.

Hence, they have rejected the approach that when the unlawful act is inseparable from a contract, the later may – in some situations at least – be set aside.

Greek law is not, the only jurisdiction where the annulment of the award decision or decision to conclude a contract and the contract as such are treated differently.

The edited collection by Treumer and Lichère, 'Enforcement of the EU public procurement rules'[164] reveals that most jurisdictions in the EU draw a sharp distinction between the annulment of the act and the contract as such.

In other words, the approach that they follow is when a contract is concluded, this remain immune and the finding of an unlawful decision can only raise a claim for damages by aggrieved competitors.[165]

[164] DJØF, 2011
[165] See further Ch.9-II-1.

IV.4.B. Challenges by the contracting parties

Most of the case law that has raised the issue of the invalidity of a contract due to a violation of mandatory law usually involves financial claims of the two contracting parties where the courts would either after a claim or incidentally and *ex officio,* review the legality of the contract.

Accordingly, the courts may have to determine whether the financial claim will be based on the contract, or as a result of the invalidity, any remedial action will be based on the law of unjust enrichment or under a civil liability claim.

Both contractual parties can raise the invalidity of a contract, and it is irrelevant whether the party that brings the claim is responsible for the violation.[166]

Hence, as a rule of thumb, the contractual parties can exit a bad bargain (and the possibility of being held liable on contractual damages) if there has been a violation that dictates the invalidity of the contract.

V. Unilateral remedying of public law violations

This section examines how far public authorities can remedy unilaterally an unlawfully concluded contract.

Under what conditions they can legitimately intervene in the contract by terminating or modifying it to correct or mitigate their unlawful decisions.

While in theory unilateral actions of public authorities are permissible for any defects in the contract to be remedied for the public interest, it seems that the prevailing view is that any legitimate unilateral intervention to a contract may only occur under contractual terms that regulate such a matter or under general provisions of law.[167]

In this respect, it seems that the only provision of law that allows public entities to intervene to the contract to correct its own violations is under Article 133 of

[166] *ΕφΑΘ-11549/1995, ΠΠΡ-142/2016*
[167] Koimtzoglou, 'Μορφές της απρόβλεπτης μεταβολής των συνθηκών εκτέλεσης των διοικητικών συμβάσεων' (1997), p.285; *ΣτΕ-3047/92*

L.4412/2016, which implements Article 73 of the EU directive on unilateral termination.

The two following parts examine the provisions of this Article. The first part looks at the conditions that will trigger the unilateral termination power. The second examines how consequential matters are treated between the parties in case unilateral termination is triggered.

V.1. Unilateral termination under L.4412/2016

Article 133(1) provides that contracting authorities may denounce a public contract by terminating it when the relevant provisions of Article 73 of L.4412/2016 (the equivalent of Article 73 of the EU directive) have been violated.

The first thing to note about this remedy is that the domestic legislator has not added any further grounds than those provided by the EU legislator.

The second thing to note is that similarly with the PCR's, there is no obligation for a contracting authority to denounce and terminate a contract.

The third thing to note that that termination under the second condition, i.e. termination of contract because it has been concluded with an economic operator who should have been disqualified from the awarding process, was already a requirement under Greek law.

When a contract is signed with an economic operator who should have been disqualified, L.3414/2005 provided that that economic operator should be forfeited, a measure which has as an effect the contract to be terminated.

The final thing to note is that the operation of termination of a contract due to a decision by the CJEU has in fact operated in Greece in the Council of State decision 2551/2014.[168]

[168] The CJEU judgment is Case *C-601/2010*, European Commission v Hellenic Republic (available in Greek and French)

In this case, it was not a contracting authority which decided to terminate the contract, but rather this decision came from a judgment of the domestic Court, which ruled that when a contract has been declared unlawful by the CJEU, this could not go on and must be set aside.

The case at hand was concerned an unlawful direct award which was the result of an unlawful modification of contract in violation of EU rules.

V.2. Consequences of unilateral termination

While unilateral actions of public authorities to the contract can be remedied through private law principles to restore the economic balance of the contract,[169] when it comes to terminating the contract due to the EU law violations, the public authority has no duty to provide compensation.

Article 192 of L.4412/2016 explicitly states that a contracting authority is not entitled to compensate a contractor (although it allows discretion to do so) if it has terminated a contract pursuant to Article 133. It is not clear why the domestic legislator has opted for such a harsh measure.

Such measure may be justifiable for the first condition regarding a contract that has been entered with a contractor who disqualified from the procurement process.

It may also be justified, under some circumstances when an unlawful modification has taken place.

In both such cases, the violations could potentially be foreseen by a contractor who may have either refrained from tendering in the first place (it is assumed that he knew of the disqualification order) or refrained from performing any further than what was originally agreed.

[169] While Greek law is heavily influenced by French law in the treatment of public contracts, it does not adopt the principle of *fait du prince* which embodies an indemnity remedy to a contractor when a public body unilaterally intervenes to a contract.

However, not providing any measure of compensation for termination due to the third condition does not seem to be justifiable.

In cases where the effects of a violation could not be foreseen by the two parties, such as when the violation is declared as 'serious' by the CJEU ex-post the conclusion of the contract, the effects of such decisions may be better shared between the parties and a contractor should be provided with some form of recovery.

Additionally, when the contract has been terminated due to an unlawful modification, any consequential matters should, in principle, be treated in line with the treatment of consequential matters under the ineffectiveness remedy.[170]

Hence, a complete ban on restitution may be justified when it can be determined that a contractor had constructive or actual knowledge of the unlawful modification. However, if this is not the case, restitution should be provided.

Similarly, a complete ban may also be justified when a contractor has performed in excess of the original agreement and in violation of the law without the authorisation of the public authority. As discussed at IV.3.B, this is an approach followed by some court decisions.

VI. Alternative remedies for aggrieved competitors

As was argued above, except for the EU ineffectiveness remedy, there is no other remedial tool according to which third-parties can challenge the effects of a contract successfully.

This section examines the type of alternative remedy that is available in those cases where the contract has been entered and there is no possibility of challenging the effects of a contract.

[170] Ch.4-V.5

The alternative remedy is that of damages. According to Article 373(1) of L.4412/2015, *"an interested party who has been excluded either from the bidding process or the award of the contract, in violation of domestic or EU law is entitled to claim damages according to Articles 197-198 of the civil code".*

The same provision further adds that "*If the interested party can prove that he would have been awarded the contract if the violation had not taken place then he is entitled to compensation according to the general law. Every provision that precludes or limits this right is not applicable."*

The first paragraph of Article 373(1) refers to Articles 197-198 of the civil code which constitute the provisions on liability for pre-contractual negotiations (*culpa in contrahendo*).

The second paragraph of Article 373(1) refers to the civil liability of the State provisions which is governed by Articles 105-106 of the Law Introducing the Civil Code (L.I.C.C.).

The next two parts examine the conditions that can trigger a damages award (1) and the scope of damages award (2).

VI.1. Conditions for damages

Article 197 of the civil code provides that "*in the course of negotiations for the conclusion of a contract the parties shall be reciprocally bound to adopt the conduct which is dictated by good faith and negotiation usages".*

Additionally, Article 198 provides that *"a person, who in the course of negotiations for the conclusion of a contract has through his or her own fault caused damage to the other party, is under the obligation to restore the harm even if the contract has not been entered into".*

A successful claimant must prove that extent of his damages as well as the causality between the unlawful act and the damages incurred.

There is no requirement to demonstrate fault on the part of the contracting authority since, in the context of public law, there is a special regime of strict liability attached to public authorities.[171]

Article 373(1) clearly states that every violation of domestic or EU law may give rise to an award of damages on the ground that the violation has created harm to the claimant.

Therefore, every unlawful act that has caused harm to a tenderer because of his trust in the rightful conduct of an authority may give rise to a damages award.[172]

Articles 105 and 106 of the L.I.C.C. prescribed that the State is liable to pay compensation for any unlawful acts or omission of its agents when exercising their powers.

A claim for damages under these provisions is of relevance in those situations where the claimant can prove that had the violation not taken place he would have been awarded the contract.

In practice, Articles 105-106 absorb in scope the provisions of Articles 197-198. Hence, they are usually invoked in parallel by an allegedly harmed party. Also, similarly with the provisions of Articles 197-198, liability under Articles 105-106 is strict and does not require demonstrating fault.

In a claim under the L.I.C.C. provisions, a claimant must prove that there was a causal link between the unlawful act or omission and the harm caused.[173] The harm will materialise when there is a violation or omission of the law, which protects the right of a claimant.

The causal link exists when, according to common experience, the allegedly harmful act or omission, in the normal course of events, and in view of the

[171] Gasoukas, 'Η αποζημίωση σε διαγωνισμούς δημοσίων έργων, κρατικών προμηθειών, υπηρεσιών: Ζημία, παράνομος αποκλεισμός, αντικειμενική ευθύνη' (2005), p.90
[172] Ibid., p.91
[173] *ΣτΕ-543/2014*

particular circumstances of the case, was objectively sufficient to bring about the harm.[174]

A claimant will also have to show *"a substantial chance"* that he would have been awarded the contract had the violation not occurred.[175]

This condition is not easily fulfilled since a contracting authority benefits from administrative discretion, when, for example, the contract is awarded on the 'most advantageous award criterion'.[176] However, in some cases, the courts have awarded damages based on these provisions.[177]

VI.2. Scope of damages

A claim under the *culpa in contrahendo* provisions amount to sunk costs, which include preparation costs for the submission of a bid and lost profits in the sense of profits that a bidder would have made from another contract or transaction that he rejected to participate in the procurement procedure.

It does not include, however, damages according to the profits he lost from the contract that was not awarded to him.

Conversely, a successful claim under the provisions 105-105 of L.I.C.C. will amount to a damages award that covers the lost profits that an aggrieved competitor would have made had the contract been awarded to him.[178]

This calculation is a difficult one and is based on the difference between the current financial position of the injured party and what it would have been had the tort not been committed.

The court may refuse damages or reduce their amount when the plaintiff has through his own fault created or contributed to the damage or omitted to prevent or minimise it, according to article 300 of the Civil Code.[179]

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[174] Pavlopoulos, (n.140) p.328.
[175] *ΣτΕ-3040/2014*
[176] Koutoupa-Rengagos, (n.45) p.397.
[177] *ΣτΕ-451/2013, 1943/2013, 3040/2014*
[178] *ΣτΕ-543/2014*
[179] Gasoukas (n.171), p.94

VII. Concluding remarks

The Greek case study is an excellent example of a jurisdiction with a traditionally highly regulated framework, where public law and specialised legislation covers every single aspect of the contractual function of public authorities, which has a high volume of litigation, and where phenomenon of widespread corruption, favouritism, as well as many intentional or unintentional irregularities on the part of public authorities are frequently apparent.

Stemming from a long tradition where public and private law are conceptually distinct matters in the eyes of the law, the Greek study revealed that a highly formalistic approach to the interpretation of traditional doctrines may create a barrier to allowing third parties to challenge the effect of a concluded public contract.

In this respect, the impact of EU law, and particularly the ineffectiveness remedy, an externally imposed remedy with a direct impact in the national legal order, has created a new landscape of challenges on concluded contracts.

Yet, even in this context, the Courts have shown a particular eager to interpret the law as narrowly as possible, and, in fact, no claim for ineffectiveness has ever succeeded.

Moreover, it was shown that the national legislators have rejected the possibility of extending the grounds under which third parties could challenge the validity of a concluded contract.

From the point of view of substantive law, it was shown that the Greek legal system is highly regulated, providing several compulsory checks that public authorities need to follow to conclude a valid and enforceable contract.

In effect, every breach of a mandatory law renders the contract subject to invalidity.

While such violations can be challenged by the two contracting parties or can be reviewed incidentally by the Courts, third parties are barred from challenging

the validity of the contract due to the highly formalistic approach adopted by the Courts and the restrictions imposed by the Constitution regarding the effect of annulment actions.

To this end, the position of Greek law was compared with a more flexible approach adopted the French administrative courts that have introduced a special remedial measure that allows third parties challenged on the effects of a contract and confers a discretion to the courts to decide the effect that a violation has on a contract after such challenge.

Since third parties will hardly ever be able to succeed to challenge a concluded contract (other than under the EU ineffectiveness remedy), the only remedy available is that of damages.

Although damages claim for lost profits can, in fact, in some circumstances succeed, the difficulty of the claimant to prove the direct causal link between the harm and the unlawful act is a factor that creates a barrier to the award of damages.

Another interesting finding from this case study is how the law treats consequential matters between the contracting parties arising from unenforceable contracts.

It was explained that the default position is that *inter partes* claims arising from illegal public contracts are regulated by the remedy of unjust enrichment. In principle, the law of unjust enrichment applies in the context of public contracts in the same way that it does for ordinary contract invalid contracts.

However, in some situations, notably, when unauthorised public funds are at stake due to an unlawful extension of a contract, the courts have adopted a more "policy-based approach" and have rejected entirely a restitutionary claim to a contractor.

Additionally, certain legislative provisions have rendered the application of any restitutionary claim conditional on whether the contractor had knowledge or contributed to the relevant violation.

With regards to how far a contracting authority may unilaterally remedy its own violations, it was explained that intervention to the contract could only be justified if relevant legislation or the contract as such allows so.

It was submitted that the most important legal instrument that provides provisions to this end is L.4412/2016, which mainly gives the power to public authorities to denounce an unlawful contract by terminating according to the EU provisions of Article 73.

The most interesting aspect around this issue is that the domestic legislator has given contracting authorities the ample power to refuse to any form of compensation in the event of unilateral termination. It was explained that this is an especially harsh measure.

Chapter 7

Law of the United States (U.S. Federal Law)

I. Introduction

The previous chapters examined the impact of unlawfully concluded public contracts under the EU (as a separate unique supranational legal system), English and Greek law.

Evidently, the focus of the analysis was on EU jurisdictions and there was an inevitable focus on the impact of EU law on the domestic laws with regards to some of the aspects of the matter under question.

However, as explained in chapter 1, the purpose of this thesis is to use the comparative legal method to examine more generally the treatment of unlawfully concluded contracts in various jurisdictions with potentially diverse regulatory approaches.

The final case study is a non-EU jurisdiction, with an especially developed regulatory public procurement system and a significant influence in the design of International public procurement regulation.

This is United States federal law, which provides for a highly developed system of public contract law and an extensive body of case law. This chapter is organised in the systematic manner as the other case studies.

II. The substantive legal framework

In the United States, the contractual function of governmental agencies is subject to a myriad of statutes and regulations.[1]

Some of the most important statutes are the Competition in Contracting Act of 1984 (CICA), which requires U.S. contracting agencies to arrange full and open competition[2], the Armed Services Procurement Act of 1947 (ASPA), which, generally, governs procurement by the military and aerospace agencies,[3] and the Federal Property and Administrative Services Act of 1949 (FPASA), which governs procurement by almost all other agencies of the U.S. government.[4]

Other important statutes include the Anti-Deficiency Act[5] (ADA), which forbids the United States federal government entering a contract without an Act of Congress in place appropriating the funds needed to meet the Government's contractual obligations, and the False Claims Act[6] (the Lincoln's Law), which imposes liability on contractors who defraud the government.[7]

Another important statute is the multi-year procurement statute,[8] which limits the government's ability to enter certain kinds of contracts because funds for the contract in future years may not be forthcoming.

In addition to the various statutes, there are multitudes of regulations governing the acquisition of goods and services by federal agencies. Foremost among these, is the Federal Acquisition Regulation (FAR).[9]

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[1] See, Schwartz, 'Learning from the United States procurement law experience: on law transfer and its limitations', (2002), P.P.L.R., 2, 115-125; Yukins, 'The U.S. Federal Procurement System: An Introduction', (2017), PLJ, 2/3, 69-93; Schwartz, 'United States of America', in Noguellou & Stelknes, '*Droit comparé des contrats publics* – Comparative law on public contracts', (Bruylant, 2010)
[2] 10 U.S. Code § 2304
[3] 10 U.S. Code §2302
[4] 41 U.S.C. § 251 *et seq*
[5] Pub.L. 97-258 (39 USC § 1341)
[6] 31 U.S.C. §§3729-3733
[7] Other important statutes include The Federal Acquisition Streamlining Act of 1994 (FASA), Pub.L. No 103-355, 108 Stat. 3242 which amended various sections of the statutes described above and the Clinger-Coher Act, Pub.L. No. 104-106, Division E, § 5101, 110 stat. 680 (1996) which governs the acquisition of information technology.
[8] 10 U.S.C. § 2302
[9] 1 CFR § 48

The purpose of FAR is to provide uniform policies and procedures for federal agencies. It covers the procurement activity of all federal agencies that do not have a specific exemption.[10]

The FAR comprehensively addresses both the procedures for the formation of contracts and the execution and performance of it. Hence, covering in detail the life cycle of contracts.

The FAR is subject to further implementation or supplementation by the government agencies.[11]

An example of these regulatory supplements to the FAR is the Defence Federal Acquisition Regulation Supplement (DFARS), which is applicable to the defence agencies.[12]

Apart from the statutes and regulations, there are important legal principles of mainly Constitutional origin that regulate the contractual activities of the federal government and its agencies.

While the U.S. Constitution does not expressly state that the government has the power to enter into contracts, it was established early in the constitutional history that agencies of the government have the authority to do so.

In *United States v Tingey*[13]*,* the Supreme Court considered that the power to enter into contracts is an inherent incident of the sovereignty of the national government and agencies are authorised to employ contracts whenever they are a reasonable means to pursue their ends.[14]

Moreover, it has been held that the federal government agencies possess the authority to enter contracts, even in the absence of statutory language expressly authorising them to do so.[15]

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[10] Nash, O'Brien-Debakey, Schooner, 'The Government Contracts Reference Handbook: A Comprehensive Guide to the Language of Procurement' (4th ed., Wolters Kluwer (Law & Business), 2013), p.229; Manuel, Halchin, Lunder & Cristensen, 'The Federal Acquisition Regulation (FAR): Answers to frequently asked questions', (2015), CRS report 7-5700

[11] Feldman & Keyes, 'Government Contracts in a Nutshell' (West, 5th edition, 2011), p.8

[12] 2 CFR § 48

[13] *30 US (5 Pet.) 115 (1831)*

[14] Schwartz, 'United States of America' (n.1), p.623

[15] *United States v Corliss Steam-Engine Company, 91 US 321 (1875)*

However, this broad capacity of entering contracts is restricted – primarily - by two legislative tools. The first is the *"Appropriation Clause"*[16] of the U.S. Constitution that provides the Congress with a mechanism to control and limit spending by the federal government.

The "*Appropriation Clause*" requires that, unless there is an Act of Congress appropriating the requisite funds for the intended purpose of entering a contract, federal agencies are forbidden from doing so.[17] As noted above, this requirement is also reflected in the Anti-Deficiency Act.

The second restraint on the government's inherent and unlimited capacity of entering - which has already been indicated above – is that a federal agency is limited to contract according to what the law prescribes.

Hence, a government contract must not be prohibited by law and, must be an appropriate exercise of government powers and duties.

In fact, under the United States federal laws any contract procured in violation of statutory provisions can have harsh effects to the contract and, historically, it was hard for contractor to recover under an unlawful agreement.[18]

However, as demonstrated in section IV, the courts in recent years have adopted a more lenient approach.

III. Control, review and enforcement mechanisms

This section outlines the relevant control and enforcement mechanisms applicable to public contracts. It is organised in the same systematic manner as the previous chapters.

It first examines whether the U.S. federal system provides for some institutional mechanism that reviews the legality of a contract whether pre – or post-award.

[16] Art.1, Sec.9, Cl.7
[17] See on financial appropriations, U.S. General Accountability Office, 'Principles of Federal Appropriation Law', (4th edition, 2016), GAO-16-463SP
[18] See indicatively, *United States v New York and Porto Rico Streamship Co, 239 U.S. 88; Clark v United States, (1877) 95 U.S. 539; G.G. Loehler v United States, 90 C.T.C.L.*

It goes on to examine whether a distinction between public and private law conceptually exists in the U.S. and how this affects the review system applicable to public contracts. Finally, it examines the judicial review process.

III.1. Institutional review mechanisms

As was argued in chapter 2, institutional review mechanisms might prove to be particularly useful for legal systems where substantive or procedural barriers restrain third-parties for challenging the effects of a contract.[19]

However, this is not the case under the U.S. federal system where, as explained in the following sections, unlawfully concluded contracts can be remedied in various ways, both by the contracting agency and the Government Accountability Office (GAO), where third-parties can challenge the effects of a concluded contract, and where review bodies frequently recommend such effects to be set-aside when a contract is concluded in violation of the law.

While the U.S. federal system does not provide for some mandatory institutional review mechanism, there are various auditing bodies in charge of routinely examining the procurement practices of federal agencies.

Such bodies include the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO), and most prominently, the Government Accountability Office (GAO).

Among other responsibilities, the GAO is responsible for issuing decisions addressing the appropriate use of funds, typically related to whether certain payments were lawful or could be paid out of a specific congressional appropriation.[20]

[19] Ch.2-III.2
[20] Gordon, 'In the Beginning: The Earliest Bid Protest Filled with the U.S. General Accounting Office', (2004), P.P.L.R., 5, 147-164; GAO, 'Contract Audits: Role in Helping Ensure Effective Oversight and Reducing Improper Payments', (February 2011), GAO-11-33IT; GAO, 'The Role of GAO in Assisting Congressional Oversight' (June 2002), GAO-02-816T

Although the GAO does not have to authorise a contract for it to go forward, yet – as explained below – it can issue recommendations to the federal agency, which more often than not are followed.[21]

The GAO can issue recommendations after a protest (see below), but it can also act ex officio by requiring the disposition of contracts.

It may issue recommendations in relation to breach of contract questions, contractor claims, the authority of an agent to sign the contract, and on the general requirement that contracts be reduced in writing.[22]

The GAO can also determine that the contract illegal and recommend its cancellation.[23]

While the GAO has no statutory authority to order an agency to refrain from a proposed course of action, practically the decisions are binding upon agencies, for if they disregard its decisions, it may face refusal of funds on the ground that the contract was awarded illegally.[24]

III.2. The distinction between public and private law

Although the U.S. federal legal system does not make a distinction between public and private law concerning the law applicable to government contracts, yet, such contracts are subject to a "special regime" that confers on the government a superior position *vis-à-vis* the contractor that is conceptually distinguishable from the rules applicable to ordinary contracts in various respects.

First, this "special regime" is reflected in the status that the government enjoys as a sovereign entity, which limits or eliminates its potential contractual liabilities. More specifically, the two intertwined doctrines on the interpretation

[21] Gordon, Ibid.
[22] Ibid.
[23] *John Reiner & Co v. United States 325 F.2d 428 (Fed.Cl.1963)*
[24] GAO-02-816T (n.20)

of government contracts, that of the "Sovereign Acts Doctrine"[25] and that of the "unmistakability doctrine", preserve the rights of the government to alter policies in response to changing political challenges that incidentally affect the performance of the contract without being held liable for breach.[26]

Another distinguishable characteristic of government contracts as compared to ordinary contracts, which is relevant to the current analysis, is the availability of a standardised protest system for disappointed intended and actual bidders concerning the formation or award of government contracts.[27]

This review system does not draw a distinction between administrative law contracts in the way that, traditionally, Greece and other jurisdictions with a similar system do and its scope is particularly wide covering most procurement contracts.

Additionally, unlike the traditional position of English law, the U.S. protests system – historically - was never concerned with whether contractual decisions by public bodies fall within the realm of public law or private law.

Instead, as it is explained in III.3 below, the system of protest is premised upon a detailed regulatory framework that allows aggrieved suppliers to challenge contractual decisions both pre and post the conclusion of a contract.

However, historically, the U.S. federal courts were reluctant to allow protests from disappointed bidders.[28] In *Perkins v. Lukens Steel*[29] in 1940, the Supreme

[25] *Deming v. United States, 1 Ct.Cl.190 (1865); Horowitz v United States, 267 U.S. 458 (1925)*
[26] However, it should be noted that these doctrines are not absolute and do not always confer immunity from contractual liability. See in particular *United States v Winstar Corporation 518 U.S. 839 (1996)* See generally on this, Schwartz, 'Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law' (1995-96) 64 Geo. Wash. L. Rev, 633; Scwartz, 'Assembling Winstar: Triumph of the Ideal of Congruence in Government Contracts Law?' (1996-1997), 26 Pub. Cont. L.J. 481; Nibley & Totman, 'Let the Government Contract: The Sovereign has the rights, and good reason, to shed its sovereignty when it contracts' (2012-2013) 42 Pub. Cont. L.J. 1.
[27] Schooner, 'Fear of Oversight: The Fundamental Failure of Business-like Government' (2001), 50 Am.U.L. Rev., 627, 638
[28] Saunders, Butler, 'A Timely Reform: Impose Timeliness Rules for Filing Bid Protests at the Court of Federal Claims' (2010), Pub. Cont. L.J. 539, 541-548; Metzger & Lyons, 'A Critical Reassessment of the GAO Bid-Protest Mechanism' (2007), Wis. L. Rev., 1224, 1234-41; Varchinski, 'Are District Courts Still a Viable Forum for Bid Protests?' (2003), Pub. Cont. L.J. 393; Black, Hallmark, 'Procedural Approaches to Filling Gaps in the Administrative Record in Bid Protests Before the U.S. Court of Federal Claims' (2014), 43 Pub. Cont. L.J., 213; Comment: The role of GAO and Courts in government contract bid protests: an analysis of post-Scanwell remedies' (1972), Duke law Journal, 745, 750
[29] *310 U.S. 113, 129 (1940)*

Court reached the conclusion that potential bidders who had been disappointed in their dealings with the federal government lacked standing to challenge alleged violations of federal law by government agencies.

The main reasoning for this conclusion was that federal procurement law was enacted strictly for the government's benefit and thus it could not be enforceable against the government by private parties.[30]

However, in 1956 the Court of Claims, as it was then called, recognised that disappointed bidders have a right to sue the government for unlawful procurement decisions.[31]

Eventually, in *Scanwell laboratories, Inc v. John H. Shaffer*[32] in 1970, the U.S Court of Appeals for District of Columbia established that the Administrative Procedure Act (APA) 1946 did authorise District Federal Courts to hear bid protests.

The system of protest is explained in more detail in the section below.

III.3. Judicial Review

As noted above, the APA authorised District and Federal Courts to hear challenges by disappointed bidders for alleged violations of procurement statutes and regulations or for lack of rationality in the selection of the winning bidder.[33]

The predecessor of the Court of Federal Claims initially heard bid protests under the Tucker Act, on the basis that the Government made an implied contract with prospective bidders to fairly consider their bids.[34]

[30] Manuel & Schwartz, 'GAO Bid Protests: An Overview of Time Frames and Procedures', Congressional Research Service, Jan. 19, 2016
[31] *Heyer Prods Co., Inc. v United States, 140 F. Supp. 409, 413 (Ct.Cl.1956).*
[32] 424 F.2d 859, 865-69 (D.C. Cir. 1970)
[33] *Diebold v United States, 947 F.2d 787, 810-11 (6th Cir. 1991);* see Sisk, 'Litigation with the Federal Government' (ALI-ABA, 2000), p. 318
[34] *Southfork Systems, Inc., v. United States, 141 F.3d 1124 (Fed. Cir. 1998)*

Today the Court of Federal Claims (COFC) shares authority over bid protests with the Government Accountability Office (GAO).[35] In addition, an intended or actual bidder can bring a claim before the contracting agency itself.[36]

The procedures and available remedies before these forums are examined separately below.

III.3.A. Interrelationship of forum and appeals

It should be noted from the outset that there is no restriction for any interested party who satisfies the requirements for standing to file protests in any of these forums subject to some limitations described below.[37]

However, care must be taken in selecting the forum because the filling of a protest may be held to be a binding election of the forum by the protestor.[38]

This is particularly the case with the GAO, which can dismiss any protest where the "matter involved" is before a court of competent jurisdiction or where the matter has been decided on the merits by a court unless the court requests a decision by the GAO.[39] This rule applies to both initial protests and requests for reconsideration.[40]

The Code of Federal Regulations (C.F.R.) § 21.11(a) requires a protester to notify GAO immediately of any court proceedings that involve the subject matter of a protest and the file all relevant documents with GAO.

[35] 31 U.S.C. § 3553
[36] FAR 33.103
[37] 31 U.S.C. § 3556
[38] Cibinic, Nash & Yukins, 'Formation of Government Contracts' (4th edition, Walter, 2011), p.1802
[39] 4 C.F.R. § 22.11(b)
[40] Cibinic, *et al.* (n.38), p.1802

III.3.B. Review before the contracting agency

The least formal, least expensive and quickest forum for a third party to challenge an allegedly 'improper' decision[41] of a contracting agency is to bring a claim before the agency itself.[42]

An agency protest - as this procedure is called - may be filed by any *"interested party"* - that is, *"an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract"*.[43] This definition of *"interested party"* is established in GAO decisions and its interpretation is examined in III.3.C below.

Protests should be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier.[44] However, the agency has discretion, if a good cause is shown, or where it determines that a protest raises significant issues to its acquisition system, to consider the merits of any protest that is not timely filed.[45]

Agency protests share many of the benefits of the GAO protest (see below), including the mandatory automatic stay of contract award or performance, the exchange of information, and a written protest decision.[46]

If an agency receives a protest before award, it may not award the contract until the protest is resolved, unless an official at a level above the contracting officer approves a written determination that contract award is justified by urgent and compelling reasons or is in the best interest of the government.[47]

As for the remedies available, these are stated in FAR § 33.102(b). This provision provides that the agency can take *"any action that could have recommended by the Comptroller General had the protest been filed with the Government Accountability Office".*

[41] FAR §33.103(e)
[42] Ibid.
[43] §33.101
[44] §33.103(e)
[45] Ibid.
[46] §33.103(h)
[47] §33.103(f)

This means the standard of remedies is the same as the one applied by GAO and examined in the section below.

When it comes to remedies after the award of the contract (i.e. after the contract is entered into) the agency may void the contract or terminate it under the default provisions of termination for convenience.[48]

In addition, if the agency concludes that a protest is meritorious because of a legal deficiency due to a violation of statute or regulation, it may pay the protester the cost of pursuing the protest but cannot reimburse him for lost profits.[49]

Another procedure for resolving protest in lieu of either protesting with GAO or litigation is alternative dispute resolution. FAR § 33.103(c) provides that the "*agency should provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests. Where appropriate, the use of alternative dispute resolution techniques, third party neutrals, and another agency's personnel are acceptable protest resolution methods*".

III.3.C. Review before the GAO

The GAO protest system is historically - and remains hitherto - the primary forum for federal procurement claims.[50]

The GAO review system has a distinct feature when compared with the review forums examined in the previous case studies. That is, its decisions come in the form of recommendations, and although the contracting agencies usually adopt those recommendations,[51] its decisions are not legally binding upon the federal agencies.[52]

[48] See further section IV
[49] *Inter-Con Security, Systems Inc. – Costs*, GAO B0284534.7, 3/14/01
[50] Only in 2015, GAO received 2496 protests.
[51] Manuel & Schwartz, (n.30) table 3 p.17; O'Connor, 'Understanding government contract law', (MC, 2007) chapter 10
[52] *Rice Servs. Ltd v United States, 25 Cl.Ct. 366 (1992); Wheelabrator Corporation v Chafee, 455 F.2d 1306 (D.C. Cir. 1971)*

The reason for this lies in the fact that GAO is a legislative branch agency and cannot constitutionally compel agencies of the executive branch to implement their decision.[53]

By statute, a claim protest before GAO may be filed by any *"interested party"*[54] which is generally defined as *"actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract".*[55]

Given the lack of direct economic interest, "concerned citizens" cannot establish standing and challenge an alleged unlawful decision before GAO.[56] Hence, similarly to the position of EU law and the Remedies Directive, only bidders with a direct economic interest in the contract are entitled to bring a claim.

Subcontractors also generally lack standing to bring a GAO protest unless the contracting agency has so requested.[57] Likewise, associations or organisations that do not perform contracts do not qualify as *'interested parties'* and cannot bring protests.[58]

Determining whether a party qualifies as "*interested"* involves consideration of various factors - including the nature of the issue raised, the benefit or relief sought by the protestor, and the party's status in relation to the procurement.[59]

Generally, prior to contract award, parties who are interested in bidding or offering qualify as "interested parties". In contrast, after the award of the contract, only contractors who bid or submit offers may generally qualify as interested parties since only they are eligible for the award.[60]

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[53] *Ameron, Inc v. U.S. Army Corps of Engineers 787 F.2d 875 (1986)*
[54] 31 U.S.C. §3553(a)
[55] 31 U.S.C. §3551(2)(A)
[56] 4 CFR 21.0 (a) 2009 See, Gordon & Golden, 'Money Damages in the Context of Bid Protests in the United States', in Fairgrieve & Lichère (edition), 'Public Procurement Law: Damages as an effective Remedy', (Hart Publishing, 2011) p.208
[57] Manuel & Schwartz, (n.30) p.6
[58] *American Fed'n of Gov. Employees, Comp. Gen. Dec, B0219590.3, 86-1 CPD ¶ 436*
[59] *Meridian Mgmt.Corp., Comp. Gen. Dec. B-271557, 96-2 CPD ¶64; Black Hills Refuse Serv.,67 Comp. Gen. 261 (1988), 88-1 CPD Para.151*
[60] Manuel & Schwartz, (n.30), p. 6; GAO, 'Bid Protest at GAO: A Descriptive Guide,' (9th edition, 2009)

When the protest relates to a "sole source award" (direct awards) or "bridge contracts" (extended/modified contracts) potential competitors qualify as interested parties.[61]

However, once the sole source procurement has been held to be proper, the potential competitor does no longer qualify for standing.[62] In addition, a protestor that would not qualify under the sole source solicitation provisions would also not qualify for standing unless he had challenged the relevant provision(s) that did not allow him to qualify for the solicitation in the first place.[63]

Regarding time limits, the CICA requires to file a protest with GAO within ten days after the contract is awarded or five days after receiving a debriefing by the agency.[64] Upon receiving a timely protest, the GAO may trigger an automatic stay (known as CICA stay) of contract award or performance.

With pre-award protests, an agency may not award the contested contract until the protest has been resolved.[65] Similarly with post-award protests, the agency may not authorise performance of the contract to begin while a protest is pending. The decision has to be issued within 100 days after the protest is filed.[66]

If authorisation for contract performance to proceed was not withheld, the agency shall immediately direct the contractor to cease performance under the contract and to suspend any related activities that may result in additional obligations being incurred by the government under the contract.[67]

[61] *Julie Research Labs., Inc., GSBCA 8070-P, 85-3 BCA ¶ 18,375*
[62] Ibid.
[63] *International Training, Inc., B-272699 Date: October 2, 1996*
[64] 31 U.S.C. §3553(d)(4)
[65] §3553(c)(1); see on a critique of the CICA stay: Metzger & Lyons, (n.28) The authors raise the concern that protestors may ''game'' the process by using the stay to exact concessions from agencies.
[66] §3554(a)(1)
[67] §3553(d)(3)(A)(ii)

The availability of an automatic stay of contract award or performance until the protest is resolved, along with the much less costly process, are the attractive procedural characteristics of the GAO protest system.

However, CICA expressly authorises agencies to override the automatic stay of contract award or performance when urgent and compelling circumstances, which significantly affect the interest of the United States will not permit waiting for a decision[68], or when the performance of the contract is in the best interest of the United States.[69]

To execute such an override, the agency must (1) prepare a written finding which must be approved by a senior official explaining the government's ''urgent and compelling'' reasons, (2) inform the Comptroller General of its decision, and (3) authorise the award of the contract or permit contract work to proceed.[70]

When the government takes such action the protesting party's only recourse is to sue the agency before the Court of Federal Claims (COFC - see below) for a temporary restraining order or for an injunction (see below).

When a protest is found to have grounds, the protestor is found to have standing and the filling is found to be timely, the GAO will accept it for review. Most reviews are conducted from the record (without a formal hearing but in accordance with the written submissions).[71]

The standard of review before is GAO is very similar to that of CICA, albeit a bit less demanding.[72]

In particular, the GAO has held that it will not sustain a protest unless the protester demonstrates 'reasonable' possibility that it was prejudiced by the

[68] §3553(d)(3)(C)(i)(II)
[69] §3553(d)(3)(C)(i)(I);
[70] §3553(d)(2)
[71] In some situations, the GAO may order hearings *sua sponte*. However, this is the exception rather than the rule. In fiscal year 2002-2006, the GAO granted hearings on between five and thirteen percent of cases (GAO, 'Bid Protest Statistics for Fiscal Years 2002-2006')
[72] Claybrook, 'Standing, Prejudice, and Prejudging in Bid Protest Cases' (2004), 33 PCLJ, 535

agency's actions and but for the agency's actions, it would have had a substantial chance of receiving the award.[73]

In relation to the remedies available, as noted, these come in the form of recommendations. The GAO may - if it determines that the protested solicitation, proposed award, or award does not comply with a statute or regulation - recommend that the agency do the following:

(a) refrain from exercising options under the contract, (b) re-compete the contract, (c) issue a new solicitation, (d) terminate the contract, (e) award a contract that complies with statutes or regulations, (f) take any combination of the above actions, or (g) implement other recommendations the GAO determines necessary to promote compliance.[74]

In deciding which of these options to recommend, GAO is required to consider *''all circumstances surrounding the procurement or proposed procurement including the seriousness of the procurement deficiency, the degree of prejudice to the other parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of the recommendation(s) on the agency's mission"*.[75]

Where the agency has determined that performance of the contract notwithstanding a pending protest is in the government's best interest, the GAO's recommendations must ignore any cost or disruption from terminating, re-competing, or re-awarding the contract.[76]

In addition, if the GAO concludes that a protest is meritorious because the agency did not comply with a statute or regulation, it may recommend that the

[73] *IGIT, Inc., Comp. Gen. B-275299.2, June 23, 1997, 97 – 2 CPD; Lithos Restoration Ltd., Comp. Gen. B-247003.2, Apr. 22, 1992, 92-1 CPD 379*
[74] 31 U.S.C. §3552(a); 4 C.F.R. § 21.1(a)
[75] 4 C.F.R. §21.8(a)
[76] 4 C.F.R. §21.8(b)

agency pay the protester the cost (excluding profit losses) of pursuing the protest.[77]

There is no specified appeals procedure for GAO decisions because they are not in the nature of judicial decisions.[78] If a protester is dissatisfied with a GAO decision, an action may be brought in the COFC, assuming that all requirements for jurisdiction are met.[79]

It is the agency's award decision, not the GAO's recommendation that is subject to review.[80] The COFC with not make a *de novo* review but, rather, will determine where GAO's recommendation was rational.[81]

III.3.D. Review before the COFC

The CICA explicitly provides that *"nothing contained in this subchapter shall affect the right of any interested party to file a protest with the contracting agency or to file an action, in the Court of Federal Claims."*[82]

The COFC and its predecessors initial relied upon the Tucker Act, (28 U.S.C. § 1491(a)(1)), to take jurisdiction over contract award controversies.[83] As a result of the Administrative Dispute Resolution Act of 1996 (ADRA), which amended the Tucker Act, COFC is now the sole federal judicial trial forum in which disappointed bidders may pursue a protest.[84]

The COFC has jurisdiction to render judgment upon a claim over the United States agencies *"founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract..."*[85]

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[77] 4 C.F.R. §21.8(e); 31 U.S.C. §3554(c)(1)(A)-(B)
[78] Cibinic, *et al*. (n.38), p.1804
[79] 31 U.S.C. § 3556
[80] *Advanced Constr. Servs., Inc. v United States, 51 Fed, Cl. 362 (2002)*
[81] *Honeywell, Inc. v United States, 870 F.2d 644 (Fed.Cir.1989)*
[82] 31 U.S.C. §3556
[83] Cibinic, *et al*. (n.38) p.1762
[84] Feldman & Keys, (n.11) p.433
[85] 28 U.S.C. § 1491(a)(1)

In addition, it has jurisdiction to render judgment on an action by an interested party objecting to a solicitation by an agency for bids or a proposed contract or any alleged violation of statute or regulation in connection with a procurement or a proposed award.[86]

It has jurisdiction to entertain such an action without regard to whether the suit is instituted before or after the contract is awarded.[87]

The threshold for determining whether a party has standing to bring a protest is whether it qualifies as an *'interested party'*.[88] Although the relevant jurisdictional statute of ADRA does not define this term, the Federal Circuit in *Rex Service Corporation v United States*[89] held that it is construed in accordance with the definition of the same term in CICA, which as noted, governs GAO bid protests.

Thus, a two-stage test is applied to determine whether a party qualifies as 'interested': (a) the protester must show that it was an actual or prospective bidder and (b) had a direct economic interest to the contract.[90]

When the claim is related to a failure of an agency to engage in competitive bidding by choosing the method of sole-source award, to satisfy the requirement of *'actual or prospective bidder'*, a potential claimant does not need to show that he would have received the award in a competition with other hypothetical bidders, but rather that it would have qualified for bidding had the competition taken place.[91]

[86] 28 U.S.C. § 1491(b)(1)
[87] Ibid*;* on post-awards see, *Impresa Construzioni Geo Domenico Garufi v United States, 238 F.3d 1324, 1330 (Fed.Cir.2001).* The Federal Courts Administrative Act of 1992 (Pub. L. No 102-572) only allowed jurisdiction of the COFC in relation to claims before the contract was awarded. This has now changed under ADRA.
[88] *American Federation of Government Employees v United States, 258 F3d 1294*
[89] *448 F.3d 1305 (Fed.Cir.2006)*
[90] In some States standing to challenge an unlawful contract has also been allowed to taxpayers. See, *Miller v McKinnon 20 Cal.2d 83 124 P.2d 34 (1942)* decided in the California Supreme Court.
[91] Cibinic, *et.al.* (n.38), p.1766; *Myers Investigative & Sec. Servs., Inc v United States, 275 F. 3d 1366 (Fed.Cir.2002); Magnum Opus Techs., Inc v United States, 94 Fed. Cl. 512 (2010)*

With regards to proving a direct economic interest, which is the relevant standard for relief to be granted, a potential claimant, is required to demonstrate that any alleged errors caused *"prejudice or (injury)"*.[92]

The concept of prejudice in this context must be interpreted as a requirement for the claimant to prove that, but for the alleged errors in the procurement, it would have had a substantial chance of receiving the contract.[93]

This test also applies to sole-source awards. In particular, a disappointed competitor can establish prejudice either by showing that proceeding without the violation would have made the agency's decision to make a sole-source award rather than to conduct a competitive bidding process irrationally, or that proceeding without the violation, the complaining party would have had a substantial chance of receiving the sole-source award.[94]

Regarding the time limits for protest, unlike the agency-level or GAO protests, these are not regulated for protests before the COFC.

However, the COFC has determined that the test in such cases is whether the delay in bringing the protest was "*unreasonable and unexcused and prejudiced the government or other parties"*.[95]

The Court has deemed 14 months after the protester knew or should have known of the ground of the protest as the basis of time limitation.[96]

Generally, however, protests should be filled quickly in order to demonstrate irreparable harm necessary to obtain permanent relief (see below).

As for the remedies available, 28 U.S.C. § 1491(b)(2) states that *"the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid and proposal costs".*

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[92] *Magnum Opus Techs… ibid*
[93] Ibid.
[94] Ibid.
[95] This is referred to as the equitable defence of laches. *Software Testing Solutions, Inc. v. United States, 58 Fed. Cl. 533, 535 (2003); National Telecommuting Institute, Inc. v. United States, 123 Fed. Cl. 595 (2015).*
[96] *CW Government Travel, Inc. v United States 61 Fed. Cl. 559 (2004)*

The COFC has a free reign to award both injunctive and monetary relief (bid preparation and proposal costs including attorney's fees under the Equal Access to Justice Act).[97]

In relation to preparation costs, the COFC will award that sum of monetary relief that would put a protestor in the position it would have been but for the errors.[98] Recovery for lost profits has been uniformly denied.[99]

Regarding the non-monetary remedies of injunctive and declaratory relief, while some court decisions have suggested that the ultimate remedy sought by a protestor is to receive the contract, in practice such remedy is granted in only the rarest of cases.

More specifically, the Court has suggested that the reverse of the contract award by a judicial decision will only be granted when but for the unlawful conduct by the government, the particular contract would have gone to the unsuccessful bidder.[100]

However, in *Parcle 49C Ltd. Partnership v United States*,[101] the Federal Circuit held that it was not for the trial court to order the award of the contract but rather to return the contract award process to the *status quo ante* any illegality.

There are four factors that the court examines when determining whether injunctive relief is granted:[102] (1) there must be strong likelihood of success on the merits,[103] (2) irreparable injury if the order is not granted,[104] (3) the

[97] *CNA Corporation v United States, 83 Fed. Cl. 1 (2008); Geo-Seis Helicopters, Inc v United States, 55 Fed. Cl. 323 (2002)*
[98] *Alabama Aircraft Industries Inc. – Birmingham v. United States, 85 Fed. Cl. 558 (2009)*
[99] See section IV.
[100] *Choctaw Mfg. Co v United States, 761 F.2d 609 (11th Cir. 1985); Superior Oil Co. v Udall, 409 F.2d 1115 (D.C. Cir. 1969)*
[101] *31 F.3d 1147 (Fed.Cir.1996)*
[102] *Cincom Sys., Inc. v United States, Fed.Cl.1997*
[103] Ibid., where the court considered the fact that the claimant lost in an earlier GAO protest
[104] *Magellan Corp. v United States., 27 Fed. Cl. 446*, where the court considered that there was no irreparable harm if the claimant had other opportunities to supply products. Contrast with *Seattle Security Services, Inc. v United States (1999)* where the court agreed with the claimants that they would suffer irreparable harm if an injunction is not granted because the only other available relief – the potential of recovery of bid preparation costs – would not compensate it for its loss of valuable business on this contract.

threatened injury outweighs any damage to the opposing party,[105] and (4) consideration of the public interest.[106]

In relation to the standard of review required for a remedy to be granted this is provided by 5 U.S.C. §706(2)(A) which provides that in order for the COFC to set aside an agency's action this must be "*arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law*".

The Court will consider any, or all, of the following three factors in determining whether there has been an abuse of discretion or that the agency acted in an arbitrary or capricious manner:

(a) subjective bad faith on the part of the agency (specific intent to injure) which deprives a bidder or the fair and honest consideration of his proposal, which usually carrier recovery of bid preparation costs,[107] (b) absence of reasonable basis for the agency decision or action,[108] (c) proven violation of pertinent statutes or regulations.[109]

Injunctive relief is an equitable remedy and thus it is entirely up to the discretion of the COFC to decide whether to grant it.[110] Hence, even if the court finds that the government actions in soliciting and awarding a contract were 'arbitrary, capricious or not in accordance with the law', it may still dismiss a claim for relief.[111]

The COFC decision may be challenged before the U.S. Court of Appeals for the Federal Circuit by filing a notice of appeal within 60 days after the date of entry of judgment.[112] The Federal Circuit will review the COFC's legal conclusions *de*

[105] *Rockwell International Corporation v United States, 4 Cl. Ct. 1, (1983)* where the court stated that injunctive relief should be denied when national security and defence concerns are raised.
[106] Public interest may wave in favour of injunctive relief: K*inge Corp. v United States, 82 Fed.Cl.127 (2008)* where the court indicated that the public interest weights in favour of preventing the government from executing a contract in violation of a statutory requirement.
[107] *Heyer Products Co v United States, 135 Ct. Cl. 63 (1956)*
[108] *Rockwell International Corporation v United States, 4 Cl. Ct. 1 (1983)*
[109] *Prineville Sawmill Co v United States 859 F.2d 905, Fed. Cir. (1988*)
[110] *FMC Corporation v Unites States, 3 F.3d 424 (Fed.Cir.1993)*
[111] See further IV.5
[112] 28 U.S.C. §1295(a)(3)

novo but will not disturb the COFC's factual findings and will apply the same *'arbitrary and capricious'* standard.[113]

IV. The impact of violations of federal law on concluded contracts

This section examines the impact of violations of the federal rules on concluded public contracts.

Before entering into further analysis, it should be noted from the outset that all violations of federal law may have an effect on a contract.

It is generally accepted that any contract that either requires the performance of an act which is not permitted by law or the parties have entered it in violation of the law (an 'improper award')[114] is regarded (at least in the context of government contracts) as 'illegal'.[115]

Consequently, the question that arises is what the effect of illegality on a contract. The starting proposition of the law on this matter is that failure of a procuring agency to comply with statutory requirements renders the contract a 'nullity'.[116]

In *Amdahl*[117], the U.S. Court of Appeals for the Federal Circuit explained that "*the government has the power to act only through its agents whose authority and manner of exercise thereof is rigidly prescribed and limited by statute, regulation, and judicial and administrative determinations. Failure to follow the applicable rules negates the agent's authority to enter into a contract binding on the government. To permit otherwise would be to nullify those very statutes, regulations, and determinations--a result clearly contrary to the public interest*."

[113] Feldman & Keys (n.11), p.438
[114] See, Ingram, 'Government Contracts: The Consequences of an Improper Award', (1970) 11 Wm. & Mary L.Rev.706
[115] Janik, & Rhodes, 'Gould, Inc v. United States: Contractor claims for relief under illegal contracts with the government' (1996), 45 Am. U. L. Rev, 1949, 1950
[116] *Toyo Menka Kaisha, Ltd. v. United States, 220 Ct. Cl. 210, 217-20, 597 F.2d 1371, (1979); Alabama Rural Fire Insurance Co. v. United States, 215 Ct. Cl. 442, 452-60, 572 F.2d 727, (1978); Schoenbrod v. United States, 187 Ct. Cl. 627, 634-35, 410 F.2d 400, (1969)*
[117] *United States v Amdahl Corporation 786 F.2d (1986)*

This statement reflects the position of the U.S. federal law in relation to any violation of federal statutes and regulations.

In fact, the U.S. federal law does not make a distinction between illegal awards which their subject matter is unlawful, and violations related to the award procedure, at least not in a contextual sense.

The emphasis is always on whether statutory requirements have not been adhered to, in which case, the contract is usually treated as a nullity since enforcing the contract would vitiate the central purpose of the relevant statutory requirement.[118]

It has been said that purported agreements made in lack of statutory authority or in violation of such statute renders any purported contract unenforceable against the government.[119]

However, as it will be shown, the distinction between violations related to the subject matter and procedure are to some extent relevant in relation to how consequential matters between the parties are treated.

Following the systematic analysis, this section starts by examining the impact of violation related to the subject matter of a contract (IV.1) and goes on to examine the impact of violations relating to the award procedure (IV.2).

After doing so, it will examine the various issues in relation to the consequences following the finding of an 'illegal' contract, i.e. the consequences to a contract (IV.3), the contracting parties' rights of relief (IV.4), and the parties that may challenge the effects of illegal contracts (IV.5).

[118] *Acme Process Equipment Co. v United States 385 U.S. 138 (1966)*
[119] *Baltimore & O.R.R. v United States, 261 U.S.; Hooe v. United States, 218 U.S. 322 (1910)*

IV.1. The impact of violations related to the subject matter of a contract

"In the absence of constitutional inhibitions, the sovereign can make such contracts as it pleases and no one can object".[120]

While the government has the constitutional authority to contract for its needs,[121] latitude to contract is limited by the 'Appropriation Clause' of the U.S. Constitution and the Anti-Deficiency Act, both of which, in essence, provide that no one can obligate the Government to make payments for which money has not already been authorised and appropriated by the Congress.

To obligate the government by contract, the agency must have received sufficient funds in an existing appropriations statute to cover the obligation, or there must be some other statute by which Congress specifically empowers an agency to make contracts without regard to the need for appropriations.[122]

The general view - as this is reflected in the jurisprudence of the federal courts - is that contracts in violation of the appropriation requirement do not bind the government. That is, they are unenforceable against the Government and they are treated as 'void'.[123]

For instance, in *Sutton v. United States*,[124] the U.S. Supreme Court held that a contract with a contractor who - through the mistake of government - had been allowed to continue work in such volume as would require an excess of the amount appropriated for the work, did not bind the government.

Similarly, in *OPM v Richmond*[125] it held that any contract (or act)[126] that involved payment of money not authorised by statute cannot bind the government.

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[120] In *Re American Boiler Works, Inc., 220*
[121] *Neilson v. Lagow, 53 U.S. (12 How.) 98, 107 (1851); United States v. Tingley 30 U.S. (5 Pet.) (1831)*
[122] 2 U.S.C. § 622(2)
[123] *United States v Amdahl Corporation (1986); American Tel & Tel. Co v United States, 177 F.3d 1368 (Fed.Cir.1999); Schism v. United States, 316 F.3d 1259, 1288 (Fed. Cir. 2002),*
[124] *256 U.S. 575 (1921)*
[125] 496 U.S. 414 (1990)
[126] The claim in this case was a tortious one but the same principle applies.

The Supreme Court emphasised the fact that a claim for payment of money from the Public Treasury contrary to a statutory appropriation is prohibited by the Appropriations Clause of the Constitution, Art. I, § 9, cl. 7, which provides in effect that such money may be paid out only as authorized by a statute.

In *Hooe v United States*,[127] the Supreme Court held that heads of departments cannot, by express or implied contract, render the government liable for an amount in excess of that expressly appropriated by Congress and that a claim against the United States for a specific amount of money which is not expressly or by necessary implication authorized by a valid enactment of Congress cannot be said to be founded on the Constitution.

It went on to say the contract is a nullity so far as the government is concerned, and no legal obligation arises upon its part to meet its provisions.

Hence, such contracts cannot be enforced and are treated as void from their conception. As it will be explained at IV.4.A, purported contracts not appropriated by statute is one of the only two categories where recovery will be denied to a contractor.

Another situation where the appropriation requirement may be violated is when a federal agency enters a contract which lacks the relevant statutory authority to do so.[128]

In such case, the federal agency lacks the relevant authority to enter the intended contract and, consequently, the contract will also be regarded as void from its conception.[129]

[127] *218 U.S. 322 (1910)*
[128] *Caci, Inc., v Michael P.W. Stobne, Secretary of the Army, 990 F.2d 1233 (Fed. Cir. 1993); New York Mail and Newspaper Transportation Co. v United States 154 F. Supp 271 (Ct. Cl), 355 U.S. 904 (1957)*
[129] Ibid.

IV.2. The impact of violations related to the award procedure

As noted above, when a government agency enters a contract in violation of a statute or regulation, the Courts will declare such contracts illegal.[130]

Courts have generally held that contracts that are the result of an improper award are generally void from their conception, i.e. they lose their effects and treated as if they never existed.

However, the Courts have not always treated illegal contracts as void *ab initio*. In particular, the Courts have made in some cases a distinction between awards that are 'plain'[131] or 'palpably'[132] illegal and those that are not.

The so-called 'plain and/or palpable' illegality determines whether no contract exists (it is deemed void) or whether the error was not palpable and/or plainly illegal and an existing agreement is merely voidable and can only be terminated for the government's convenience.[133]

The Courts and review bodies have provided various tests in determining whether an award is plainly or palpably illegal.

The initial position of the Courts seems to have focused on the gravity of the violation and how far the contractor was aware of this. In *Prestex*[134] the Court of Federal Claims had suggested that an obvious material deviation can destroy the validity of the contract officer's award.

This rule is applied when the deviation is major - that is, it affects price, quality, or quantity of the goods or services required.[135] Such major deviations include deviations from advertised specifications or deviations from formal advertising procedures.[136]

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[130] Quinn, 'Government Contracts-Illegal Contracts-Jurisdiction of Court of Claims to Grant Quantum Meruit Recovery – Yosemite Park & Curry Co. v. United States, 582 F.2d 552 (Ct.Cl.1978)' (1979), BYU Law Review, 2/8, 419
[131] *John Reiner & Co v. United States 325 F.2d 428 (Fed.Cl.1963)*
[132] *Warren Brothers Roads Co. v United States, 355 F.2d 612 (173 Ct. Cl. 714)*
[133] *John Reiner (1963)*
[134] *Prestex, Inc. v United States 320 F.2d 367 (Ct.Cl.1963)*
[135] See also *New York Mail & Newspaper Transp. Co. v United States, 154 F. Supp 271 (Ct.Cl.1957)*
[136] Ingram, (n.114)

Other major deviations include agreements made by contracting officers acting beyond their statutory authority,[137] contracts not made in writing in violations of the relevant statutory requirement,[138] and when conflicts of interest are involved in the transaction.[139]

It has been suggested by the Court in *Prestex* that such major deviations cannot be waived; hence the resulting contract is void.[140]

However, the Court in *Reiner*[141] seems to have taken another view in determining whether an award is plainly or palpably illegal. It suggested that where the problem of validity arises after the award, the court should ordinarily impose the binding stamp of nullity only when the illegality is plain.

If the contracting officer has viewed the award as lawful, and it is reasonable to take that position under the legislation and regulations, then the contract is presumably valid and can only be cancelled for the government's convenience.

Consequently, it may be argued that there are two tests as these have been reflected in Court decisions that may determine whether there has been a plain or palpable illegality.

The first focuses on the gravity of the error and the second whether it was reasonable in the circumstances for the procuring agency to believe that the contract was awarded lawfully.

Both theory and case law are indecisive on which test prevails. However, it may be argued that the two are interrelated.

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[137] *Federal Crop Insurance v Merill, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947); Cooke v United States 91 U.S. 389 (1987); Chavez v United States 18 Cl.Ct. 540 (1989)*

[138] In 'FASA and False certifications: Procurement Fraud on the Information Superhighway', (1995), 25/1 Pub. Contr. L.J, 1-46, Cox notes that historically the Congress has established control over federal contracts, and one of the most important was the requirement for a written contract since this requirement imposes restrictions upon the officers themselves from making reckless engagements.

[139] *K & R Engineering Co. v. U.S., 616 F.2d 469 (Ct. Cl. 1980)*

[140] *Prestex* (1963); *Schoenboard v United States, 410 F.2d 400* (187 Ct. Cl. 627)

[141] *John Reiner & Co v. United States 325 F.2d 428 (Fed.Cl.1963)*

Indeed, it may be argued that it could not be reasonable for a procuring agency to believe that the award was lawful when there has a material deviation as described above.

Another proposition that has been put forward by the federal court in *Amdahl* is that an award is plainly or palpably illegal, if it was made contrary to statutory or regulatory requirements because of some action or statement by the contractor, or if the contractor was on direct notice that the procedures being followed were violative of such requirements.

In any event, the determination of plain or palpable illegality is not that paramount since the government can terminate the contract for its convenience, regardless of how the illegality is classified.[142]

It is indeed recognised as a matter of procurement policy that unlawfully awarded contracts should be cancelled or withdrawn even though they are not deemed to be plainly illegal.[143]

Hence, the effect of finding a contract plainly or palpably illegal is only pertinent in relation to the type of relief that is available to a contractor and potentially the government itself.[144]

IV.3. The consequences of illegality on a contract

As explained, there are two effects that illegality may have on a contract, it may either render it void or it may render it voidable.

The effect of finding a contract void is that the contract cannot be enforced by either party, while the effect of a rendering a contract voidable is that it is up to the government to decide if it wants to go on with it or instead terminate it for its convenience.

[142] Ingram, (n.114)
[143] *John Reiner v United States (Fed.Cl.1963)*
[144] See IV.4 & V.

As was noted above, the effect of whether the contract is void or voidable becomes pertinent mainly for the purposes of the type of relief that a contractor is entitled to since the government can terminate a contract when an illegality has taken place for its convenience.

In addition, as already explained and analysed further at IV.5, the U.S. federal courts and boards routinely recommend the termination or cancellation of a contract after protests to allow the aggrieved protestor to compete for that contract.

Even in this case, however, the effect of whether the termination of a contract renders the contract void or voidable is only pertinent in relation to the form of relief that is available to the contracting parties, as indicated above.

IV.4. Addressing consequential matters arising from illegal contracts

This section examines how consequential matters are treated when a contract is illegal and unenforceable, that is - when a contract is declared void *ab initio*.

Historically, the U.S. federal courts and review bodies motivated by the idea that any recovery arising from illegal contracts would create a drain to the 'public fisc'[145] have denied recovery to contractors.

However, in some other cases it has been suggested that where a benefit has been conferred by the contractor on the government in the form of goods or services, which it accepted, a contractor may recover at least on a '*quantum valebant*' or '*quantum meruit*' basis for the value of the conforming goods or services received by the government prior to the rescission of the contract for invalidity.[146]

The current position seems to reflect the view that recovery will be allowed based on a quasi-contract. The only exception to this is when such recovery

[145] *OPM v Richmond, 496 U.S. 414, (1990)*
[146] *United States v Amdahl Corporation 786 F.2d (1986)*

must come from funds that have not been statutorily appropriated or when there has been an element of 'fraud' in the transaction.

The next two parts of this section examine the type of relief that is available to a contractor and the type of relief available to the government as well as any possible limitations on such relief.

IV.4.A. Claims against the Government

Historically, when an illegal agreement was found, and the purported contract was declared void, a contractor would claim equitable estoppel[147] against the government in order to bar it from raising the illegality as a defence and avoiding making a payment on the basis of reliance damages.[148]

However, the Courts have consistently held that a contract made on an unauthorised basis or in violation of a statutory requirement cannot bind the government.[149]

Consequently, they have asserted that estoppel cannot be applied against the government since such a claim would hold the government liable for reliance damages.[150]

The traditional reluctance to invoke equitable estoppel against the government is primarily derived from the doctrine of sovereign immunity.[151]

The basic premise under this doctrine is that the sovereign as representative of all the people is charged with the protection of the public purse and should not

[147] The elements of establishing equitable estoppel are: (a) the party to be estopped must know the facts; (b) that party must intended that his conduct is to be acted upon on or must so act that the party asserting the estoppel has a right to believe it is so intended; (c) the party asserting the estoppel must be ignorant of the true facts; (d) the party asserting the estoppel must rely on the other party's conduct to his detriment.
[148] Whelan & Dunigan, 'Government Contracts: Apparent Authority and Estoppel' (1967) 55 Geo. L.J 830; Saltman, 'Estoppel against the government: have recent decisions rounded the corners of the agent's authority problem in federal procurements?' (1976) 2, Fordham L. Rev.45/3, 497
[149] Saltman, ibid.
[150] Ibid.
[151] Pillsbury, 'Estoppel Against the Government', (1958); Porter, 'Contract Claims Against the Federal Government: Sovereign Immunity and Contractual Remedies', Harvard Law School – Federal Budget Policy Seminar, Briefing Paper No.22;

be estopped by a plaintiff who asserts his private financial interests. As has been asserted, the government's welfare outweighs injury to any individual.[152]

The Courts have repeatedly emphasised that where Congress has laid down restrictions on government action or government spending, those restrictions should never be transgressed.[153]

An exception to the inapplicability of estoppel as the basis of a claim is when this is recognised by statute.[154]

Additionally, in the case of *United States v Georgia-Pacific*[155] the Court of Appeal for the Ninth Circuit suggested that estoppel can form the basis of a claim provided that the necessary conditions are satisfied and that the agency acted within its proprietary capacity as well as the agent who entered the contract was acting within the scope of his authority.

More recent decisions, however, have suggested that the basis of a claim in case a contract is declared void from its conception is that of an implied-in-fact contract.

In *Amdahl*[156] the Court of Appeal for the Federal Circuit stated that, although the contract was void *ab initio* (and hence unenforceable against the government) for being plainly illegal, but the government has benefited from this contract through goods delivered or services rendered, then the court will grant relief of a quasi-contractual nature to the contractor.

As the Court has put it, *"where a benefit has been conferred by the contractor on the government in the form of goods or services, which is accepted, a contractor may recover at least on quantum valebant or quantum meruit basis for the value of the conforming goods or services received by the government*

[152] *Federal Crop Insurance v Merill, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947); Utah Power & Light Co v United States, 243 U.S. (1917)*; see generally, Saltman, (n.148)
[153] *Federal Crop…* Ibid
[154] *OPM v Richmond 496 U.S. 414, (1990)*
[155] *421 F.2d 92 (1970)*
[156] *United States v Amdahl Corporation 786 F.2d (1986)*

prior to the rescission of the contract for invalidity. The contractor is not compensated under the contract, but rather under an implied-in-fact contract".

It has been argued that recovery under an implied-in-fact contract in such situation is akin to recovery under an implied-in-law contract.[157]

Indeed, it is the implied-in-law contract doctrine that imposes a legal duty and treats the agreement as a contract for the purposes of a remedy only and exists where one party has conferred a benefit on another party and while there is no agreement, equity requires it.[158]

The Court of Claims has stated that "a contract implied in fact is a promise implied by law" whereas "a contract implied in law is an obligation imposed by the law".[159]

Implied-in-fact and implied-in-law contracts also differ in the remedies they offer. Whereas the measure of recovery for an implied-in-fact contract is usually based on reliance damages,[160] recovery for an implied-in-law contract is limited to restitution[161] and relief is only available if the other party has been 'unjustly enriched'.[162]

It is not clear why the Court in *Amdahl* held that recovery is based on an implied-in-fact contract and not on implied-in-law. One possible reason for this is that the Tucker Act does not allow actions against the Government under an implied-in-law contract.[163]

In any event, and regardless of the technicalities, the courts have in various cases ruled that a contractor is entitled to relief based on *quantum meruit* (as

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[157] Boyd III, 'Implied-in-Fact Contract: Contractual Recovery against the Government without an Express Agreement' (1992), 21 Pub. Cont. L.J., 84, 124; Boyd III & Huffman, 'The treatment of Implied-in-Law and Implied-in-Fact Contracts and Promissory Estoppel in the United States Claims Court", (1991), 40/9, Cath. U. L.Rev., 605; 'Grounds for Recognition of Implied Contracts under the Tucker Act' in 42 Yale L.J. (1934) 674

[158] *Travelers Indem Co v United States, 142 (Cl.Ct.1988)*

[159] *J.C. Pitman & Sons, Inc. v United States, 317 F.2d 366, 368 (Ct.Cl.1963); Hercules, Inc. v. United States 516 U.S. 417, 423-24 (1996)*

[160] *OAO Corp v United States, 17 Cl. Ct. 91 (1989)*

[161] *UDS Inc. v United States, 699 F.2d. 1147, 1154-55 (Fed.Cir. 1983).* See generally for the law of restitution in the U.S., Smith, 'Restitution' in Cane & Tushnet (edition) 'The Oxford Handbook of Legal Studies', (OUP, 2003), chapter 3.

[162] *Hercules, Inc v United States, 516 U.S. 417 (1996)*

[163] See Boyd III; Boyd III & Huffman (n.157)

much as he merited) or *quantum valebant* (as much as it was worth) based on the more general principle of implied (or quasi) contract.[164]

Under an implied contract - as this has been interpreted within the context of illegal government contracts - a contractor is entitled to relief based on the value of the benefits conferred to the government.[165]

Hence, a contractor cannot recover other costs related to the contract such as start-up costs. The contractor cannot, of course, recover payments that were available under the contract, as these have no longer any effect.[166]

As noted, the relief available is measured based on *quantum meruit* or *quantum valebant.* Traditionally, *quantum meruit* was deemed applicable to implied contracts for services, while *quantum valebant* was deemed applicable to implied contracts for goods.[167]

The courts, however, have blurred the distinction, often allowing *quantum meruit* recovery for implied-contracts for goods.[168]

Since *quantum meruit* has been measured by the reasonable value in the marketplace for the goods produced – the same measurement is used to calculate recovery under *quantum valebant*.[169]

Hence, when works or services are involved in the transaction, a contractor is usually entitled to recovery based on the reasonable value in the marketplace for the services or works rendered and have benefited the government.[170]

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[164] See *Prestex* (1963) where the Court of Claims states that "*Even though a contract be unenforceable against the Government, because not properly advertised, not authorized, or for some other reason, it is only fair and just that the Government pay for goods delivered or services rendered and accepted under it. In certain limited fact situations, the courts will grant relief of a quasi-contractual nature when the Government elects to rescind an invalid contract*". See also *Gould, Inc. v United States 67 F.3d 925 (Fed.Cir.1995); New York Mail and Newspaper Transportation Company v. United States Ct. 332, 2 L. Ed. 2d 260 (1957)*

[165] *Amdahl*, *(1986)*

[166] Ibid.

[167] Boyd III, (n.157) p.126

[168] See for example, *Yosemite Park & Curry Co v United States 582 F.2d 552 (Ct Cl. 1978); Amdahl (1986)*

[169] *Prestex (1963)*

[170] *Acme Process Equip. Co. v United Stattes, 171 Ct. Cl. 324 (1965*)

When the intended transaction is related to goods, the Court in *Amdahl* has stated that no precedent supports an order to return conforming goods as a remedy where is a contract is held to be void *ab initio*.

Therefore, the Court held that "*where conforming goods have been delivered by a contractor and accepted by the government, the contractor has been entitled to payment, either on a quantum valebant or quantum meruit basis if the contract is void ab initio*…"

Having explained that generally when a contract is declared void *ab initio* due to an illegality, a contractor will be entitled to relief under an implied-contract, the next thing to consider is whether there are situations in which recovery may be restricted or banned altogether.

Although the available literature does not provide a solid theory around this matter, a careful examination of landmark cases reveals two situations where a contractor may be banned from a recovery remedy.

The first is when recovery can only be made from funds that have not been appropriated.

Both the Appropriations Clause of the Constitution, Art. I, § 9, cl. 7, and the Anti-Deficiency Act (31 U.S.C. § 1341) provide that claim for payment of money from the Public Treasury contrary to statutory appropriation is prohibited.

The Anti-Deficiency Act also emphasises that "*an officer or employee of the United States Government or of the District of Columbia government may not … involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law*".[171]

Thus, for instance, in *Sutton v United States*[172] the Supreme Court held that a contractor cannot recover for work done in excess of an appropriation.

It stated that there is "*those dealing with him must be held to have had notice of the limitations upon his [The Secretary of War] authority. But there is nothing*

[171] 31 U.S.C § 1341 (a)(1)(B)
[172] *256 U.S. 575 (1921)*

in the contract indicating a purpose to bind the government for any amount in excess of the appropriation. On the contrary, it limits to the amount of the appropriation the work which may be done".

Hence, it does not matter if a contractor was not aware of the limitation. Any claim for recovery done in excess of an appropriation will not be ordered.

Conversely, in *Sutton v United States* the Court did allow recovery for works done within the limits of that statutory appropriation.

Hence, if a specific transaction is statutorily appropriated for X amount, a contract can recover that amount, but if the works cost X+Y (Y being an amount not appropriated), he will not be able to recover Y.

It does not matter that a contractor has performed and has conferred a benefit on the government.

In *Hooe v United States*[173] the Supreme Court held that it is only the Congress that may intervene in such situation in its discretion to provide a remedy to a contractor from which the government has gained an advantage.

If goods are involved in the excess of this appropriation, it is likely that since these are not 'conforming to the statutory requirement of being appropriated'[174], they will most likely need to be returned to a contractor.

A second situation when recovery will most likely be denied all together is when 'fraud' is involved in the transaction.

In *Amdahl,* the Court stated that the remedy may be different in a case involving fraud or the like, a matter that was not involved in that case and cited *K & R Engineering Co v U.S. (1980)* where a contractor was denied *quantum meruit* recovery because of violation of a conflict-of-interest statute.

In this context, the term 'fraud' seems to have been given a very narrow sense. It does not involve that situation where a contractor may have direct notice of

[173] *218 U.S. 322 (1910)*
[174] *Amdahl (1986)*

the potential deviation of the federal agency from the statutory requirements,[175] but rather the government must have been defrauded by the contractor.

In *K & R Engineering,* the Government had unilaterally terminated the contract after having found an unlawful arrangement between the plaintiff and one of the government's agents.

The unlawful arrangement was related to the collusion between a government agent and the contractor for the latter to obtain several contracts with the Army.

The Court of Claims held that the contracts were unenforceable against the Government as they were entered in violation of the conflict-of-interest statute (18 U.S.C. § 208(a)).[176]

It also clearly held that such violations preclude the plaintiff from recovering damages for termination, while those violations also permit the government to recover from the plaintiff any amount paid under such contracts.[177]

The Court cited the Supreme Court decision in *United States v. Mississippi Valley Generating Co., 364 U.S. 520, (1961)* where a similar illegality took place and stated inter alia, that *"whatever may be the appropriateness of allowing recovery where the government has received benefits under the tainted contract, recovery is not permissible where, the firm seeking recovery itself was involved in the corruption of the government official*… and that to permit recovery under such a contract would be "*affirmatively sanctioning the type of infected bargain which the statute outlaws and depriving the public of the protection which Congress has conferred also requires rejection of the plaintiff's claim for money under quantum meruit or quantum valebat".*

[175] *Prestex (1963)*; *Schoenbrod v United States, 410 F.2d 400 (187 Ct. Cl. 1969)*
[176] This statute reads as follows: '*an officer or employee of the executive branch of the United States Government . . . participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a . . . contract . . . in which, to his knowledge, he . . . has a financial interest*'.
[177] See also *Atlantic Contracting Co. v. United States,* 57 Ct.Cl. 185 (1922); See IV.4.B.

A final situation that should be noted is that there have been some cases where when a plain or palpable illegality has been found a contractor was not entitled to relief under an implied contract.

Most of those cases had to do with a contract entered by a government official who did not have statutory authority to bind the government.[178]

In *Chavez,*[179] for example, the Claims Court rejected a claim founded on an implied-in-law contract on the basis that the Court did not have jurisdiction to hear such claims under the Tucker Act.

The Court held that *Amdahl* decision was limited to situations when an unenforceable contract was entered into by persons authorised to bind the government.

It seems that the *Chavez* decision must be understood narrowly. It suggests the exclusion of recovery in those situations where the agent officer does not have any statutory authority to enter the contract.

However, it does not preclude recovery when the agent has authority to enter a specific contract but has done so in violation of statutory requirements like it happened in *Amdahl*.

The problem of unauthorised commitments of government officials has to a large extent been reconciled with FAR 1.602.3, which allows the government agency to ratify an unauthorised agreement provided that the government has obtained a benefit from the supplies or services, the contract was within the statutory powers of the agency, and funds were available at the time the unauthorised agreement occurred.

[178] *Chavez v United States, 18 Cl. Ct. 540 (1989); H.Landau & Co v United States, 16 Cl.Ct.; 35 (1988); H.F. Allen Orchards v. United States, 749 F.2d 1571, 1575 (Fed. Cir. 1984); Federal Crops Ins v Merrill, (1947); Hawkins & Powers Aviation, Inc v United States, 46 Fed.Cl. 238 (2000)*
[179] *Chavez v United States (1989)*

IV.4.B. Claims against the contractor

When there is a payment under an illegal contract that has been declared void, the government would be able to recover based on an implied contract as discussed above.

Hence, if payment has been made that has not conferred any benefits to the government, a Court will order this payment to be recovered.

A matter that is more controversial is what happens in that situation where payments have been made under a contract which has not been appropriated or when fraud is involved in the transaction.

Would a contractor be under an obligation to return those payments even if he has rendered performance in return? It seems that the answer is affirmative.

In *Sutton,* the Supreme Court citing *United States v Pacific Railroad*[180] emphasised that the government was not liable for the unlawful appropriation (since the relevant agency did not have the statutory appropriation) and hence, it should not bury the cost of any performance, although the work was now affixed to the property of the government.

In those cases where 'fraud' is involved the Court in *K&R Engineering* emphasised that "*the protection of the integrity of the federal procurement process from the fraudulent activities of unscrupulous government contractors and dishonest government agents requires a refund to the government of sums already paid the plaintiff no less than it requires nonenforcement of the contract not yet completed*."

It also stressed that "permitting the contractor to retain amounts already received would create the danger that "*[m]en inclined to such practices, which have been condemned generally by the courts, would risk violation of the statute knowing that, if detected, they would lose none of their original investment, while, if not discovered, they would reap a profit for their perfidy*".

[180] *120 U.S. 227 (1887)*

The proposition that Government will be entitled to recover from the contractor under an illegal contract even when he has performed in return for those payments is also supported by some individual State court decisions which have taken a stricter approach from the federal law.

Thus, for instance, in *S.T. Grand, Inc. v New York*[181] the Court of Appeals of New York held that the rule is that where work is done pursuant to an illegal contract, the contractor may make no recovery either on the contract or on *quantum meruit* basis, while the municipality was entitled to recover from the contractor all amounts paid under the illegal contract. The same conclusion was reached by the California Supreme Court in *Miller v McKinnon.*[182]

IV.5. Challenging the effects of an illegal contract

As indicated, the government has a wide discretion to terminate contracts unilaterally. Indeed, it has used this discretion to terminate existing contracts when an illegality has taken place.[183]

Additionally, many of the cases that involved the issue of the effects of an improper award where the result of a protest by third-parties.[184]

As explained in section III above, both the GAO and the Federal courts have a wide margin of discretion in deciding the type of remedy they may order or recommend.

Title 4 § 21.8 of the Code of Federal Regulation (CFR) provides between others that the GAO may re-compete the contract, issue a new solicitation, terminate the contract, award a contract that complies with statutes or regulations, or take any combination of the above actions.

[181] *32 N.Y.2d 300, 298 N.E.2d 105 (1973)*
[182] *20 Cal.2d 83 (1942)*
[183] See indicatively *Clark, (1877); New York Mail, (1937); Yosemite Park, (1978); Gould Inc (1995)*
[184] *Warren Brothers Roads Co. v. United States, 355 F.2d 612 (Ct. Cl. 1965); John Reiner, (1963); Amdahl, (1986); Caci (1993)*

In deciding which remedy to order, Title 4 § 21.8 provides a wide margin of discretion to the GAO. This include an assessment of *''all circumstances surrounding the procurement including the seriousness of the procurement deficiency, the degree of prejudice to the other parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of the recommendation(s) on the agency's mission".*

Hence, the GAO takes an effect-based approach in balancing all the competing interests to determine the appropriate recommendation.[185] Some authority suggests that the cost that termination may have to the Government overrides all other interests.[186]

Similarly, the COFC can hear post-award protests and has also considerable discretion in determining the type of relief available to a protestor when it finds that the decision of the agency was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; without observance of procedure required by law.[187]

The COFC will consider various variables in determining whether the contract should be set-aside, which includes whether the injury to the protestor outweighs the damage to the public interest or that of the contractor.

For instance, in *J.C.N. Construction v United States,*[188] despite finding in favour of the protestor on the merits of its claim, the court declined to grant the termination of the contract because the majority of the work required by the contract had already been performed.

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[185] Termination of a contract is a necessary requirement when GAO recommends the re-competition of that contract (*ACCESS Sysm Incm B-400623, 3, 4 Mar 2009*)
[186] *Peter N.G. Schwartz Cos. Judiciary Square Ltd. P'ship B-239007.3, Oct. 31, 1990, 90-2 CPD; SWD Assocs. Costs, B-226956.3, Sept. 1, 1989, 89-2 CPD; Shields & Dean Concessions, Inc.—Reconsideration B-292901.4, March. 19, 2004*
[187] 5 U.S. § 706
[188] *COFC No.12-353C (Nov. 6, 2012)*

V. Unilateral remedying of illegal public contracts

As was argued in chapter 2, public authorities and governmental agencies are in the best position to remedy unlawfully entered contracts.[189]

The U.S. federal legal system is probably the most advanced in this respect. The government is afforded with special powers including the right to unilaterally change and/or terminate a contract.[190]

The termination of a contract can be done through the termination for convenience clause that confers to the government, in whole or in part, the power to terminate the performance of a contract, whenever it determines such termination to be "in the government's interest".[191]

Such clause is mandatory as it expresses a significant or deeply ingrained strand of public procurement policy and is included in a contract by operation of the law even if it is expressly absent from the contract itself.[192]

This requirement is of particular importance since it removes any liability from the government under the contract if such clause is absent.[193]

The right to terminate for convenience has historically been viewed as protecting the public interest by ensuring that the government does not have to pay for something that it may no longer need or want.[194]

No statute stipulates what criteria an agency must consider in deciding when to terminate a contract. The only criterion is that is must be "in the government's interest". This is to be determined solely by the agency itself.[195]

[189] Ch.2-III.3
[190] See for a brief analysis, Manuel, Lunder, Liu, 'Terminating Contracts for the Government's Convenience: Answers to Frequently Asked Questions', CRS Report for Congress, February 3, 2015, Congressional Research Service, R43055
[191] 48 C.F.R., § 52.249-2; § 49.501-505 and § 52.249-2(a)
[192] *G.L. Christian & Associates v United States, 160 Ct.Cl 1, 312, F.2d 418 (Ct.Cl.1963)*
[193] Ibid.
[194] *Russell Motor Car Co v United States, 261 U.S. 512 (1921)*
[195] *Commercial Cable Company v United States 170 Ct.Cl. 813 (1965)*

This test provides for almost an inherent unlimited capacity to the agency to terminate the contract.[196] Thus, there are no prescribed conditions, similarly, for instance, to the EU unilateral termination remedy.

Such termination can take part when there has been an improper award. In *Reiner*, for instance, after the recommendation of the GAO, the Government terminated the contract and the contractor was compensated on the basis of the termination of convenience clause.

Similarly, in *Prestex*, the Government terminated the contract in its own initiative after having found that the award did not confront with the award specifications.

There are, indeed, few meaningful limitations on the capacity of the government to terminate the contract for its convenience.

In *Krygoski Cont. Co., Inc v. United States*[197] the court held that the government's decision to terminate a contract for convenience is conclusive and will not be disturbed by the courts unless the contractor can prove that the government acted in bad faith or the government abused its discretion.

The bad faith element requires from the contractor to demonstrate by clear and convincing evidence that the government acted with specific intent to injure the contractor, while abuse of discretion requires showing that the decision to terminate had no reasonable relation to the government's best interest.[198]

A more recent decision, however, has suggested that improper termination takes place when the government has engaged in some form of improper self-dealing from its own benefit or to benefit another contractor.[199]

[196] *United States v Corliss Steam Engine Co., 91 U.S. 321 (1875)*
[197] *94 F.3d 1537 (Fed.Cir.1996)*
[198] *Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234 (Fed.Cir.2002)*
[199] *TigerSwan, Inc. v United States 110 Fed.Cl.336 (2013)*

If the termination is found to be improper, the contractor is entitled to claim common law damages, which include recovery of anticipated profits (i.e. profits it had reasonably expected to earn on the terminated portion of the contract).[200]

If the termination is proper, however, the contractor will be entitled to reimbursement for all reasonable and allowable costs incurred regarding performance, as well as a reasonable profit for the additional works that were not performed, unless the government can show that completion of the contract would have been a loss for the contractor.[201]

These additional reasonable profits provided under the termination for convenience is the difference in terms of calculation on recovery between contracts that are plainly illegal (calculated on *quantum meruit basis*) and those that are not plainly illegal (and consequently voidable).[202]

In *Amdahl* the Court stated that when the illegality is deemed voidable, a contractor is entitled to payment on the basis of termination of convenience clause which includes recovery on the basis of the costs of performance (as opposed to recovery based on the benefits conferred to the government which is the basis under the implied contract doctrine), as well as reasonable profits on the additional work in category.

VI. Alternative remedies to aggrieved competitors

Having explained that when a contract is concluded, aggrieved competitors can protest the contract before the GAO and the COFC - where both review bodies routinely recommend and direct the government agencies to re-open competition when they found such award to have been improperly awarded - the next issue that needs to be explained is what is the alternative remedy

[200] Feldman & Keys, (n.11), p.624
[201] 48 C.F.R. 52.249-2(2)
[202] *Dairy Sales Corp. v. United States, 219 Ct. Cl. 431, 436-37, 593 F.2d (1979); Trilon Educational Corp. v. United States, 217 Ct. Cl. F.2d (1978); G.C. Casebolt Co. v. United States, 190 Ct. Cl. 783, (1970)*

when the set-aside of a contract is not considered appropriate by the review bodies.

As submitted in section III, the only alternative remedy is that of a damages award that is limited only to preparation costs.[203] Neither the GAO[204] nor the COFC[205] has jurisdiction to award damages for potential lost profits.

Gordon and Golden have explained why damages are limited to preparation costs and why lost profits have been excluded as a form of reimbursement.[206]

The first reason is the one already suggested - that is, both review bodies may recommend or order the termination of a contract and its re-competition. If protestors are given a 'second bite at the apple', requiring the government to also pay lost profits is seen as unjustified.

The second reason, which is linked to the above argument, is that since the procurement is usually re-opened, there is the valid question of whether the protestor, even given a fair chance, will actually win the contract.

If it does, the government will be paying its contract price, including its profits. But if the protestor does not win the re-opened, why should the government pay its lost profits.

The third reason that Gordon and Golden submit is that there is a significant difficulty in calculating lost profits. They suggest that the calculation is more difficult in the U.S. because under the U.S. federal system contract prices are often negotiated after the contract award. Thus, making it difficult to calculate those potential losses.

On a more technical basis, both the GAO and the COFC have justified the inapplicability of profit losses award on the fact that there has not been any kind of contract between the protestor and the government.

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[203] *Keco Industry Inc v United States 203 Ct.Cl.556, 492 F.2d 1200 (1974)*
[204] GAO, 'Bid Protest at GAO: A Descriptive Guide, 2009, 9th edition' it clearly states that 'GAO never recommends that agencies pay lost profits or other common law damages'.
[205] 28 U.S.C. §1491 (b)(2) explicitly limits the possibility of recovery above preparation costs. See *Cincinatti Elec Corp v Kleppe, 509 F.2d 1080 (1975)*
[206] See, Gordon & Golden, (n.56), pp.207-212

For instance, the GAO has held that there is no situation where anticipated profits may be recovered when the underlying claim is based upon equitable, rather than legal principles and, since a contract was not formed between the unsuccessful bidder and the government, the only relief possible was of equitable nature that can only cover reasonable value of services and did not encompass any profits that might have been earned by the protestor.[207]

Similarly, the COFC has held in *Heyer*[208] that an unsuccessful bidder could not recover anticipated profits it would have made from the contract, even though its bid was rejected in violation of the law, a because the contract under which the bidder would have made such profits never actually came into existence.

VII. Concluding remarks

The examination of the U.S. federal law reveals some very interesting findings.

To begin with, in relation to the right of third-parties to challenge the effects on an unlawfully concluded contract, it was demonstrated that the U.S. protest system is arguably the most flexible and pragmatic compared with all other jurisdictions examined.

It allows, for third-parties to challenge an improper contract award after the conclusion of such contract and, routinely the GAO and the COFC order or recommend the cancellation of a contract in order for it to be re-competed.

The frequent recommendations and directions for terminating an unlawfully awarded contract is also one of the main reasons that U.S. federal system has excluded the possibility of a remedy of damages for lost profits.

In considering whether to set aside an improper contract or not, they will take several considerations into account including the circumstances surrounding

[207] *Effective Learning, Inc – Request for Review of Prior Claim Decision, B-215505, 19 Feb 1985, 85-1 CPD 207*
[208] *140 FSupp (Ct.Cl. 1956)*

the procurement, such as the stage of the execution of the contract or the urgency of performance and any possible damage to other parties.

It was also examined how the U.S. system treats contracts entered in violation of federal laws and regulations.

It was shown that, generally, a contract that is concluded in violation of statute or regulation will be treated as illegal.

However, it was explained that the effect that an illegality may have on a contract is not conclusive. The courts have made a distinction between illegalities that plain and palpable that render the contract automatically void from its conception, and those that are not and render the contract voidable.

It was shown that, historically, when a contract was declared illegal and unenforceable, there has been a strong tendency of the courts to favour unconditionally the government over any individual's interest by allowing any burden from illegality to fall to the contractor by barring him from any form of relief.

This harsh rule reflects the policy that is better for a contractor to suffer from the mistakes of agents than to adopt a rule, which might be turned to the detriment and injury of the public.

However, more recent decisions have balanced the effects of illegality and have allowed recovery to a contractor who has performed under the illegal agreement and such performance has benefited the government.

This type of recovery is based on the doctrine of implied contract that allows a party to recover based on the benefits that the other party has received.

It was explained that while this remedy is the norm, there are situations where U.S. federal law will either restrict or ban completely the possibility of recovery based on the theory of implied contract.

These situations include illegal contracts that have been entered into without the necessary statutory appropriation and when fraud is involved in the transaction.

Finally, it was shown that the U.S. federal system provides for *supra* powers that the government and its agencies hold *vis-à-vis* the other contracting party.

The basic characteristic is the power of the government to unilaterally terminate a contract, without being held liable for breach, whenever the government or its agencies consider that the public interest requires so.

This power, while not limited to correcting violations is used frequently for this purpose. When such termination takes place, a contractor is entitled to compensation based on the termination for convenience clause.

Part III

Findings, analysis and conclusion

Chapter 8

Findings and analysis

I. Introduction

The analysis in Part 2 mapped the law of the various selected jurisdictions in a systematic way by adopting a neutral and functional approach.

It provided a positive analysis on how each jurisdiction treats unlawfully concluded public contracts while refraining from adopting detailed normative suggestions on how each jurisdiction could improve its regulatory framework based on its individual institutional setting.[1]

The systematic analysis was based on a hypothetical framework submitted in part I (chapters 2 and 3) of the regulatory issues that may arise from public contracts that have been concluded unlawfully.

These hypotheses did not intend to be exhaustive. Instead, they attempted to provide a taxonomical framework of some of the pertinent policy and regulatory issues involved in the treatment of unlawfully concluded public contracts.

This chapter extracts the main findings from the comparative study and critically analyses the approaches followed by the jurisdictions examined.

In particular, it reflects these practical approaches to the normative regulatory and policy framework suggested in Part I in order to comprehensively map this uncharted area of law.

It proceeds as follows.

Section (II) analyses and evaluates the issue of third-party challenges on the effects of a contract.

[1] An attempt to critique on the approach of each jurisdiction from an internal normative point of view (i.e. a "*de lege ferenda"* approach within their institutional framework) has been left outside the scope of this thesis and is aimed to be discussed in individual research papers.

Section (III) analyses and evaluates the issue of the effects of public law violations on concluded contracts.

Section (IV) analyses and evaluates the issue of the economic consequences between the parties from contracts that have lost their contractual effects.

Section (V) analyses and evaluates the issue of the powers of public authorities to unilaterally remedy a public law violation.

Section (VI) concludes by proposing a roadmap that perhaps legal systems should consider when regulating the various aspects on the treatment of unlawfully concluded public contracts.

II. Third-party challenges on the effects of unlawful contracts

One of the most controversial aspects around the treatment of unlawfully concluded contracts is whether third-parties can challenge the effects of such contracts and if yes, under what conditions.

From a policy perspective, the complexity of this matter lies in the tension that is created between potentially conflicting interests.[2]

On the one hand, refusing to enforce a contract may cause hardship to the private contractor, particularly if he has contracted in *bona fide* and with no knowledge of the alleged violation.

Financial compensation may be granted to repair his losses, which, however, at the same time, may create a burden to the public purse.

Additionally, and most importantly, the refusal to enforce a contract can interrupt the service delivery that might be of utmost importance to the intended beneficiaries of that contract.

[2] See also Ch.2-III.1

On the other hand, if an unlawful contract remains unaffected it may encourage unlawful conduct to be reiterated, which eventually may distort the level playing field to the detriment of value for money.

Moreover, public authorities which by their nature are obligated to accord all potential contractors an equal opportunity to enjoy the public benefit may have possibly deprived them of a fair opportunity to contract with them.

Finally, the non-imposition of some adverse impact on the effects of a contract, may not create the right incentives and consequently provide for a regime where public authorities will not be held accountable to for their decisions, hence undermining the value of well-established principles in public contracts regulation such as probity, integrity and fair treatment.

Eventually, a careful balance between the public and the private interests involved is essential for an effective regime to develop for third-party challenges on the effects of an unlawfully concluded contract.

The most important regulatory aspects of the design of third-party challenges on the effects of unlawful contracts may be systematised in the following four categories.

The first is the impact of traditional doctrines in the shaping of the institutional design of third-party challenges on the effects of a contract examined at II.1.

The second is the substantive and procedural rules that aim to balance the public and the private interest when it comes to allowing third-parties challenging contractual effects which are examined at II.2.

The third issue is the alternative remedies available to third-parties which is examined at II.3.

The fourth is the institutional mechanisms available as an alternative or additional enforcement system which is examined at II.4.

II.1. The impact of traditional doctrines

Despite the policy considerations which may limit the availability of challenges on the contractual effects, such availability may also be restricted in some jurisdictions by the sometimes - artificial imposition of traditional doctrines.

The most important examples on this issue are offered from the study of Greek and English law, both of which (albeit in different contexts), restrict the availability of such challenges by the imposition of traditional doctrines.

In the case of Greece, it was shown that both the legislature and the judiciary are very reluctant to allow challenges by third-parties on concluded contracts.

L.4412/2016, which is currently the most important legal instrument in public contracts regulation, has maintained the position of its predecessor L.3886/2010 and provides that ''*if the Court annuls an act or omission of the CA after the contract has been concluded, this is not affected...*'

Additionally, the adherence of judicial reasoning on the theory of detachable acts has created a paradox according to which the administrative act leading to the conclusion of the contract can be annulled after a protest, while the contract *per se* is not subject to annulment, and in most of the cases, remains entirely unaffected.[3]

The Greek legal system is not the only one that makes a sharp distinction between the award decision or the decision to conclude the contract and the contract as such.

The edited collection by Treumer and Lichère, '*Enforcement of the EU public procurement rules*'[4] reveals that most continental jurisdictions tend to draw such a distinction.

For instance, Germany driven by the strong commitment of the *pacta sunt servanda* rule and the interests of the contract partners involved in mind, a contract award decision (which coincides with the decision to conclude a

[3] Ch.6-IV.4.
[4] DJØF, 2011

contact) cannot be set aside.[5] This means that even an unlawfully concluded contract remains effective.[6]

Under Italian law, there is also a sharp distinction between the final award and the contract and, the annulment of the award has different effects depending on whether the contract is already concluded.[7]

In the first case, the annulment of the final award itself is substantially useless since the focus is on the contract, while in the latter case the annulment of the final award causes the impossibility for the contracting authority to conclude the contract.[8]

Similarly, in Denmark, the understanding of the legislator has been that the annulment only has an impact on the administrative decision and not on the contract as such. In other words, the validity of the concluded contract remained unaffected by the annulment of the decision to conclude the contract.[9]

Professor Treumer has explained that this does not necessarily imply that the contracting authority in question is entitled to execute the contract as if nothing had happened and that it has been debated in the literature whether some form of positive actions must take place by considering the interest of the contracting party and that of the complainant.[10]

However, the authorities have almost without exception executed such contracts and have thereby refrained from terminating or shortening the contracts in question.[11]

English law, on the other hand, does not make a distinction between the unlawful decision and the contract *per se*.

[5] Burgi, 'EU Procurement Rules – A Report about the German Remedies System' in Ibid., p.132
[6] Ibid.
[7] Combra, 'Enforcement of EU Procurement Rules. The Italian System of Remedies' in (n.4), p.248
[8] Ibid.
[9] Treumer, 'Enforcement of The EU Public Procurement Rules: Danish Regulation and Practise' in (n.4), p.271
[10] Ibid., p.272
[11] Ibid.

When the unlawful decision is nullified so does the contract. Hence, the contract will not confer contractual rights on either party.[12]

However, it may be argued that English law also imposes obstacles in the availability of ex-post challenges, albeit in a different context.

The source of this obstacle lies in the lack of clarity on how far contractual decisions are subject to judicial review.

As demonstrated, the courts have made the availability of review subject to the requirement that there is some sufficient public law element.[13]

The sufficient public law element is easier to be established when the authority is acting under statutory powers. Hence, decisions that are against the extent given by legislation, and for the purposes contemplated by it usually satisfy the sufficient public law element requirement.

Conversely, if a contractual decision is not statutorily underpinned then it is not clear whether it is reviewable or not.

This lack of clarity on how far a public law element is necessary for a review process to be allowed, coupled with the fact that it is not always clear when such sufficient public law element is attributable in a contractual decision, could be regarded as an obstacle on the availability for third-parties to challenge unlawfully concluded contract.

However, it should be highlighted that this is an obstacle of procedure rather than substance. Under English law, once a court finds a breach of public law in a contractual decision, then judicial review for third-parties is available even after the conclusion of the contract.[14]

In the case of EU law, it was noted that the general view was that violations of EU law do not have any effect on a contract and that the EU legislature did not

[12] Ch.5-IV.1.B
[13] Ch.5-III.2.A
[14] Ch.5-IV.1.D

provide for the option for aggrieved competitors to challenge the effects of contracts entered in violation of EU rules.

This changed with the introduction of the ineffectiveness remedy in 2007.

The EU ineffectiveness remedy, discussed in more detail in the next part of this section, was designed to combat the type of violations that were impossible for third-parties to successfully challenge before the conclusion of the contract, that is – direct awards and the deprivation of allowing successful challenges before contracts are concluded – i.e., when the standstill or the automatic stay requirement have been breached.

Despite its limited scope, and some flaws in its design, this remedy should be praised for its contribution to eliminating, among others, the traditional barriers that are apparent in many EU jurisdictions and make it practically impossible to challenge the effects of an unlawfully concluded contract, thus depriving of the most effective remedy for aggrieved economic operators.

The adherence to a dogma, that many continental jurisdictions follow, according to which concluded contracts, even if unlawful, are treated as sacred cows and, the only available remedy for aggrieved competitors is that of damages, ignores the value of a very effective remedy.

Returning the market to the pre-transfer position and allowing the re-competing of such contracts eliminates any negative externality to aggrieved suppliers. It also eliminates the possibility of public authorities being held liable for unlawfully depriving the contract from other more suitable companies and having to pay damages with clearly adverse consequences for the public purse.

Of course, it is not always desirable to have unlawfully concluded contracts set-aside or shortened,[15] but the point here is that such a remedy should not simply be denied because of some artificial distinction between the contract decision and the contract as such.

[15] Ch.2-III.1

Finally, in relation to the U.S. federal system, no such traditional institutional barriers were detected.

The U.S. federal review bodies have an important margin of discretion on whether an unlawful contract should be set-aside and re-competed or instead allow such contract to go ahead.[16]

The U.S system does not artificially impose obstacles on the possibility of challenging contractual decisions even when the contract has been concluded and partially executed.

Instead, it gives a good amount of discretion to the review bodies to evaluate all the interests involved and make an informed decision based on the circumstances of each case.

II.2. The substantive and procedural design of a protest system on the effects of unlawfully concluded contracts

A main hypothesis that underpinned the analysis was that the design of the substantive[17] and procedural[18] rules in relation to how far third-parties can challenge the effects of an allegedly unlawful contract are important elements for understanding how the various conflicting interests involved in an unlawful public contract are balanced.[19]

For instance, limiting the option of challenges to third-parties with a direct economic interest in the contract reveals a clear direction of a regulatory system to balance, first and foremost, the economic interests involved.

Similarly, providing short-time limits and/or very restrictive conditions for challenging the effects of a contract, shows protection towards the legal status of a contract.

[16] Ch.7-III.3
[17] Substantive rules refer to the type of violations that may trigger the availability of such challenges and possible conditions attached to those violations.
[18] Procedural rules refer, inter alia, to the necessary requirements for standing to be granted and the time limits for brining such challenges.
[19] Ch.2-III.1

This section critically evaluates the approaches of the different jurisdictions examined around the design of their substantive and procedural rules.

The starting point here is the EU ineffectiveness remedy, which has a major impact, as explained above, in Greece, the UK, and in many other EU Member States on the development of a remedial tool that allows challenges on the effects of an unlawfully concluded contract.[20]

The remedy is designed to combat very limited EU law violations that are directly linked to the deprivation of protesting a procurement decision prior to the conclusion of a contract.

These are awards without competition when this is not permitted under EU law and have deprived other competitors for competing for the relevant contract, and breach of standstill period or automatic suspension requirements that have deprived an aggrieved supplier of the opportunity to challenge a decision.

It was explained that the limited violations that may trigger this remedy reveal a lot about its nature.[21]

The remedy is not designed to generally allow challenges on serious violations that significantly affect the outcome of competition but instead, it aims only to capture those violations that either deprive economic operators of the opportunity to compete or successfully challenge a decision prior to the conclusion of the contract.

Hence, the EU legislator while providing for the option to challenge an unlawful direct award, automatically precludes this possibility when an ex-ante notification has been given and the standstill requirement has operated.[22]

[20] On the member states remedies system before the introduction of the EU ineffectiveness remedy, the most informed comparative study is provided by Arrowsmith's, (edition), 'Remedies for Enforcing the Public Procurement Rules' (Earlsgate, 1993)
[21] Ch.4-IV.2.A
[22] Ch.4-IV.2.E

Although the remedy should be praised in many respects, it may be argued that it creates a gap between the objectives that it aims to achieve and the means that it prescribes.

More specifically, while this remedy aims to tackle one of the negative externalities that is directly applicable to the economic interest of other competitors, i.e. the harm created by being deprived of the opportunity to either compete or challenge a decision, it does not address other possible violations that may undermine competition and may not be detectable prior to the conclusion of the contract.

This may be violations related to conflict of interests, or when an authority enters into restrictive long-term agreements, which as a result may deprive other potential contractors of a market opportunity.[23]

However, its moderate scope may be justified on the fact that interference on concluded contract is a particularly sensitive issue in many national laws and opening the scope of violations may create, first, perplexities within the national legal systems approach, and second, a potentially undesirable volume of challenges to executory contracts.

The remedy also tries to create a balance between the private and the public interest. That is - the interest of aggrieved competitors and the interest of the public in uninterrupted service delivery.

Thus, it provides for a discretion to be exercised by national review bodies to assess whether 'overriding reasons of general interest' require the contract to go ahead. If the relevant review body decides that such interests exist, it should order alternative remedies to ease the effects of the unlawful contract.[24]

These overriding reasons of general interest are not defined in the remedies directive. However, it is relatively easy to assume - from the wording of the relevant provisions - that such interests mainly refer to the public interest on

[23] Ch.4-IV.2.A
[24] Ch.4-IV.2.D

uninterrupted service delivery, and this exception may only be construed, as any other exception under EU law, narrowly.

Economic interests of any kind, including the economic interest of the contractor or the authority, do not fall within this exception. This may be too restrictive since the economic interest of public authorities, which involve directly or indirectly public expenditure, can constitute – broadly speaking - an overriding reason of general interest.

Another parameter that the EU legislator has imposed to create a balance between the various interests involved are explicit time-limits to bring a challenge. This will be 6 months in the event an ex-ante notification has not been given, hence allowing some time for aggrieved competitors to find out if there has been a violation and whether they should challenge it.

In conclusion, despite some flaws in the design of this remedy, discussed in chapter 4, the general architecture is designed in a moderate and balanced manner and within the spirit of proportionality.

Having recapped on the EU ineffectiveness remedy, the remainder of this section discusses the approaches of the UK, Greek, and U.S. law respectively.

In the UK, it was shown that there are two group of violations where the effects of a contract may be successfully challenged with the consequence being having the contract set-aside.

The first one is when legislation prescribes that such challenges are available. There are two instruments that provide for a challenge on the effects of a concluded contract.

The first is the PCRs which provides for the EU ineffectiveness remedy and the second is the NHS Regulations 2013, which also provides for an ineffectiveness remedy.

In the case of the EU ineffectiveness remedy, it was explained that the UK has not added anything further than what the EU legislator prescribed. The

conditions that may trigger the remedy and the requirements for standing are the same.

In the case of the NHS Regulations, it was explained that the remedy is wider in scope than the PCR's equivalent.

However, it was noted, that the remedy has never been exercised in practice, and while being wider in scope in terms of the violations that may trigger it, it is only available in relation to contracts with NHS bodies.[25]

The second group of violations that may allow the successful challenge on the effects of a contract is when an *ultra-vires* action has taken place.

It was explained that the relevant jurisprudence suggests that the courts may review and quash a contract in the following two situations.

The first is when an authority did not have the statutory power to enter a purported contract,[26] and the second is when an authority has entered an otherwise lawful contract in breach of the public law principle of procedural propriety in the narrow sense. Violations of this latter type include transactions that involve fraud, corruption or bad faith.[27]

In cases in which a contract is challenged on admissible public law grounds, the potential pool of claimants, in theory at least, is relatively wide since UK courts have interpreted the 'sufficient interest' requirement in a relatively liberal manner.[28]

This position of English law while being restrictive and not capturing all potential negative externalities, it does respond to legitimate policy concerns.

As was noted in chapter 2, violations related to the subject matter of the contract provide stronger grounds for eliminating or extinguishing the contractual effects.[29]

[25] Ch.5-IV.3
[26] Ch.5-IV.1
[27] Ch.5-IV.2.A
[28] Ch.5-IV.1.D
[29] Ch.2-II

Additionally, procedural violations which involve elements of bad faith such as corruption and fraud in the transaction also carry strong policy grounds for a contract to limit or lose its effects.[30]

Such impact creates an additional layer of deterrence in the formation of contracts being the result of such socially undesirable activities and incentivises potential contractor of avoiding potential collusions.

Allowing third-parties to challenge contracts that are the result of such activities provides, at least from a normative perspective, a strong enforcement tool to capture such transactions.

In the context of Greek law, it was found that apart from the EU ineffectiveness remedy, no other violations may have in effect any impact on an allegedly unlawful concluded contract after a third-party protest.

The main reasons for this can be traced, first to the platonic effect that the annulment of a contractual decision has on a contract and, second, the unwillingness of the legislature to allow such third-party actions.[31]

This takes us back to the point made about the imposition of artificial traditional doctrines. In this case of Greece, public contracts fall under the ambit of administrative law. Consequently, the courts simply adhere to the principles established therein.

However, this position ignores the reality of providing an effective enforcement tool that could capture unlawful behaviour and, allow a strong sanction to materialise by limiting or extinguishing the effects of a contract that is the result of such behaviour.

It may be argued that because of the unavailability to the challenge unlawful contracts, authorities will often hasten to conclude the contract to render their violations immune to challenge.

[30] Ch.2-II.3; V.2
[31] Ch.6-IV.4.A

Finally, in relation to the U.S. federal law as explained in the section below, there are no artificial conditions that prohibit or deprive third-parties to challenge a contract.

It is inherent in the logic of the protest system to allow claims post-award with the ultimate aim being that, if a violation of statute or regulation is found by the review bodies, to a have a contract set aside and re-competed.

Of course, the U.S. federal system provides for substantive safeguards to post-award challenges. Hence, a protester must demonstrate competitive prejudice for the GAO to sustain the protest, which requires showing that if the agency had acted properly, it would have had a good chance of receiving the award.[32]

Additionally, in deciding the appropriate remedy, the GAO must consider all the circumstances surrounding the procurement or proposed procurement, including "…*the seriousness of the procurement deficiency, the degree of prejudice to the other parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the urgency of the procurement…"*.

Hence, the GAO has a wide margin of discretion to consider all the interests involved - that includes the economic interests of the parties involved - in deciding the appropriate recommendation.

Therefore, one notable difference between the GAO and the EU regime is that, the former places emphasis on all interest involved, including the interest of a contractor.

In the case of protests before the COFC, a protestor also must show that the alleged violation has prejudiced him in receiving the contract. Additionally, a high threshold is required for protests to be allowed, which includes showing a subjective bad faith on the part of the government, no reasonable basis for the

[32] Ch.7-III.3.C; IV.5

agency decision, abuse of discretion by the procuring officials or that pertinent statutes or regulation were violated.[33]

The COFC has also a wide margin of discretion to decide the appropriate remedy. It may award the re-compete of the contract taking into consideration whether the injury to the protestor outweighs the damage to the public interest or that of the contractor and vice versa.

It is submitted that the U.S. approach is pragmatic and highly policy orientated. It starts with the position that an unlawful award must be re-competed, hence potentially providing the most effective remedy to aggrieved competitors.

II.3. Alternative remedies to aggrieved competitors

The proposition of allowing challenges on the effects of an unlawful contract by third-parties is premised upon the idea of eliminating the possibility of external harm.

In the context of aggrieved competitors who have been unlawfully deprived the opportunity to contract with a public authority, such harm may be measured either in relation to the contract profits they would have made had the public law violation did not take place and in relation to the contractual opportunity that a potential competitor gained, which consequently made them worse-off.

However, it is not always possible or desirable to have an already executory contract set-aside for it to be re-competed.

Hence, when a public law violation does not adversely affect the contractual effects, the external harm to aggrieved competitors who have been unlawfully deprived the contract is minimised by a financial damages award.

The approach of the jurisdictions examined to post-award damages claims reveals once again a lot about how carefully legal systems should consider the

[33] Ch.7-III.3.D; IV.5

most effective remedy which is the challenges on the effects of unlawful contracts and their re-competition.

This remedy eliminates any potential external harm by returning the market in the status quo ante and allowing for the allocation of the contract to be reconsidered.

Of course, it is not always desirable to allow such challenges since the public interest in uninterrupted service delivery may require otherwise. Additionally, a contractor might have entered in good faith and his interest will have to be considered too.

From the jurisdictions examined, the U.S. approach seems to be the most effective because while it limits the scope of monetary damages to preparation costs, it does so with the presumption that when a claimant can show that a contract award was improper and that there has been a competitive prejudice, the review bodies will routinely direct the termination and the re-competition of that contract.[34]

Instead of trying to determine the potential chances of a claimant being awarded the contract had the violation not taken place - and potentially having to compensate for the price of a contract almost twice,[35] which eventually may create a burden to the federal budget – the U.S. takes as starting point that while compensation for lost profit is not available, the re-competition of the contract is.

This approach also eliminates the possibility of opportunistic behaviour. Any post-award challenger will have to make sure that he can show a competitive prejudice on part of the federal agency and how this prejudice affected his chances of being awarded the contract.

Even if, however, it is assumed that a damages award is an equally effective remedy that can eliminate the external harm from the unlawful contract, the

[34] Ch.7-VI

[35] This would include paying the contract price to the actual contractor and potential losses to the aggrieved company.

jurisdictions examined show that the conditions imposed for damages claim to be successful are, in some cases, very difficult to satisfy.

Thus, for instance, EU law sets a high standard of proof that lies with the claimant who needs to show the existence of a serious breach.[36] This approach is followed in the UK for damages claims under the PCRs.[37] Additionally, under Greek law, damages are rarely awarded due to the difficulty of a claimant to prove the causal link between the harm and the violation.[38]

II.4. Institutional review

As it was argued in chapter 2, there are many good reasons for legal systems to provide for an institutional pillar of review in parallel with an ad hoc protest system.[39]

In all jurisdiction examined there is some form of such specialised institutional mechanisms performed by administrative or semi-judicial bodies that may review the legality of public contracts.

The functions and enforcement powers of such bodies vary between the systems. These variations reflect the structural and legal arrangements of each legal system, but also the culture that is embodied in their public contract system.

Hence, for example, in Greece where phenomena of corruption, favouritism, lack of transparency, are regularly apparent, various institutional mechanisms have been set.

Conversely, in the UK, such mechanisms are limited and with no enforcement powers. The only body that performs such powers is Monitor, which, however, operates solely in the NHS framework and, in practice, never performs those powers.

[36] Ch.4-VI
[37] Ch.5-VI.1
[38] Ch.6-VI.1
[39] Ch.2-III.2

Unlike the other jurisdictions examined, Greece has set mandatory review before a contract is entered.

This is a review tool aiming to enhance the confidence of the public that contract awards are not the result of favouritism or other forms of intentional irregularities on the part of public authorities.[40]

Currently, the bodies that perform the function of pre-contractual review are the Court of Auditors and the Single Public Procurement Authority.

Both pre-review procedures are mandatory, and omission of an authority to submit their contracts for review before these bodies' results for a contract to be rendered void.[41]

As was argued in chapter 2, such pre-emptive review mechanisms can have various benefits for the contract performance. They may eliminate the possibility of a contract entered unlawfully and safeguard the probity of the contract ex-ante.[42]

However, such pre-emptive review mechanisms, particularly when they are mandatory can also lead to delays in the conclusion of contracts, as they might involve extensive bureaucratic procedures. In Greece, for instance, there has been criticism exactly for this reason.[43]

Thus, the possibility of entering a mandatory review mechanism, while it may create an additional layer of overview and deterrence in the formation of unlawful contracts, needs to be designed in a way that it is efficient and avoids cumbersome procedures.

This should come as a note to any jurisdiction that aims to enhance their control and enforcement mechanisms prior to the conclusion of a contract.

Another parameter to the function of institutional review bodies is how far they may intervene on an unlawfully concluded contract.

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[40] Ch.6-III.1
[41] Ibid.
[42] Ch.2-III.2
[43] *ΣτΕ-13/2016*

We have seen that the GAO can perform such function whether after a protest or on its own motion.[44] We have also seen that the EU Commission may also act ex officio or after a complaint.[45]

Legal systems could consider establishing such intervening mechanisms as they may constitute an effective method that can eliminate the legal and incentive obstacles imposed to ad hoc protests.[46]

III. Determining the impact of public law violations on concluded contracts

By suggesting a normative framework in chapter 2, it was argued that there are various rationales that may determine the impact that violation of public law rules have on concluded contracts.[47]

One of the main arguments was that there are stronger policy grounds for a contract to lose its effects when it has been the result of violation related to the subject matter of the contract as to when a violation related to the procedure of concluding a contract has taken place.

Additionally, it was argued that violations related to the procedure of concluding a contract that may adversely affect the outcome of price, quantity, and quality of goods or services purchased might also not be desirable to enforce.

However, it was also debated that the impact that a violation might have on a contract may also be determined by deontological principles that can only be understood within the purposive context of what a legal system aims to achieve.

The purpose of this section is threefold.

The first aim is to summarise and comprehensively present the kind of violations that the selected jurisdictions have chosen to act as 'legal overriding

[44] Ch.7-III.1
[45] Ch.4-III.1
[46] Such legal obstacles may be the imposition of artificial doctrines as discussed above. Obstacles on incentives may be lack of financial interest or fear of risks of retaliation (see Ch.2-III.2)
[47] Ch.2-II

of contracts' (i.e. actually or potentially have an adverse impact on the original effects of a contract).

The second aim is to assess how far and in what context the distinction between violations related to the subject matter of the contract and violations related to the award procedure has application in the jurisdictions examined.

The third aim is to discuss the problem of public authorities raising a public law violation to avoid an otherwise contractual breach when faced with a private law claim by a contractor.

III.1. Findings from the case studies

As was argued in chapter 4, EU law does not, generally, require any adverse effects on a concluded contract when this has been entered in violation of the applicable EU law rules.

The only exception to this is the violations that may trigger the ineffectiveness remedy. However, as repeatedly explained, the ineffectiveness result is only there for the protection of competitors.

Hence, the relevant violations do not, as a matter of EU law, automatically raise an obligation for a contract to be set aside.

Similarly, contracting authorities have the discretion to terminate a contract under Article 73.

The only possible exception where there is a requirement under EU law to set aside a contract is when there has been a serious breach as declared by the CJEU in a procedure pursuant to Article 258 TFEU.[48]

Under U.S. federal law, the position is that any contract entered in violation of federal law is subject to invalidity on the theory that the illegality prevented the contract from arising.

[48] Ch.4-V.2

The term illegal contract might refer to a transaction that requires the performance of an act which is against the law, or it might refer to a contract, the performance of which is not illegal as such, but the parties have entered in violation of the law.

Both types of illegality are common in government contracts in the United States federal and state system.

However, as far as the second category is concerned, the federal courts have made a distinction between violations which are plainly illegal and render a contract void and unenforceable by either party and, violations which are not, which render the contract voidable.[49]

The determination of plain illegality is not a very clear exercise. If this was to be systematised, it was argued that major deviations from the rules that ex-post affect the price, quality or quantity of the contracted-for-activity constitute plain illegalities.[50]

Another variable that has been suggested for determining such illegalities is when a contractor was on direct notice that the procedures being followed were violating statutory requirements.[51]

Under Greek law, the starting point is that any violation of mandatory rules *(ad solemnitatem*) entails the conclusive invalidity of a contract.

Greek law sets various requirements for the formation of public contracts such as the written form of the contract, the use of proper award procedures, a requirement that every contract entered must be provided by law and the compulsory review before the Court of Auditors.[52]

Violation of such requirement will render the contract void and unenforceable by either party.

[49] Ch.7-IV.2
[50] Ibid.
[51] Ibid.
[52] Ch.6-IV.1; Ch.6-IV.2

Interestingly, as noted above, while third-parties may in theory and under certain conditions challenge such violations in a writ for annulment, the stamp of nullity to the contract will hardly ever be imposed.

Finally, the English law position seems to suggest that the stamp of invalidity will be imposed in the following three situations.

The first is when a contract has been entered in excess of the statutory powers of a public authority.[53]

The second is when a contract is lawful as such but there has been an irregularity in its formation such as fraud, corruption or bad faith.[54]

Hence, unlike the position of Greek and U.S. federal law, English law does not take as a starting point that every violation of statutory requirement will affect the contract. Rather, it has taken the view that public law violations do not have any effect on a contract but for the limited exceptions described above.

III.2. The distinction between violations related to the subject matter and violations related to the award procedure

One of the main hypotheses upon which the comparative analysis was premised was that violations related to the subject matter of a contract carry wider policy implications and are more suited to lose or limit their effects, as compared to violations related to the procedure or formalities in awarding a contract.[55]

It was argued, that a violation related to the subject matter of a contract should preclude the possibility of enforcement by either party. Such contracts were never intended to be made and hence they may produce harmful externalities that exceed any benefit to the contracting parties.[56]

[53] Ch.5-IV.1
[54] Ch.5-IV.2.A
[55] Ch.2-II
[56] Ibid.

It is submitted that all jurisdictions examined provide, at least to some implicit level, for such distinction.[57]

Under English law, this distinction is pertinent as the courts have made almost a conceptual distinction between these two types of violations.

It is only when the authority has no legal power to enter a contract where the court will impose the stamp of nullity in the contract and render it unenforceable by either party, while generally, and with limited exceptions discussed above, procedural irregularities in the formation of an otherwise lawful agreement do not affect the contract.

In the context of the U.S. federal law, while such a distinction does not carry the conceptuality apparent in English law, yet, the distinction is to some level relevant, although the relevancy here is more implicit.

The U.S. federal courts although recognising that generally that every statutory violation may render a contract subject to nullity, nevertheless, they never allowed a contract to be enforced when this was in violation of the statutory appropriation requirements.[58]

Additionally, as explained and reiterated in the section below, the courts have banned a complete recovery to a contractor when such appropriation requirements have been violated.

Hence, in these contexts, the U.S. approach provides for a harsher approach when a violation is related to lack of appropriation on the part of the federal agency either because it lacks the relevant funds or because it lacks the authority to enter a contract as opposed to when a procedural requirement has been breached of an otherwise lawful contractual agreement.

In relation to the position of Greek law, the distinction is not relevant since any violation of *ad solemnitatem* rules renders a contract subject to invalidity.

[57] Under EU law this distinction has no application (Ch.4-IV.3)
[58] Ch.7-IV.4.A

However, it was shown that the distinction is pertinent in relation to how consequential matters are treated.

In particular, when a violation has rendered a contract unlawful and invalid, a contractor is entitled to recovery for performance that benefited the authority under the law of unjust enrichment.

However, this remedy has denied when performance has exceeded by 50% the value of the original agreement - an action that is prohibited by statute.[59]

In other words, while the agreement was lawful in its conception, it stopped being so when performance violated the law.

Hence, within this prism, Greek law implicitly states a higher consideration for those transactions that - broadly speaking - are unlawful as opposed to contracts that their subject matter is lawful but have been concluded in violation of a procedural requirement.

III.3. The problem of public authorities invoking their own public law flaws

In all jurisdictions examined, most of the litigation involved financial claims between the contracting parties where usually the public entity would raise the public law violation to avoid an otherwise contractual breach.

The commercial implications of such behaviour are not always welcome. With public authorities regularly looking to disclaim commercial agreements to rein in long-term spending commitments, private organisations should be able to take some comfort from their decision to contract with them.

On the other side of the coin allowing public authorities to raise its own violations may be justified on the policy of ensuring that authorities act lawfully so that the contract at stake does not produce the various potential harmful externalities discussed in chapter 2.

[59] Ch.6-IV.3.B

Hence, there must be a careful balance between these competing interests. This throws the issue back to what kind of violations should impact on the effects of a contract.

The case studies reveal a mixture of interesting aspects on this matter, which are worth briefly discussing.

English law seems to have taken a very policy-oriented approach. As discussed above, its view seems to reflect the proposition that a distinction to be drawn in a private law dispute between a decision of a public body entering a contract outside its legal authority and decisions related to the award procedure.

In the first case, the contract is rendered unenforceable against the public authority while in the latter it is enforceable.[60] The only exception to this second category is only when the party seeking to enforce it, knew that it was the result of an improper decision (i.e. acted in bad faith).[61]

Additionally, the UK parliament has attempted to eradicate the commercial uncertainty around public contracts (at least those with local authorities) even for the first type of violations.

Hence, the Localism Act 2011 has explicitly provided local authorities with wide powers to enter contracts to avoid the effects of finding a contract *ultra vires*.[62]

Additionally, contracts with local authorities which meet the certification requirements of s.2 of the Local Government (Contracts) 1997 Act will be characterised as prima facie within the authority's powers and are, therefore, unlikely to form the subject matter of a private law defence.[63]

The position of U.S. law is that through time federal courts have narrowed down the effects of illegality to a contract. It is only when an illegality is plain that the contract will be rendered unenforceable.

[60] Ch.4-IV.2.A
[61] Ibid.
[62] Ch.5-IV.1.A
[63] Ch.5-IV.1.C

As noted above, such illegality will take place when there has been a deviation from the procedural requirements that have ex-post affected the quality, quantity or price of the contracted-for-activity.

Additionally, some decisions seem to suggest that when a contractor is in direct notice of the violations he will not be able to enforce a contract and a federal agency can rely on this on its defence.[64]

U.S. law also has made clear that violations of statutory appropriations will also render the contract unenforceable against the federal agency.

There are some overlaps between the English and the U.S. approach. Both are motivated by considering the commercial implications of not allowing a contractor to enforce his contractual rights.

However, one notable difference between these two systems is that under U.S. law when an illegality has taken place (even if not plain) the contract will be rendered voidable, meaning that the federal agency can still terminate it for its convenience without absorbing the whole contractual effects.

The concept of voidability as developed within the framework of U.S. federal law does not exist under English law. As discussed in section V below, public authorities do not have a wide discretion to unilaterally intervene in a contract.

Under Greek law, any public law violation may be raised by a public authority to render a contract invalid and avoid the effects of an otherwise contractual breach.

The Greek judiciary has not debated this issue and particularly it has not debated how far the law needs to create a balance between protecting the integrity of the system while maintaining confidence to the private sector to enter into contracts with public entities.

[64] Ch.7-IV.2.

It is difficult to ascertain how far the invocation of the illegality as a defence by public authorities may affect the behaviour of the private sector in engaging with public contracts.

Possibly this could be the examination of an empirical study. However, it could be argued that, at least from a normative perspective, legal systems must debate how far authorities can escape a bad bargain by simply raising those violations.

There is perhaps a distinction that should be made, in some cases, between the impact of violation (X) when it is subject to challenge by third-parties, in which case, a contract may not be enforceable by either party, and the impact of the same violation (X) when invoked as a defence by the contracting parties.[65]

There is a clear policy underpinning for such a distinction, that is, that in the first case third-party considerations come into place, and if the effect of such challenge is for the contract to be set-aside and re-competed, it would not be particularly wise to also allow a contractor to enforce that contract by claiming damages.

Contrariwise, when the illegality is raised solely within a dispute between the parties, which for whatever reason want to escape their obligations, the impact of a violation should be ascertained based on a balance between commercial considerations and the integrity of the public contract system.

However, it may be argued, and this is where English law gets its right, that there are some types of violations that should lead to unenforceability in any eventuality.

These are violations related to the subject matter of a contract for the reasons explained in chapter 2, and when there is evidence that a contractor acted in bad faith.

[65] Ch.2-II.4

In the latter case, there is a strong policy underpinning to condemn such behaviour and public authorities should be able to escape contracts that are the result of collusion between their agents and a contractor.

IV. Addressing economic consequences *inter partes*

When a public law violation dictates the overturning of the effects of a contract, what are consequences for the two contracting parties?

On the one hand, a contractor may have performed the delivery of goods or services for which he has received no payment in return. Additionally, he may have invested in preparatory works for the execution of an unlawful contract. Will he be able to recover for such performance and/or investments, and if yes, to what extent?

On the other hand, a public authority may have made payments for which it received no performance in return. Conversely, it may have made payments for a contracted-for-activity that did it not have the legal power to do so. Will it be able to recover those expenses, and if yes, to what extent?

As was argued in chapter 2, the main policy issues around how consequential matters are treated can be identified on the type of remedy that is available to the contracting parties (i.e. the scope of recovery), and whether there are restrictions on the availability of a recovery claim.[66]

Indeed, the scope and restrictions on recovery are important elements in understanding how far competing interests are properly balanced. In our case, the economic interests of a contractor versus the interest of protecting public funds and protecting the policy that the public law rule that had been violated aimed to achieve.

The comparative study shows a mixture of approaches. However, all jurisdictions intersect on the fact that contractual rights cannot be enforced and

[66] Ch.2-V

recovery for a contractor is based on the benefits that have been conferred to the authority.

Additionally, the U.S., English and Greek law approaches seem to intersect on the fact that recovery may be denied or partially satisfied when a contractor acted in bad faith.

Also, U.S, and to some extent, Greek law approach, suggest that when such recovery exceeds what is lawfully permitted, recovery may be denied.

This sections critically examines the issue of recovery by reflecting the finding of the case studies to the policy considerations involved on this issue.

It first analyses the position of a contractor and then examines the position of a public authority.

IV.1. The position of a contractor

The position of the contractor is the one for which more attention has been paid from scholars in the case studies examined.

This should not come as a surprise as generally, it is this contractual party that has more to lose from the potential unenforceability of a public contract.

They will usually have provided some performance and will try to enforce that before courts to get paid while the public authority will raise the public law violation in order to avoid the effect of a contractual breach.

Consequently, most of the litigation has focused on this issue, and so has scholarship.

The case studies examined have some interesting lessons to provide in terms of regulatory approaches regarding this matter.

This part reflects and critically examines the approaches of the jurisdictions by looking at three specific issues.

The first is the scope of recovery that is allowed.

The second is whether the disturbance to public finances is factored by the law and/or the judiciary when considering recovery.

The third is how far the knowledge of the public law violation and its effects on the part of the contractor provides for a partial or complete ban on a recovery claim.

IV.2. The type and scope of the remedy

All case studies, with some limited exceptions,[67] intersect on the fact that recovery for a contractor from unlawfully concluded contracts is to be ascertained based on performance that has benefited the public entity.

The scope of recovery does not differ substantially between the jurisdictions.

Hence, for example, under Greek law, the courts will consider the costs that the authority incurred had the contract been valid and, on that basis, will order any enrichment to be returned.[68]

This suggests that the calculation of restitution reflects the market value of the contracted-for-activity.

Greek law also allows the possibility for violations on the part of the public entity that have rendered the contract invalid to bring a tortious claim for civil liability.[69]

In such case, the scope of recovery is determined based on the difference between the current financial position of the injured party and what it would have been had the tort not been committed.

Under U.S. law it has been stated that *even though a contract be unenforceable against the Government, because not properly advertised, not authorized, or*

[67] For example, in the UK, PCR 101 allows the contracting parties, at any time before the declaration of ineffectiveness, to agree by contract any provisions regulating their mutual rights and obligations. Additionally, the Local Government (Contracts) Act 1997, allows for agreement of discharge terms between the parties in case of a contract being declared *ultra vires.*
[68] Ch.6-IV.3.B
[69] Ch.6-IV.3.D

for some other reason, it is only fair and just that the Government pay for goods delivered or services rendered and accepted under it.[70]

The calculation of such recovery is based on the benefits that were conferred to the government based on the reasonable value in the marketplace for the services performed.[71]

English law adopts a similar interpretation on recovery, which reflects the money value of the benefit received.[72]

A difference among the approaches of the jurisdictions examined is that Greek and English law seems to take the view that when goods are involved in a claim for restitution arising from unlawful contracts, these, when possible, should be returned in their original form.[73]

In contrast, the U.S. approach suggests that there is no such requirement and when the government has accepted the goods under the unlawful transaction, a contractor is entitled to payment on a *quantum meruit* basis.[74]

EU law does not provide a positive obligation which prescribes a specific remedial pattern that national laws need to follow in case of ineffectiveness.

However, it was argued that if the policy of the remedy is restoring the public contract market in the position it was before the unlawful award took place, recovery for a contractor should, in principle, be limited to any performance that has benefited the authority.[75]

Hence, regardless of some differences, all the approaches suggest that when a public law violation dictates the contract to be rendered invalid, contractual rights are not enforceable and usually a remedy is based on restitution.

[70] *Prestex v United States 320 F.2d 367 (Ct.Cl.1963)*
[71] Ch.7-IV.4.A
[72] Ch.5-IV.1.G
[73] Ch.5-IV.1.G; Ch.6-IV.3.B
[74] Ch.7-IV.4.A
[75] Ch.4-IV.2.F

This position reflects the policy considerations submitted in chapter 2, where it was argued that a remedy based on restitution addresses in a satisfactory manner both interests.

By forcing the parties to return to the *status quo ante*, it removes any incentives to enter an unlawful contract while maintaining an equitable outcome for both parties.

Additionally, it secures that public funds will not be disbursed for an unlawful purpose, while it makes sure that the policy behind the violated public rule will be adhered to.

A counter-argument to the above proposition is that by limiting the remedial claim upon restitution, a contractor who acted in good faith and without relevant knowledge of the alleged illegality may find himself deprived of profits that he would have made but for the public law violation that the public entity triggered.

Indeed, this a legitimate argument and takes us to the point that the impact of a public law violation must adhere to some clearly defined rationale. Hence, when the law prescribes that violation (X) will render a contract unenforceable, this should be premised on a clearly defined purpose.

As submitted in chapter 2, such defined rationales may be based on the potential harmful externalities that a public law violation may create on the effects of a contract or some clearly defined and justified deontological aim.[76]

IV.3. Restrictions on recovery – The disruption to public finances

As was argued at chapter 2, a recovery claims may involve large sums of money, which might seriously jeopardise the availability of public funds and resources with potentially deleterious effects on a community.

This risk is particularly relevant when performance was related to a transaction that its subject matter was unlawful.

[76] Ch.2-II

In such case, funds that could have been distributed for some beneficial activity may need to be utilised for reimbursing the contractor.

Additionally, this risk may be relevant when a procedural violation has adversely affected the price, quantity or quality of goods, works or services purchased.

In such case, the difference between the market price and the contract price which was the result of the unlawful award may also be detrimental to the intended beneficiaries.

The approaches of the jurisdictions examined echo upon some of these considerations.

In the context of Greek law, the disturbance of public finances is factored as a defence to a public authority.

More specifically, it has been ruled in some cases that a contractor will be denied restitution based on unjust enrichment when he has performed in excess of what is lawfully permitted.[77]

Thus, in this context, Greek law sets a hard line of recovery for unauthorised performance even if such performance has benefited the public entity.

The U.S. approach is especially strict when unauthorised public finances are at stake. Hence, when the amount of recovery exceeds what is statutorily appropriated it will be denied even if the performance of the contractor has benefited the federal agency.[78]

English law, on the other hand, has rejected the protection of unauthorised funds as a defence upon which a public authority can rely to avoid making restitution.[79]

In chapter 2 it was argued, that the disturbance of public finances may well be factored as a ground upon which a public authority may rely upon to avoid

[77] Ch.6-IV.3.B
[78] Ch.7-IV.4.A
[79] Ch.5-IV.1.G

making restitution. This is particularly the case when recovery is based on an unauthorised transaction.

The risk is, however, that a moral hazard may be created if such defence is followed where a contractor will have to absorb all costs for a violation that is attributable to the public authority which bears no costs.

By the same token, there might be a problem of asymmetry where, perhaps, a public authority is in a better position to know about its violation and should absorb some of the risks of such violation.

Hence, at least from a normative perspective, a careful balance is needed between the protection of unauthorised funds and the economic interest of a contractor.

IV.4. Restrictions on recovery – The knowledge of the public law violation and its effects

While the disturbance to public finances parameter might not be the strongest factor for a legal system to restrict or ban recovery to a contractor, the knowledge of the underlying violation (and perhaps its effects) or contribution to it by a contractor should, indeed, affect the ability to recover in whatever form that recovery is sought.

As argued in chapter 2, such a measure can effectively deter the formation of contracts entered in violation of public law.[80] If a contractor will have to bear the potential cost of performance if a violation is raised before a court, he will most likely avoid entering a proscribed transaction for which he has knowledge of its unlawfulness.

Consequently, such a harsh measure may lead to the formation of less unlawful contracts since the party with the market incentives (i.e. the contractor) will avoid entering such transactions.

[80] Ch.2-V.2

Apart from EU law which as noted does not provide positive obligation as to how national laws arrange consequential matters, all other jurisdictions examined seem to intersect on the fact that knowledge or contribution to illegality will create a bar or restriction on recovery.

Greek law approach is strong on this matter. Both L.4412/2016 and L.2362/1995 subject the availability of recovery on the condition that a contractor did not know or should not have known or has not contributed to the illegality that gave rise to an invalid contract.[81]

Interestingly, as the author comes from this jurisdiction and has knowledge of the current affairs in this country, phenomena of unlawful contracts still make the headlines, which perhaps counters the assumptions submitted above.

However, how far such measure may incentivise contractors from entering proscribed transactions and how litigation culture may affect such incentives may only be determined by a careful empirical study.

Yet, from a normative perspective, it may be argued that the barriers imposed to third-party enforcement could be a source of the execution of unlawful contracts.

Such barriers restrict the availability of strong enforcement mechanism where parties with a strong financial interest may be able to challenge unlawful decisions ex-post.

The position of English law on this matter has not been litigated. However, leading academic commentary on this issue has suggested that when the contractor knows, or perhaps ought to know, that the contract is *ultra vires* and therefore of no legal effects, he may be denied restitution.[82]

Finally, U.S. law provides that the relative knowledge of the illegality does not deprive a contractor of recovery. However, contribution to the illegality and, more specifically, contracts tainted by fraud of government officials is one of

[81] Ch.6-IV.3.B
[82] Ch.5-IV.1.G (p.135); IV.2.G (p.148)

the few reasons that recovery may be denied regardless of whether the relevant performance of that contract has benefited the government.[83]

IV.5. The position of a public authority

An authority may have made payment under an unlawful agreement. The question then is whether it entitled to recover those payments.

It was argued in chapter 2 that public authorities should be able to recover payments made under an unlawful agreement, particularly in that situation that has received no performance in return.[84]

This argument was premised on two grounds. The first was that public authorities act in the public interest and any resources wasted may be harmful to the taxpayer's money.

The second was that public authorities lack market incentives and, hence, restricting recovery does not constitute the appropriate deterrent tool.

Other legal tools such as criminal or civil law sanctions imposed against the individual agents who might have acted with malice are more appropriate.

Indeed, a disqualification measure and/or criminal conviction of a public official who has knowingly or negligently authorised an unlawful contract may well restore the integrity of the system and create the necessary business confidence for potential future contractors.

The jurisdictions examined reveal an underlying convergence on this issue – that is, that payments under an unlawful agreement for which a public authority has received no performance in return are recoverable and will hardly ever fail.[85]

[83] Ch.7-IV.4.A
[84] Ch.2-V.2
[85] Ch.5-IV.1.H & IV.2.H; Ch.6-IV.3.C; Ch.7-IV.4.B

A more controversial issue is how far it can recover payments for which it has received performance in return, but such performance was unlawful, i.e. the subject matter of the contract was unlawful.

In such case, the performance would not have benefited the authority as the relevant performance was in violation of the law.

As noted above, the U.S. and Greek law suggest that such payments are recoverable on the part of the public entity.

In contrast, English law has taken the view that a contractor under an *ultra vires* agreement may recover under the law of restitution.[86] Consequently, a public authority will be able to recover payments for which it has not received any performance in return.

V. Unilateral remedying of public law violations

In chapter 2 it was argued that perhaps the less costly and time-consuming way for an unlawful contract to be remedied is through the exercise of some unilateral corrective action on part of the public entity.[87]

Allowing public bodies to do so addresses, inter alia, the problems associated with external ad hoc enforcement and the potential problem of lack of incentive for a contractor to raise the unlawfulness of the transaction in the potential detriment of the public interest.

However, such unilateral corrective action must be regulated in a balanced manner to avoid the asymmetry problem associated with the public authority being able to exercise such power while a contractor cannot.

Hence, defined criteria and remedial measures regulating consequential matters in case of such intervention should be available.

[86] Ch.5-IV.1.G
[87] Ch.2-III.3

This project examined the approaches of each jurisdiction in relation to how far authorities can unilaterally intervene to correct their own violations without being held liable for breach, the method of remedial action and how consequential matters are treated when such intervention takes place.

This section assesses the position of the jurisdictions examined on this matter.

First, it looks at the type of violations that can be remedied and the method of remedial action.

Second, it looks at how consequential matters are treated when such unilateral intervention takes place.

V.1. Type of violations & method of unilateral remedial action

Under EU law, the type of violations that be unilaterally remedied are provided in Article 73 of Dir.2014/24/EU and the equivalent provisions in the other two directives.

Under these provisions, there are three EU law violations that constitute 'legitimate reasons' according to which an authority may, in its own discretion, unilaterally terminate an executory contract.[88]

However, those violations are only the explicitly prescribed ones and national laws may choose to add further grounds provided that these are proportionate.

There are three violations that Article 73 provides. The first is when the contractor should have been disqualified from the awarding process due to violations of a criminal nature as these are defined in the relevant EU law instruments.

Indeed, this is a very good reason to allow authorities to unilaterally intervene and terminate a contract.

[88] Ch.4-V

Awarding authorities through their own mistake or because the disqualified supplier has submitted falsified documentation may have allowed such supplier to participate in the bidding process and win the contract.

Hence, the measure of termination may effectively deter such suppliers from participating in the tendering process in the first place. Consequently, this measure may well serve EU policy objectives in procurement regulation.

The second violation is when an unlawful modification has occurred. This is another good reason to provide for such power and is a measure that responds to EU policy objectives.

Authorities may have mistakenly modified a contract in violation of EU rules and should be able to terminate that part of the contract that is unlawful.

The third violation is the least clear one. Article 73(c) provides for termination for a 'serious' breach as this is defined ex-post by the CJEU.

As argued in chapter 4, this is the only ground which perhaps sets a requirement rather than a discretion for an authority to terminate the contract.[89]

The implementation of Article 73 in the UK and Greece has been on a copy out approach basis. Both jurisdictions have added nothing substantive to its wording.

Within the realm of domestic doctrines, it was demonstrated that English law does not provide essential powers according to which a public entity can legitimately either terminate or modify a contract to remedy a public law violation.

It was explained that traditionally, the government enjoyed some special powers according to which they can unilaterally override their contractual obligations if the public interest so requires.

[89] Ch.4-V.2

Yet, these powers have been construed very narrowly and have only be allowed where the government is acting in the general public good and are a necessary measure of a general kind that affects the nation as a whole.[90]

Therefore, any unilateral intervention to the contract requires consent and consideration by both parties. Hence, such interventions are better to be exercised by the imposition of express contractual terms.[91]

It was explained that some standard form contracts in the public sector provide for 'break clauses' or 'termination for convenience clauses' which allows for termination in the discretion of a public authority when unexpected events occur.[92]

The exact scope of such power depends on each individual contract. Some model contract terms provide for a wider scope on termination clauses, while others have limited the explicit grounds for termination when the violations of Article 73 of the EU Directive have taken place.[93]

As far as the traditional position of Greek law regarding unilateral actions, the administration, in theory at least, is entitled to conduct all those kinds of unilateral direct and indirect acts on the contract that are necessary for the public interest.[94]

However, it seems that the scope of these powers is more limited in practice and particularly when it comes to public entities exercising unilateral acts to correct their own violations.

Unilateral acts may only be exercised when allowed either by legislation or regulated by provisions within the contractual agreement itself.[95]

[90] Ch.5-V.1
[91] Ibid.
[92] Ibid.
[93] Ibid.
[94] Ch.6-V
[95] Ibid.

In this respect, it seems that currently public authorities can only intervene unilaterally to correct their own flaws according to the EU law provisions of Article 73.[96]

As for the U.S. federal law, the position is that government agencies have wide powers to unilaterally intervene to a contact. These powers allow the government to terminate partially or completely an executory contract when it has been entered in violation of federal legislation.[97]

The scope of these powers is especially wide and, cannot be disturbed by the courts unless, for limited situations, that is, where a contractor can demonstrate by clear and convincing evidence that the procurement officials acted in bad faith – such as to acquire a better bargain from another source.[98]

One issue that should be noted is that the power to unilaterally intervene in a contract to correct public law violations has not captured any attention neither in literature nor litigation.

This is true not only for the jurisdictions examined but it seems to have a wider application. In the excellent edition of in Noguellou & Stelknes, '*Droit compare des contrats publics* – Comparative law on public contracts'[99] reveals that almost all legal regimes examined therein have some rules that enable public authorities to unilaterally terminate or modify the contracts.

While many different reasons for such actions are mentioned (such as unforeseen circumstances, changes in government policy or as a punitive measure to the contractor), it seems that in the countries examined therein there is no reference in exercising such power when the public entity itself has violated mandatory rules of public contracts.

From the case studies examined in this project, the U.S. seems to be only one where such powers are exercised for the above purpose.

[96] Ch.6-V.1
[97] Ch.7-V
[98] Ibid.
[99] (Bruylant, 2010)

Perhaps legal systems should consider addressing more carefully this issue. As repeatedly argued, public authorities should be able to remedy their own violations.

They should be able to do so, however, within clearly defined criteria and not raise their own public law flaws to escape a bad bargain. Thus, it may be argued again that the gravity of the violation and its potential ex-post effects should be central to the availability of the exercise of such powers.

Such powers perhaps should also distinguish between violations where there is a requirement for a public authority to intervene and remedy the effects of the violation and violations where unilateral action is discretionary.

The prioritisation of the objectives that each legal system aims to achieve with the exercise of such powers is central to the determination of such distinction. Some violations might carry wider policy implications for the probity of the system and unilateral actions may be a requirement, while other type of violations may require more discretion on the part of the public authority.

V.2. The treatment of consequential matters

While a public authority should unilaterally intervene to a contract to remedy its unlawful effects, this should not come at the absolute expense of a counterparty.

Hence, some of form of recovery should be provided. However, recovery in such case should not cover anticipated profits for performance not rendered. It should mainly lie where it falls, i.e. reasonable recovery based on what has been performed.

Of course, there might be an exception to this. A notable such exception is when a contractor was aware of the violation or has contributed to it. As explained above such conduct can justify the complete ban of recovery as a strong deterrent measure.

The jurisdictions examined reveal a spectrum of approaches ranking from reasonable compensation based on performance to compensation covering reasonable profits of the additional works not performed, to no compensation at all.

Thus, for instance, in the UK the calculation of compensation is based on explicit contractual terms. Some anecdotal evidence suggests that this may cover reasonable profit losses or simply reasonable compensation based on performance before the contract was terminated.[100]

In the U.S. when a contract is voidable due to an illegality and it may be terminated for the convenience of the government, a contractor is entitled to compensation under the termination for convenience clause.[101]

Such compensation covers the contract price for all works completed and accepted prior to termination and a reasonable profit on the additional work unless the government can show that completion would have been a loss for the contractor.[102]

Under Greek law, a public authority can deny compensation when a contract is terminated due to the violation of the relevant Article 73 EU law requirements.[103]

This approach was criticised by this author for its unfairness and the lack of careful consideration on the part of the domestic legislature.[104]

A proposition that can be put forward and perhaps may influence the approach of legal systems regulating this matter is that when a violation (X) can be remedied through the channel of third-party protest or through the channel of unilateral action of a public authority, the amount of compensation should adhere to the same type of calculation.

[100] Ch.5-V.3
[101] Ch.7-V
[102] Ibid.
[103] Ch.6-V.2
[104] Ibid.

Assume for instance the example of EU law where an ineffectiveness claim due to an unlawful modification is pending before a court and the contracting authority decides to terminate the contract and compensate the contractor.

If compensation is more favourable when unilateral termination takes place, the objective of the EU ineffectiveness remedy is to some extent circumvented.

By the same token, every unlawful contract that can be remedied through different channels should treat consequential matters within the same framework.

A counter-argument to this proposition is perhaps that since unilateral remedying actions are the most effective and time-consuming way to correct violations, some additional compensation may be justified on the basis that the cost of litigation that a public authority absorbs from a protest being avoided.

VI. A proposed roadmap

Drawing from the policy and regulatory considerations developed in Part I, the practical approaches from the examination of different legal systems in Part II and the reflection of those practical approaches to the policy considerations analysed in this chapter, this conclusion section provides a brief roadmap that perhaps legal systems should consider when regulating the various aspects of unlawfully concluded public contracts and which may also trigger ideas for future research.

Public authorities occasionally may enter into contracts in breach of public law or other mandatory requirements. The effect of those breaches might be minor, while others might have a significant direct or indirect negative impact on the intended beneficiaries and the public interest.

Consequently, the execution of some unlawful contracts may even lead to negative consequences on the well-being of a society. The taxpayer will have

to absorb the effect of such contracts either by absorbing their cost and/or by being provided with the inferior quality of works, goods or services.

The problem with regulating unlawfully concluded public contracts is that they involve various competing interests.[105]

The basic premise of this thesis is that a careful balance between the public and the private interest is essential for regulating the treatment of such contracts.

The proposed roadmap consists of three issues which are very closely interrelated, and which have already been discussed. There is no specific hierarchy on how to approach this roadmap and not all issues might be relevant to each legal system.

The first issue is the enforcement mechanisms and the institutional and regulatory setting within which these mechanisms may operate.

We have proposed and discussed various such mechanism ranking from ad hoc ex-post protests on the effects of a contract to independent and partial mechanisms and unilateral corrective actions by public authorities.

These mechanisms can perform similar functions or act as a supplement to each other.

Special attention should be given to the ad hoc protest system since this is an effective oversight mechanism with almost universal application and where third-parties are directly involved in a transaction.

In a nutshell, the main aspects that a legal system should carefully consider in this respect are the following.

The first is that it should make sure to give some breathing space between the award decisions and the conclusion of the contract.

The EU standstill obligation and the U.S. automatic stay are both good examples of implementing such breathing space. Such measures may prevent unlawful

[105] Ch.1.-I; Ch.2

contracts coming into effect in the first place, hence avoiding the complexities that protests to the effects of contracts may create.

Most importantly, however, since the focus of the current analysis was on unlawfully concluded contracts, legal systems should carefully debate how far and under what conditions they may allow challenges on the effects of such contracts.

As repeatedly argued, allowing ex-post challenges is the most efficient remedial measure for aggrieved competitors.

It allows for the possibility of the market to return to the pre-transaction position and thus it may minimise potential harmful externalities. It also minimises opportunistic behaviours and safeguards public authorities from the possibility of being held liable for a wrongdoing and having to compensate third-parties for potential harm.

The premise of the debate on the design of potential challenges on the effects of a contract should be founded on a careful balance between the various interests involved as well as the policy objectives that each system aims to achieve.

Hence, legal systems should remove the artificialities that are imposed by their institutional setting that make such challenges difficult if not impossible and instead, focus on intended outcomes.

Theoretical and empirical tools may be used to assess those intended outcomes and, on that basis, make the necessary amendments that will allow under certain substantive and procedural conditions and safeguards the availability of challenges on the effects of a contract.

The debate of allowing a system of individual protests on the effects of a contract should not be exhausted to domestic legal systems but international instruments regulating public contracts should also consider introducing a remedial measure of this kind.

Both the UNCITRAL Model Law and the GPA of the WTO, which provide and encourage domestic review procedures, fall short on regulating the availability of challenges ex-post.[106]

This position neglects that public authorities may simply run to sign a contract to escape the system of ad hoc protests, hence rendering such a system of little practical value.

From a trade perspective, especially, domestic supplier review systems may have minimal value if ex-post challenges are not available.

For instance, contracting authorities may notify their intention to award a major construction contract under a direct award. If challenges on the contractual effects are not permitted under the relevant review system and the trade agreement does not provide for such challenges, then public authorities can simply enter that contract without consequences.

This may lead to negative results for the effectiveness of the trade agreement on public procurement since it may disincentivise foreign suppliers from engaging with government procurement opportunities as these have been agreed between the trade partners.

EU law and the ineffectiveness remedy may have a very good lesson to give in this respect. It demonstrates how a proportionate regime can be created that simply aims to tackle those violations that deprive the opportunity of competing for an award or challenging a decision.

The second issue of this roadmap that a legal system may wish to consider is how a breach of a regulatory requirement (what is labelled in this project as public law requirements) may impact on the effects of a contract.

This is a difficult task and any recommendations should come with a caution. In chapter 2 different rationales were proposed in determining this issue. When

[106] The author has already drafted a paper in this respect which is intended to be published under the provisional title "Challenges of unlawfully concluded public contracts in international public procurement regulation"

imposing a 'legal overriding' to a contract, the legal system may wish to consider the intended outcomes.

They may wish to consider what kind of effect such measure could have in safeguarding the integrity of the public contract system, the preservation of public funds and the elimination potential harmful externalities to achieve the most socially beneficial outcome.

Legal systems may also want to consider that when a public law violation has an impact on the effects of a contract, this may have commercial implications, especially in those situations where a private contractor has entered in good faith and with no knowledge of the violation nor its effects.

It is unattractive, to say the least, that public bodies could raise their own unlawful actions to defend a claim made against it under an agreement it has entered. They usually have access to legal and financial advice and it is in the best place to guarantee that the agreement is lawful.

To this end, it was noted that in some situations a distinction that might need to be made in relation to the effects of a violation when this is subject to challenge by a third-party and when the same violation is raised as a defence between the contracting parties in a contractual dispute.[107]

The distinction is relevant because different policy considerations arise in these different sets of facts. Consider, for instance, an unlawful direct award which is subject to challenge. In such case, a legal system may find it desirable to set-aside the contract and re-compete it.

Consider that the same violation is raised by a public authority on a contractual dispute to render the contract unenforceable and escape its obligations.

In this scenario, a legal system may wish to consider the potential precedent that it might establish by allowing public authorities to escape contracts.

[107] Ch.2-II.4; Ch.8-III.3

If an unlawful direct award does not affect the public interest and since third-parties with a potential interest to that contract were not involved in the dispute, a legal system may choose to allow the enforcement of the contract.

By the same analogy, unilateral actions corrective actions on a contract to remedy a public law flaw, should not come at the expense of creating an acute moral hazard issue where one party will have a superior position to discharge the contract without absorbing the contractual cost.

Hence, any unilateral intervention such as the early discharge or immediate termination of a contract should ideally be exercised under clearly defined criteria. The simple argument that a public authority may raise that such unilateral action was made in the public interest should be strongly scrutinised by courts or other dispute forums.

Which public law violations and to what extent they will affect the contract is a difficult task. As was argued in chapter 2, unlawfully concluded public contracts might have considerable external effects to the intended beneficiaries of that contract.

It was for this reason that it was suggested that the design of the effects of public law rules should be determined based on an assessment of clearly defined harmful externalities and the potential losses in welfare to the public authority.

In any event, careful consideration should be given on this issue. Perhaps empirical evidence and economic analysis combined may provide a solid theory on this complicated issue upon which a regulatory framework may be produced.

The final stop of this roadmap is the treatment of consequential matters between the parties when a contract loses its effects.

On the assumption that a public law violation requires the setting aside of a contract and where its effects have been nullified or partially satisfied, the main issue at stake is who bears the loss of the public law violation which has rendered performance impossible.

It has been suggested that the most appropriate remedy in such case is one best on restitution. This is the suitable basis for recovery for the contracting parties because if the public law rule that has allegedly been violated is designed to alleviate the contractual effects then no recovery should be based on the contract.

Restitution forces the parties to their pre-violation position and hence minimises the possibility of incentives to enter into unlawful contracts in the first place. It also ensures that the public purse is not unduly affected.

There is always the possibility for the legislature and the judiciary to consider the behaviour of the public authority and how far its own negligence or omissions resulted on the adverse effects produced on the contract.

Hence, in some cases perhaps a contractor may be able to claim recovery based on the tortious ground of civil liability of the State or some similar doctrine.

A successful civil claim may compensate a tort victim for the losses he sustained due to the wrong committed. Hence, in our context, a contractor may be entitled to recovery akin to contractual breach.

This creates somehow a paradox if the objective of the public law rule is to extinguish or limit the effects of a contract. Why would a State create an additional ground to be held liable on a non-contractual basis when the purpose of the rule is to escape the effects of a contract in the first place?

Therefore, a successful recovery claim on this basis should be the exception and not the norm. Recovery should aim to minimise all the negative effects resulting from such contracts and restitution is the most appropriate way to do so.

Legal systems may also want to consider if there are any circumstances that recovery to a contractor may be denied or partially satisfied.

In this respect, it was suggested that the most obvious reasons for restricting recovery are when the contractor was either aware of the violation and/or its effects or has contributed to it.

There are very good reasons to do so in such events. From a normative perspective, at least, it reduces the incentives to enter unlawful contracts and hence safeguards the deterring effect that the public law rule aimed to achieve.

The protection of the public purse, on the other hand, is not a very strong ground to ban or partially satisfy recovery. Some of the risks of the transaction must be absorbed by the public entity.

The moral asymmetry that the system should tackle here is an obvious one. It may not simply allow the principal wrongdoer which is the public authority that violated the relevant public law rule to escape any cost.

On the other hand, recovery should always be available to a public authority. Public entities do not generally have market incentives and denying recovery will not create any significant layer of deterrence.

Most importantly, recovery should not be denied because otherwise the purpose of the relevant public law rule which intended for the transaction never to be made is negated in the detriment of public money.

Chapter 9

Concluding remarks and the way forward

The thesis examined in a comparative context the impact of violations of public law on concluded contacts.

As was suggested in chapter 1, a comparative and contextual legal analysis is the most appropriate method for a legal research area that has never been comprehensively mapped before.

The analysis conducted attempted to systematically present the difficult balance between the various conflicting interest and the multifaceted regulatory issues that arise in the context of unlawfully concluded public contracts.

A note should be made here about the specific contribution of this thesis in the existing legal scholarship.

There have been important pieces work on various aspect surrounding the treatment of unlawfully concluded public contracts most of which has been cited throughout this thesis.[1]

For instance, there has been literature addressing how consequential matters arising from invalid public contracts are addressed under the approach of different domestic jurisdictions.[2]

Additionally, there is literature that examines similar aspects as the ones examined in this project such as the availability of challenging the effects of contracts by third-parties[3], how far contracting authorities can unilaterally

[1] Mainly referring to research drafted in English.
[2] See indicatively, Arnould, 'Damages for performing an illegal contract: the other side of the mirror – comments on the three recent judgments of the French Council of State (2008), P.P.L.R., 6, 274-281; Halonen, 'Shielding against damages for ineffectiveness: the limitations of liability available for contracting authorities – a Finnish approach', (2015) P.P.L.R., 4, 111-121.; Arrowsmith, 'Ineffective transactions and unjust enrichment: a framework for analysis (1989), L.S, 9, 121-145
[3] See indicatively, Treumer & Lichère (edition), 'Enforcement of the EU Public Procurement Rules', (DJØF Publishing, 2011)

intervene to concluded contracts[4] and the interrelationship of public and private law in the context of public contracts.[5]

A notable mention should be made about the work of Professor Arrowsmith, which has been an important influence in appreciating the complexity of the policy issues involved around the treatment of unlawfully concluded public contracts and consequently in drawing the structure of this project.

Hence, for instance, in her thesis 'Government Procurement and Judicial Review',[6] Arrowsmith in chapter 14 onwards provides an analysis on a range of issues concerning the impact of breaches of public law on concluded contracts under the Canadian approach.

Similarly, in her chapter 'The impact of public law on the private law of contract',[7] Arrowsmith explains the impact of public law principles on the effects of a contract under the approach of English law.

However, while Arrowsmiths' studies identify the policy issues involved in the treatment of unlawful public contracts, her analysis is limited in one jurisdiction and take an internal perspective and bottom-up reasoning by examining the various issues from the institutional perspective of each jurisdiction.

Instead, this thesis had a strong comparative element in order to provide a comprehensive and systematic coverage of the treatment of unlawfully concluded contracts by bringing in additional perspectives into a single framework (Part II).

Additionally, this thesis attempted to conceptualise and develop a theoretical framework of the policy and regulatory considerations involved in the treatment of contract concluded in violation of public and mandatory rules (Part I).

[4] See indicatively, Noguellou & Stelkens, 'Droit comparè des contrats publics – Comparative law on public contacts', (Bruylant, 2010)
[5] See indicatively, Arrowsmith, 'Government contracts and public law' (1990), L.S., 10/3, 231-244; Davies, 'The Public Law of Government Contracts' (OUP, 2008); Freedland & Auby (edition), 'The Public Law/Private Law Divide: *Une entente assez cordiale? - La distinction du droit public et du droit privé: regards français et britanniques* (Oxford, 2006)
[6] (Carswell, 1988)
[7] Halson's (edition) 'Exploring the Boundaries of Contract', (Darmouth, 1996), ch.1

This is not to suggest that this framework provided for a complete theory. However, it did attempt to provide a taxonomy on this complicated area and a necessary neutral template upon which similar issues were examined in a systematic way regardless of the institutional setting and the legal characteristics of each jurisdiction.

Finally, the thesis attempted to bring together the comparative approaches and the theoretical considerations in order to comprehensively map this area of law (Part III).

It is within these contexts that this thesis provided an original study with no equivalent in the existing literature that hopefully will also act as a starting point for future research.

The comparative and contextual legal analysis, however, is not without important methodological limitations. One such limitation was that it did not allow the engagement of empirical methods that could shed light on various aspects of the treatment of unlawfully concluded public contract.

This may be the task of future research. It may include the application of quantitative and/or qualitative methods focusing on how far public authorities are aware of the potential adverse effects to a contract when this has been entered into unlawfully and whether, in fact, such potential effects are seriously considered before entering into contracts.

Empirical methods could also be employed to examine how far potential suppliers for the public sector are aware of the legal consequences in case they enter a contract in violation of legal requirements and whether such awareness affects their decision making.

Interdisciplinary methods may also be employed to examine various aspects around the treatment of unlawful public contracts. Economic analysis of law may be applied, for instance, to examine how illegal contracts under private law are any different from the equivalent public contracts and build a theory in this respect.

Finally, doctrinal methods could also prove useful for future research. It could look at the same issue that this project examined and could build upon the proposed framework with reference to other jurisdictions.

A doctrinal work of this kind does not have to exhaust its research in procurement contracts, which was the focus of this analysis but may look at other kind of contracts that public authorities may enter unlawfully.

This may be, for instance, privatisation contracts, which by their nature require the transfer of state-owned property to private companies. It is interesting to see in this respect, what is the effects of such contracts if declared unlawful under different legal systems.

In conclusion, there are a lot of interesting aspects for future research and this project may act as a starting point for further exploration of this complex but fascinating regulatory subject.

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