Scope of the remedies system

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A ‘comparative’ note on scope:

- **US federal procurement law + policy:** applies only to the US federal government – not the 50 states, let alone their counties and municipal governments, or utilities.

- **EU procurement law and policy:** applies to the Member States, central, regional, municipal + utilities + EU institutions = £1.5 trillion/17% of GDP.
Why enforcement, review and remedies?

- (Substantive) public procurement rules need ‘teeth’ to be taken seriously, to be followed in practice
  - **Enforcement from above**: Article 258 TFEU
    Commission against the Member State where violation occurred
  - **Internal** review: government remedy
  - **Enforcement from below**: aggrieved bidder brings action in *independent national review body*, seeking *set aside, damages, annulment, ...*

- Procedural autonomy of the Member States v. detailed Remedies Directives 89/665+92/13

Beyond the Directives:

- Directives do **NOT** apply below certain thresholds
  - £101,323 (£125,000) for supplies and services
  - £3,927,260 (£4,845,000) for works
  - (Part B services will soon be moved to Directives’ regime)
  - (Defence and security: new Directive incl. remedies)

- Larger part (up to 90%) of pp below the thresholds
  - SMEs
  - Start-up companies

- **TFEU applies to pp below thresholds, de minimis (-)**
  - *Telaustria, Vestergaard, An Post, ...*

- **Commission focus on pp below the thresholds**
  - Interpretative Communication 2006
  - ‘Contracts with internal market interest’
  - Green Paper 2010: ‘simplified procedures’
“In order to comply with this requirement of effective judicial protection, at least decisions adversely affecting a person having or having had an interest in obtaining the contract, such as any decision to eliminate an applicant or tenderer, should be subject to review for possible violations of the basic standards derived from primary [EU] law.”

- Case C-50/00P, *UPA*, at paragraph 39.

“In accordance with the case-law on judicial protection, the available remedies 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).”

- Cases C-46/93, *Brasserie du Pêcheur*, at paragraph 83
- Case C-327/00, *Santex*, at paragraph 55.
**Interpretative Communication, at 6**

- “To allow for an effective exercise of the right to such a review, contracting entities should **state the grounds for decisions which are open to review** either in the decision itself or upon request after communication of the decision.”


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**Scope of review below thresholds**

- **No difference (mirror):**
  - Austria
  - Bulgaria
  - Cyprus
  - Estonia
  - France
  - Hungary
  - Latvia
  - Lithuania
  - Portugal
  - Romania
  - Slovenia
  - Spain
  - Sweden
  - The Netherlands

- **Minor differences:**
  - Czech Rep. *(requirements)*
  - Denmark *(legal foundation)*
  - Finland *(standstill)*

- **NO review system:**
  - Germany
  - Ireland
  - United Kingdom

Sources: SIGMA 2007 and SIGMA 2010
Motivation?

- Why applying the **mirror principle**?
  - Austria: case law of the highest courts based on **equality** and **access to justice** guarantees in the *Bundesverfassungsgesetz*.
  - New Member States: *acquis communautaire* pressure?
  - France: pp review older than thresholds?

- Why having **NO** review system?
  - United Kingdom: minimal transposition?
  - Germany: fear of over-litigation?

Conclusions

- Directives do not apply:
  - Below thresholds
  - Exemptions...

- Principles of the TFEU apply.

- Reaction of Member States:
  - Mirror principle
  - Different regulation
  - No regulation