

# Judicial Protection in the Field of Public Procurement: The Transposition into Dutch Law of Directive 2007/66/EC Amending the Remedies Directives

Wouter-Jan Berends

## Keywords

European Contract Law, EC, ECJ, Public Procurement, Remedies Directive, Dutch Implementation, Wira, European Court of Justice.

## Abstract

Public procurement procedures in the EU are coordinated by Directives 2004/17/EC and 2004/18/EC. The *acquis communautaire* provides minimum requirements for review procedures against public procurement decisions in order to ensure access to effective remedies for economic operators. These minimum requirements are established in Directives 89/665/EEC and 92/13/EEC and recently amended by Directive 2007/66/EC. The Helby report identified several substantive concerns over the Dutch proposal on the implementation of the Remedies Directive; *Wet implementatie rechtsbeschermingsrichtlijnen*. Although the transposition target date has not been met, the Dutch legislature has succeeded to transpose Directive 2007/66/EC into Dutch law while addressing the concerns of the Helby report.

## Author Affiliations

L.L.M., Graduate Student from Utrecht University Faculty of Law.

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## I. Introduction

The main provisions concerning the coordination of public procurement procedures are now contained in the so-called Public Procurement Directives, Directives 2004/17/EC<sup>1</sup> and 2004/18/EC<sup>2</sup>. In addition, the EU has adopted directives to coordinate the laws, regulations and administrative provisions of the Member States in order to ensure that economic operators can effectively enforce the rights granted to them under the Public Procurement Directives in their national legal orders. When economic operators, for one reason or another, do not agree with decisions taken by public authorities in relation to a public procurement procedure they can challenge those decisions by starting a domestic review procedure which should comply with certain minimum requirements. These minimum requirements were laid down in Directives 89/665/EEC<sup>3</sup> and 92/13/EEC<sup>4</sup>, the so-called Remedies Directives. In December 2007, Directive 2007/66/EC<sup>5</sup> was adopted to amend the existing Remedies Directives. The Member States were obliged to transpose this directive into national law by 20 December 2009.<sup>6</sup>

This article deals with the transposition of Directive 2007/66/EC into Dutch law. More specifically, the transposition measure adopted in the Netherlands will be analysed to examine how the Dutch legislature has chosen to implement several provisions of the directive and whether transposition of the directive has contributed to the removal of certain point of concern which existed in the Dutch judicial protection regime in the field of public procurement. Although the Dutch legislature did not quite succeed in transposing the directive in time, a new Act of Parliament has been adopted recently. The Act is known as the *Wet implementatie rechtsbeschermingsrichtlijnen aanbesteden*<sup>7</sup> (Act on the Implementation of Public Procurement Remedies Directives – Wira) and has entered into force on 19 February 2010.

First, the existing legal framework in the area of public procurement at the EU level will be set out, focussing on the two most important problems Directive 2007/66 is intended to solve: the race to contract signature and the illegal direct award of contracts. Then, the relevant legal framework in the Netherlands will be discussed. In this section attention will be paid to several points of concern observed with regard to the two problems mentioned above. Subsequently, the most important provisions of the Wira will be analysed to see to what extent the transposition of Directive 2007/66 has been used to address those points of concern. Finally, some conclusions on the transposition of Directive 2007/66 by means of the Wira will be drawn.

## II. EU legal framework

As indicated above, the EU legal framework with regard to judicial protection in the area of public procurement consists of Directives 89/665 and 92/13, as amended by Directive 2007/66. The first directive coordinates the review procedures of the Member States in connection with public sector contracts, while the second relates specifically to utility contracts.

The Remedies Directives stipulate that the Member States shall take the measures necessary to ensure that decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible. They also refer to the principle of equivalence: there may be no discrimination between undertakings as a result of the distinction between national rules implementing Community law and other national rules. Review procedures should be available to any person having or having had an interest in obtaining a public contract. The Member States are required to ensure that the authorities responsible for reviewing allegedly unlawful decisions have the power to take interim measures as soon as possible and in summary proceedings. In addition, they must have the power to set aside or ensure the setting aside of decisions taken unlawfully and to award damages.

1 Directive (EC) 2004/17 of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, [2004], OJ L134, 1-113.

2 Directive (EC) of the European Parliament and of the Council 2004/18 of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, [2004], OJ L134, 114-240.

3 Council Directive (EEC) 89/665 of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, [1989], OJ L395.

4 Council Directive (EEC) 92/13 of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, [1992], OJ L76.

5 Directive (EC) 2007/66 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, [2007], OJ L335.

6 Directive (EC) 2007/66, Art. 3(1).

7 Wet implementatie rechtsbeschermingsrichtlijnen aanbesteden [Act on the Implementation of Public Procurement Remedies Directives] (hereinafter referred to as *Wira*), Staatsblad van het Koninkrijk der Nederlanden [Official Gazette of the Netherlands], 2010, No. 38.

Both directives have now been amended by Directive 2007/66. The Commission's aim was to resolve two main problems it identified. The first was that it was difficult in practice to ensure that the signing of a disputed contract could be prevented in time. This problem occurs in the pre-contractual phase. The second problem was that of illegal direct awards, i.e. contracts awarded without prior notification and competition in breach of the public procurement directives.<sup>8</sup> Since in this case the contract has already been concluded, the problem can only be solved in the post-contractual phase.

The first problem is known as the 'race to contract signature' and occurs when there is a desire on the part of a contracting authority to conclude the awarded contract very quickly after the award decision has been taken in order to make the consequences of that decision irreversible. This conduct makes it impossible for rejected competitors of the successful tenderer to start a review procedure in time to challenge an allegedly unlawful award decision, which is problematic in the context of legal protection because in most EU Member States, once the contract has been concluded, rejected tenderers only have the possibility to claim damages. This practice thus deprives the Remedies Directives of an important part of their effect and leads to a situation in which rejected tenderers are not effectively protected. After all, an unsuccessful tenderer is not primarily interested in financial compensation; he wants to be able to challenge the award decision so that in the end he can conclude and perform the contract himself instead of a competitor, maybe after a new public procurement procedure. Furthermore, the Commission considered that damages alone do not have enough deterrent effect to prevent contracting authorities from infringing the rules because economic operators will have to prove that they had a real chance of being awarded the contract.<sup>9</sup>

The problem of the race to contract signature was also addressed by the European Court of Justice (ECJ) in the *Alcatel Austria* case. In its judgement the ECJ stated that 'Member States are required to ensure that the contracting authority's decision prior to the conclusion of the contract [...] is in all cases open to review under a procedure whereby unsuccessful tenderers may have that decision set aside if the relevant conditions are met'.<sup>10</sup> The possibility of obtaining damages alone was deemed insufficient. In the case *Commission/Austria*<sup>11</sup> the ECJ clarified that review should be made possible by allowing for a reasonable period between the award decision and the conclusion of the contract. In effect it introduced a standstill period. Such a standstill period has now been inserted into the Remedies Directives by Directive 2007/66.<sup>12</sup> This was deemed necessary because the Member States gave effect to the ECJ's ruling in different ways, while some adopted no or insufficient measures.<sup>13</sup>

The second problem, the illegal direct award of public contracts has been classified by the ECJ in the *Stadt Halle* case as 'the most serious breach of Community law in the field of public procurement on the part of a contracting authority'.<sup>14</sup> In that case the ECJ ruled that Member States cannot make the possibility of review subject to the fact that the public procurement procedure in question has formally reached a particular stage. In this way it aimed to prevent that an illegal decision not to follow a procurement procedure would deprive competitors of an economic operator to whom a contract was awarded directly of the possibility to have such a decision reviewed. For that reason, review should be available 'to any person having or having had an interest in obtaining the contract in question who has been or risks being harmed by an alleged infringement, from the time when the contracting authority has expressed its will in a manner capable of producing legal effects'.<sup>15</sup>

The solution Directive 2007/66 provides for this problem is that a contract awarded directly in breach of the obligation to publish a contract notice contained in Directive 2004/17 or 2004/18 must be considered ineffective by a review body independent of the contracting authority.<sup>16</sup>

### III. Legal Framework in The Netherlands

8 Commission (EC), 'Proposal for a Directive of the European Parliament and of the Council 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' COM (2006) 195 final/2, 14 June 2006, 2.

9 Commission (EC) (n. 8).

10 Case C-81/98 *Alcatel Austria AG and Others, Siemens AG Österreich and Sag-Schrack Anlagentechnik AG v Bundesministerium für Wissenschaft und Verkehr*, [1999] ECR I-07671, para. 43.

11 Case C-212/02 *Commission v Austria*, Judgment of 24 June 2004, unpublished.

12 Directive 2007/66, Art. 2(a).

13 Commission (EC) (n. 8).

14 Case C-26/03 *Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna*, [2005] ECR-I 1, para. 37.

15 Case C-26/03, para. 41.

16 Directive 2007/66, Art. 2(d).

### III.1 Civil Courts

In the Netherlands, judicial protection in public procurement cases is usually provided by the civil courts. This is due to the fact that decisions taken in the context of a public procurement procedure are classified as decisions taken in preparation of a private law juridical act, i.e. concluding a contract. Article 8:3 of the *Algemene wet bestuursrecht* – (General Administrative Law Act – Awb) stipulates that the judicial review of such decisions does not fall within the scope of competence of the administrative courts. As a consequence the civil courts have jurisdiction.

Under Dutch civil law it is possible to start either summary proceedings or proceedings on the merits or a combination of both. In practice, an application for review of an award decision will, given the urgent nature of the matter, take the form of summary proceedings. This is due to the fact that the objective of the application will generally be the award of a contract which the contracting authority has decided to grant to a competitor of the applicant. In summary proceedings it is possible to request interim measures to be taken, such as an order to suspend the public procurement procedure or an injunction on awarding the contract to a third party. Judicial decisions taken in summary proceedings have by their nature a provisional character, so in subsequent proceedings on the merits the court is not bound by them.<sup>17</sup> However, judicial decisions taken in summary proceedings can have consequences which cannot be materially repaired. The judge in summary proceedings may for example order that a contract should be awarded to the applicant or that the public procurement procedure should be redone. The usual length of summary proceedings in public procurement cases in the Netherlands is two weeks. Proceedings on the merits are far more time-consuming. For that reason they are only suitable for claiming damages after the contract has been concluded since in the case *Uneto/De Vliert* the Dutch Supreme Court ruled that concluded agreements, in principle, cannot be annulled or declared void on the ground that the public procurement rules have been infringed by a contracting authority.<sup>18</sup>

### III.2 Transposition Measures

When the Remedies Directives were adopted they were implemented in the Netherlands without adopting transposition measures or amending existing legislation. The Government considered that the legislation existing at the time was already in line with the obligations contained in the directives, since civil courts and arbitration commissions could take interim measures, set aside decisions and award damages. However, after the *Alcatel Austria* and *Commission/Austria* cases amendment of existing legislation was deemed necessary to explicitly provide for a standstill period between the award decision and the conclusion of the contract. The amendment was made by including an obligatory minimum standstill period in the *Besluit aanbestedingen speciale sectoren* (Decision on Procurement in Special Sectors – Bass), implementing Directive 2004/17<sup>19</sup> and the *Besluit aanbestedingsregels overheidsopdrachten* (Decision on Public Procurement Rules – Bao)<sup>20</sup> implementing Directive 2004/18.

### III.3 Points of Concern

In 2006, the Government submitted a bill for an *Aanbestedingswet* (Public Procurement Act).<sup>21</sup> In the context of that bill it was considered appropriate to investigate the effectiveness of the Dutch judicial protection regime in the field of public procurement in the light of the envisaged review of the Remedies Directives, the case-law on those directives and criticism from scholars and practitioners. The law firm Houthoff Buruma was commissioned to conduct the investigation, which resulted in a report on judicial protection in the area of public procurement (the Hebly report).<sup>22</sup> In the report several points of concern are collected and commented upon. It also contains recommendations. Although the report deals with a much wider range of issues, only those topics which relate to the race to contract signature and the illegal direct award of contracts will be discussed.

A first point of concern raised in this context is that, in practice, contracting authorities do not only use the standstill period as such but also as a time limit, which means that applications for review made after expiry of the standstill period are

17 Wetboek van Burgerlijke Rechtsvordering [Code of Civil Procedure], Art. 257.

18 *Uneto/De Vliert*, HR, 22 January 1999, NJ 2000, 305.

19 Besluit aanbestedingen speciale sectoren [Decision on Procurement in Special Sectors] (hereinafter referred to as *Bass*), Staatsblad van het Koninkrijk der Nederlanden [Official Gazette of the Netherlands], 2005, No. 409, Art. 57(2).

20 Besluit aanbestedingsregels overheidsopdrachten [Decision on Public Procurement Rules] (hereinafter referred to as *Bao*), Staatsblad van het Koninkrijk der Nederlanden [Official Gazette of the Netherlands], 2005, No. 408, Art. 55(2).

21 Tweede Kamer der Staten-Generaal [House of Representatives of the Netherlands], Vergaderjaar 2005-2006, 30 501.

22 JM Hebly, ET de Boer, & FG Wilman, 'Rechtsbescherming bij aanbesteding' (Uitgeverij Paris, Zutphen 2007).

inadmissible. Although, in principle, this is considered to be allowed under national law and the Remedies Directives, the lack of a clear legal provision can cause confusion which might lead to legal uncertainty. Therefore, it was recommended to include such a legal provision in a new act.<sup>23</sup>

Another point discussed in the report is the length of the minimum standstill period. It was recommended to maintain the length of 15 days laid down in the Bass and the Bao.<sup>24</sup>

A third point of concern is that an application for the review of an award decision has no automatic suspensory effect, so a contract can be concluded between expiry of the standstill period and the judgment of the court in summary proceedings. Since it is questionable whether this is in conformity with the Remedies Directives, it was recommended to introduce such effect. The suspension period should last until the judgment in summary proceedings, not until a decision on the merits because that would cause a long period of legal uncertainty.<sup>25</sup>

A fourth point of concern is the duty to inform unsuccessful parties of the reasons why their offer was rejected in relation to the start of the standstill period. It is, off course, essential to know the reasons for a negative decision in order to be able to decide whether to apply for review of that decision. The duty to state reasons is laid down in different provisions of the Bass and Bao and it is not clear how they relate to each other exactly. The general provisions on the standstill period stipulate that an award decision should at least contain the grounds for that decision.<sup>26</sup> However, the Bass and Bao also provide that rejected tenderers or candidates must be informed of the reasons for their rejection, on their request, within 15 days of receipt of such a request.<sup>27</sup> The provisions can be interpreted in two ways: either, there is only one duty to inform and the standstill period starts to run when a rejected party has been properly informed or there are two distinct duties to inform with a starting point for the standstill period that differs from that for the period within which rejected parties should be informed. The second interpretation could have the consequence that the standstill period expires before a rejected party has been properly informed but on the basis of the text of the provisions it cannot be ruled out completely. Since this interpretation could deprive the standstill period of its useful effect it is probably incompatible with the Remedies Directives. It was therefore recommended to dispel any uncertainty in this regard. It was further recommended to clarify who exactly should be informed of award decisions.<sup>28</sup>

The last two points of concern relate to the phase after a contract has been concluded. The first is that direct awards which have not been made public in any way and which result in contracts being concluded without taking into account the standstill period must be considered as an infringement of the Remedies Directives. Therefore, it was recommended to introduce a duty to publish such awards when their value is above the applicable threshold amount.<sup>29</sup>

The last point is that, as indicated above, under Dutch law, concluded contracts can, in principle, not be annulled. However, there are exceptions and actions which have a similar effect. It was recommended to dispel the considerable confusion on this point by specifying when annulment is possible, most importantly in case of contracts concluded after an illegal direct award and contracts concluded before expiry of the standstill period.<sup>30</sup>

## IV. The Wira

Since its entry into force on 19 February 2010, the legal protection regime with regard to public procurement in the Netherlands is governed by the Wira. In order to avoid going into too much detail, only the articles which are relevant for the main problems as identified by the Commission or the points of concern signalled in the Hebly report will be discussed. Unless otherwise indicated, the articles of the directive referred to are the articles of Directive 89/665, as inserted or amended by Directive 2007/66.

### IV.1 Pre-contractual Phase

23 Hebly, De Boer, & Wilman (n. 22) 77-78 and 116.

24 Hebly, De Boer, & Wilman (n. 22) 78-80 and 117.

25 Hebly, De Boer, & Wilman (n. 22) 81-83 and 118.

26 Bass, Art. 57(3) and Bao, Art. 55(3).

27 Bass, Art. 50 and Bao, Art. 41.

28 Hebly, De Boer, & Wilman (n. 22) 83-85 and 119-121.

29 Hebly, De Boer, & Wilman (n. 22) 87-89 and 122-123.

30 Hebly, De Boer, & Wilman (n. 22) 93-96 and 133-136.

In Article 4 Wira the minimum standstill period provided for in Article 2a, as inserted by Directive 2007/66 is laid down. The contracting authority must apply a minimum standstill period between the award decision and the subsequent conclusion of the contract of at least 15 calendar days. This period begins to run on the day following the date on which the award decision was sent to the tenderers or candidates concerned.<sup>31</sup>

For the sake of clarity, the legislature has introduced a single minimum standstill period. It has therefore opted not to differentiate according to the means of communication, although Directive 2007/66 offers this possibility.<sup>32</sup> One of the reasons for this choice is that communications of award decisions must be sent electronically or by fax.<sup>33</sup> Another reason is that the standstill period which was introduced in the Netherlands to comply with the ECJ judgements in the cases *Alcatel Austria* and *Commission/Austria*, discussed above was also 15 days.<sup>34</sup> It is also in line with the recommendation contained in the Hebly report. On the basis of Directive 2007/66 a period of 10 calendar days starting on the day following the date of receipt of the award decision was also an option. However, this option has not been included in the Wira because it is not always clear for contracting authorities when their award decision has been received, resulting in legal uncertainty. The explanatory memorandum to the Wira specifies that if a contracting authority has failed to send the award decision to all parties concerned, the standstill period does not begin to run until the failure has been repaired.<sup>35</sup>

Article 4 (4) Wira contains the three exceptions to the standstill period laid down in Article 2b, as inserted by Directive 2007/66. The first is that the minimum standstill period does not have to be taken into account when either the Bass or the Bao does not require prior publication of the contract notice in the *Official Journal of the European Union*. A possible reason is that the contract in question has a value below the applicable threshold amount. A second exception applies when there is only one tenderer and the contract is awarded to him, while there are no other candidates. In that case there are no parties concerned who can request review of the decision. A last exception applies in connection with contracts granted on the basis of a framework agreement or specific contracts granted on the basis of a dynamic purchasing system.

It should be noted that the standstill period included in the Wira is only a standstill period and not a time limit. Although Article 2c of Directive 2007/66 provides for the possibility of including a time limit for applications to review award decisions in summary proceedings, this option has not been included in the Wira. According to the explanatory memorandum this option limits the possibilities of economic operators to challenge allegedly unlawful decisions.<sup>36</sup> On this point the legislature has not followed the recommendations contained in the Hebly report and thus favours the judicial protection of rejected parties over the legal certainty which a time limit would have offered contracting authorities and successful tenderers. This choice allows unsuccessful tenderers to challenge the award decision even after expiry of the standstill period, although most of the time they will only be able to claim damages because the contract in question will normally have been concluded already. However, their claim will at least be admissible.

Article 5 Wira explains when tenderers or candidates shall be deemed to be concerned for the purposes of Article 4. This is the case when they have not yet been definitively excluded. Exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure. Candidates shall be deemed to be concerned if the contracting authority has not made available information about the rejection of their application before the notification of the contract award decision to the tenderers concerned. This article clarifies who should be informed of award decisions, as was recommended in the Hebly report.

Article 6 (1) Wira contains requirements relating to the contents of the award decision. Contracting authorities cannot simply let the parties concerned know whether they will be awarded a particular contract or not; they have to inform them of the relevant reasons for a positive or negative decision. In addition, the decision of a contracting authority should contain an accurate description of the standstill period. Economic operators must know exactly when the period expires and how much time they have to appeal against a decision.

31 Wira, Art. 4(1)-(3).

32 Directive (EC) 2007/66, Art. 2(a) (2).

33 Wira, Art. 6(2).

34 To avoid overlapping provisions on the standstill period in the Wira on the one hand and the Bass and the Bao on the other, Art. 57 (2)-(4) Bass and Art. 55 (2)-(4) Bao have been repealed on the entry into force of the Wira (Staatsblad van het Koninkrijk der Nederlanden [Official Gazette of the Netherlands], 2010, No. 67).

35 Implementatie van de rechtsbeschermingsrichtlijnen aanbesteden (Wet implementatie rechtsbeschermingsrichtlijnen aanbesteden) [Implementation of the Wira], Tweede Kamer der Staten-Generaal [House of Representatives of the Netherlands], Vergaderjaar 2008-2009, 32 027, No. 3, 17.

36 Implementatie van de rechtsbeschermingsrichtlijnen aanbesteden (Wet implementatie rechtsbeschermingsrichtlijnen aanbesteden) [Implementation of the Wira] (n.35) 24.

The requirement to state reasons was inserted in the Remedies Directives to close the information gap unsuccessful tenderers were confronted with. Under Directives 2004/17 and 2004/18 reasons for refusal only had to be communicated to economic operators on their request and this limited their possibilities to have decisions reviewed.<sup>37</sup> Article 2a (2) as inserted by Directive 2007/66 requires contracting authorities to provide a summary of the relevant reasons. The legislature has deemed it necessary to adopt stricter requirements by obliging contracting authorities to state all relevant reasons, not just a summary.<sup>38</sup> When contracting authorities do not comply with this requirement, the standstill period does not begin to run and contracts cannot be legally concluded.<sup>39</sup> This provision takes away the uncertainty which existed with regard to the start of the standstill period, as was recommended in the Hebly report.<sup>40</sup>

It should, however, be noted that there is also another reason why this issue had to be clarified. In a recent judgment in infringement proceedings against Ireland the ECJ ruled that the Irish transposition measures infringed the Remedies Directives because the relevant rules were drafted in such a way that the standstill period preceding the conclusion of the contract could expire before tenderers were fully informed of the reasons for the rejection of their offer.<sup>41</sup> Since it was possible to interpret the Dutch transposition measures in a way which caused exactly the same problem (see section 3.3), the Wira and the amendments made to the Bass and the Bao correct a situation which was in fact incompatible with the existing Remedies Directives.

Article 7 Wira stipulates that if a party concerned applies for review of an award decision during the standstill period, that period is suspended until the civil court or arbitration commission has decided on the interim measures requested. According to Article 2 (3) as inserted by Directive 2007/66 the suspension may also last until a decision on the merits has been taken. The legislature has chosen not to avail itself of this option because on average civil proceedings on the merits in the Netherlands last 18 months, which would result in a considerable period of legal uncertainty with regard to the contract. This is in line with the recommendations in the Hebly report. Although in practice it is unlikely that a decision on interim measures will be taken before expiry of the standstill period, Article 7 explicitly provides that this should be the case.

## IV.2 Post-contractual phase

Article 8 Wira concerns the situation in which a contract has already been concluded and the post-contractual phase has started. As indicated above, Directive 2007/66 provides for the ineffectiveness of contracts concluded illegally. It is for domestic law to determine the legal consequences of such ineffectiveness. Article 8 Wira stipulates that contracts concluded as a result of an award decision can be annulled. Under Dutch law annulment has the effect that all contractual obligations are cancelled retroactively. Although Dutch law in principle allows for both judicial and extra-judicial annulment, Directive 2007/66 provides that ineffectiveness should be the result of a decision of an independent review body.<sup>42</sup> Accordingly, Article 8(1) Wira refers explicitly to judicial annulment.

Contracts can be annulled on three grounds. The first is that the contracting authority has awarded a contract without prior publication of a contract notice in the *Official Journal of the European Union* where this is required by the Bao or the Bass. This provision addresses the problem of contracts granted directly in breach of Directives 2004/17 and 2004/18. The sanction of annulment significantly increases the risk contracting authorities run when they decide to award contracts without a public procurement procedure. These risks are no longer only financial in nature but can also have administrative and political consequences. This will promote risk-averse behaviour on the part of contracting authorities.<sup>43</sup>

The second ground for annulment is that the contracting authority has concluded a contract without respecting the (suspended) standstill period. Directive 2007/66 makes a distinction between violations of the standstill period in combination with an infringement of Directives 2004/17 and 2004/18 and violations of the standstill period without such an infringement. Although the first violation is considered more serious, the legal consequences are the same. For the sake of clarity, this

<sup>37</sup> Art 49(2) of Directive 2004/17 and Art. 41(2) of Directive 2004/18, implemented in Art. 50 Bass and Art. 41 Bao, respectively.

<sup>38</sup> This is in line with a recommendation that was not explicitly made in the Hebly report but was advanced by Helby and Wilman. See Hebly and FG Wilman 'Consultatie Wet implementatie rechtsbeschermingsrichtlijnen aanbesteden (WIRA): een reactie' (2009) *Tijdschrift Bouwrecht* No.5/2009, 387-392.

<sup>39</sup> Explanatory Memorandum to the Wira proposal (TK 2008-2009 32 027, nr. 3) 18.

<sup>40</sup> In fact, Art. 50 Bass and Art. 41 Bao have become redundant, although they have not been repealed.

<sup>41</sup> Case C-455/08 *Commission v Ireland*, Judgment of 23 December 2009, n.y.r., para. 42.

<sup>42</sup> Directive 2007/66, Art. 2(d).

<sup>43</sup> JM Hoek, 'Implementatie rechtsbeschermingsrichtlijn, een Europees breekijzer' (2009) *Tijdschrift Bouwrecht* No. 5/2009, 379-386.

distinction has not been included in the Wira, so any violation of the standstill period makes a contract subject to annulment.<sup>44</sup> With the inclusion of these grounds for annulment the legislature has provided the clarity recommended in the Hebly report.

The third ground for annulment is that the contracting authority has applied the exemption concerning the standstill period for contracts granted on the basis of a framework agreement or specific contracts granted on the basis of a dynamic purchasing system to a contract with an estimated value that is equal to or higher than the threshold amounts, while infringing specific provisions contained in the Bao or Bass which stipulate that prior publication of the contract notice is compulsory.

The second paragraph of Article 8 Wira contains time limits with regard to the claim for annulment. Time limits enhance legal certainty for economic operators and contracting authorities because after expiry they know that the contracts they have concluded can no longer be annulled. In principle, the deadline for lodging a claim for annulment is 6 months after the conclusion of the contract. This is equal to the minimum period contained in Article 2f (1) (b) of Directive 2007/66. However, the time limits can be shortened to 30 calendar days when contracting authorities opt for voluntary transparency either by publishing a contract award notice accompanied by a justification of the decision to award the contract without prior publication of a contract notice or by informing the tenderers and candidates concerned of the conclusion of a contract, provided that this information contains all the relevant reasons for their choice.

Article 9 (1) Wira also rewards voluntary transparency on the part of contracting authorities, in this case with protection against possible annulment, in accordance with Article 2d (4) and (5) as inserted by Directive 2007/66. Contracts cannot be annulled on the basis of Article 8 (1) (a) Wira if contracting authorities which consider that the Bao or the Bass allows the contract in question to be awarded directly have published a notice expressing their intention to conclude the contract in the *Official Journal of the European Union*. In addition, they must have applied the standstill period before concluding the relevant contract. The elements which a voluntary published contract award notice should contain are included in Article 10 Wira. Article 9 (2) Wira offers similar protection against possible annulment on the basis of Article 8 (1) (c) for contracts granted on the basis of a framework agreement or a dynamic purchasing system. In both cases the parties concerned are properly informed and have the possibility to request a review before a contract is concluded. This means it is their responsibility to take appropriate action in time and the sanction of annulment is no longer needed to protect their interests.<sup>45</sup>

Article 11 (1) Wira corresponds to Article 2d (3) inserted by Directive 2007/66 and provides that a court may decide not to annul a contract which has been concluded illegally, in whole or in part, despite one of the grounds contained in Article 8 (1) Wira being present, when overriding reasons relating to a general interest require that the effects of the contract are maintained. In that case the court is obliged to impose alternative sanctions. The legislature has opted to include this option to give courts the possibility to take into account all circumstances of a particular case and to prevent a formalistic approach. According to the explanatory memorandum courts should be restrictive when considering whether overriding reasons relating to a general interest are present. As is also indicated in Directive 2007/66, economic interests directly related to the contract cannot qualify as such, except if annulment in exceptional circumstances would have disproportionate consequences.<sup>46</sup>

Article 12 Wira provides for an alternative sanction which the court can impose when it has decided to apply Article 11 Wira. The court can, either on request of an interested party or on its own motion, decide to shorten the duration of the contract, taking into account the seriousness of the infringement, the conduct of the contracting authority, the nature of the agreement and, where applicable, the possibility to restrict the effect of annulment.

Article 14 Wira deals with another form of alternative sanctions. It stipulates that if a contract has not been annulled, in whole or in part, on the ground of overriding requirements in the general interest, an administrative fine shall be imposed on the contracting authority by the Board of the Nederlandse Mededingingsautoriteit (Dutch Competition Authority - NMa). This is also the case if the contract has been annulled but the effect of the annulment has been partially or completely restricted. The administrative fine must be dissuasive, proportionate and effective considered in connection with the shortening of the duration of the contract on the basis of Article 12 Wira, it can amount to a maximum of 15% of the estimated value of the public contract concerned, and is payable to the State. In the Netherlands, appeal against an administrative fine lies to the administrative court.

44 Explanatory Memorandum to the Wira proposal (n. 39) 19-20.

45 Explanatory Memorandum to the Wira proposal (n. 39) 20.

46 Explanatory Memorandum to the Wira proposal (n. 39) 21.

According to the legislature it was necessary to include the possibility of administrative fines as alternative sanctions for annulment to comply with Article 2e (2) as inserted by Directive 2007/66. Shortening the duration of contracts is not always possible, for instance because the mutual obligations have already been fulfilled or because this would be contrary to the general interest. In such cases the court should be able to impose administrative fines to make sure that the combination of the two alternative sanctions is still dissuasive, proportionate and effective.<sup>47</sup>

## **V. Conclusion**

The transposition of Directive 2007/66 by means of the Wira has indeed been used to address the points of concern which were raised in the Hebly report. With the exception of a statutory time limit for applications for review of award decisions, the recommendations made in the report have all been incorporated in the Wira. By adopting the Wira the Netherlands have fulfilled their obligation to ensure that the Dutch legal protection regime in the field of public procurement is in line with the directive, as well as the case-law of the ECJ. In some cases the legislature has even improved the legal protection beyond the level required by the directive, notably in connection with the obligation to provide reasons for a negative decision. The proper legal framework has been put in place; we will now be able to see how effective the Wira will turn out to be in practice.■

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<sup>47</sup> Explanatory Memorandum to the Wira proposal (n. 39) 21.