



RESEARCH NOTE

RESEARCH AND DOCUMENTATION DIRECTORATE

Conditions governing the admissibility of legal actions, brought by competitors of a successful tenderer, which were not participants in a negotiated procedure without prior publication of a contract notice

[...]

[...]

July 2022
[...]



SUMMARY

INTRODUCTION

1. The Research and Documentation Directorate (RDD) received a request for a research note on whether a competitor of a successful tenderer for a public contract has a right to bring a legal action in relation to a negotiated procedure without prior publication of the contract notice (hereinafter 'NPwPP'), where that competitor did not participate in the procedure.
2. In essence, the question arising is whether, notwithstanding non-participation by a competitor of a successful tenderer in a NPwPP, that competitor is able to bring judicial proceedings in order for the court seised to examine whether the contracting authority complied with the conditions for using that procedure.
3. It is important to note, as a preliminary point, that under the legislation in force governing the award of public contracts at both national ¹ and European Union level, ² contracting authorities may only use an NPwPP in very exceptional circumstances. It is the very nature of the procedure which makes it exceptional. Where a situation is urgent and unforeseeable, a contracting authority may derogate from the ordinary rules of publication for public procurement procedures, which guarantee the widest possible competitive tendering. In such cases, European legislation ³ provides, in principle, for a right to challenge before the courts any infringement of the conditions for using an NPwPP.
4. For the purposes of this research note, two categories of judicial remedies have been considered in a sample of 12 Member States (**Germany, Belgium, Spain, Estonia, France, Ireland, Italy, Netherlands, Poland, Czech Republic, Romania and Slovenia**). On the one hand, they involve (i) direct actions for annulment or a review of legality and (ii) on the other hand, non-contractual liability actions in so far as they are likely to lead the courts to examine whether the rules governing the use of an NPwPP have been complied with (criterion of illegality, source of the harm).
5. A detailed table summarising the situation in the legal systems of the 12 Member States studied is annexed to this introductory summary. The sources of the data included in that table can, in principle, be directly accessed via hyperlinks.

¹ Article 32 of 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 2014 L 94, p. 65](#)).

² Article 164(d) and paragraph 11.1(c) of Annex I of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU, and repealing Regulation (EU, Euratom) No 966/2012 ([OJ 2018 L 193, p. 1](#)).

³ Article 1 of 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 L 335, p. 31](#)).

I. LEGAL ACTIONS FOR ANNULMENT OR A REVIEW OF LEGALITY

6. In all 12 Member States involved in the study, a competitor which did not participate in an NPwPP may bring an action for annulment or a review of legality after to the conclusion of a contract following the close of the procedure. Such remedies are available either under a *lex generalis* (see A below) or a *lex specialis*⁴ (see B below).

A. ORDINARY LAW ACTIONS FOR ANNULMENT OR A REVIEW OF LEGALITY (*LEX GENERALIS*)

7. In nine of the 12 Member States concerned (**Germany, Belgium, Spain, France, Ireland, Italy, Poland, Czech Republic and Romania**), it is clear from ordinary law provisions or even decisions of the courts that a competitor which did not participate in an NPwPP may bring an action for annulment or for a review of legality following the conclusion of such a contract. These various actions fall into three categories, namely a direct action before the court having jurisdiction (see 1 below); a legal action conditional on a prior administrative appeal (see 2 below); and a legal action conditional on a prior appeal to an independent body (see 3 below).
8. From the outset, it should be noted that in **Romania** there are two types of alternative actions at first instance, which fall under categories (1) and (2), respectively.

1. DIRECT LEGAL ACTION BEFORE THE COURT HAVING JURISDICTION

9. In five Member States (**Belgium, France, Ireland, Italy and Romania**), an action for annulment or a review of legality can be brought directly before the court having jurisdiction.
10. In **Belgium**, an action for annulment can be brought before the Council of State or an ordinary court, according to the circumstances. The purpose of this action is, inter alia, to obtain the annulment of the decisions of contracting authorities, a declaration that a contract is ineffective and interim measures. By contrast, compensation is not available in such actions.
11. Under the conditions for admissibility relating to the legal standing of a competitor, that competitor must demonstrate it has a current or past interest in obtaining the contract, an illegality and harm resulting therefrom, whether actual or potential.
12. In **France**, according to a line of case-law starting with a judgment delivered by the *Assemblée* of the Council of State on 16 July 2007 in the *Société Tropic Travaux Signalisation* case, which was subsequently clarified by the Council of State in other judgments, a competitor may, where an administrative contract is at issue, bring a *recours de plein contentieux en contestation de validité du contrat (RCVC)* (that is to say, an action in which the administrative courts have extensive powers to review the validity of a public contract). The purpose of this action is, inter alia, to obtain the cancellation of the contract, interim measures and compensation.
13. Under the conditions for admissibility relating to the legal standing of a competitor, that competitor must demonstrate that it has suffered direct and certain harm to an interest as a result of the award of the contract and invoke infringements of the rules applicable to the award of public contracts which relate directly to that interest.

⁴ For the purposes of this research note, as regards the request addressed to the RDD, classification as *lex specialis* is strictly reserved for legislative sources relating directly or even explicitly to actions brought by a competitor once a contract has been concluded following an NPwPP, in which the competitor did not participate.

14. Moreover, under French ordinary law, a competitor is entitled to make a *référé contractuel* (that is to say, an application made following the signature of the contract and seeking to remedy infringements of public procurement rules) to the administrative courts. This action is inadmissible where a *référé précontractuel* (that is to say, an application made prior to the signature of the contract and seeking to remedy infringements of public procurement rules) has been made or if the contracting authority has made public its intention to conclude the contract, following the close of a public procurement procedure which is not subject to a prior publication obligation. The purpose of this application is, inter alia, to obtain interim measures or even a final decision terminating or cancelling the contract. However, in contrast to an RCVC,⁵ compensation is not available in such actions. Under the conditions for admissibility relating to the legal standing of a competitor, that competitor must demonstrate that it has an interest in obtaining the contract and that it has suffered harm due to infringements of publication and competitive tendering obligations.
15. In **Ireland**, it is apparent from the *obiter dictum* of certain courts that, following an NPwPP, a special legal action seeking a review of the award of public contracts can be brought in the High Court (Order 84A of the Superior Court Rules on EU public procurement law). The purpose of this review is, inter alia, to obtain a declaration that the contract is ineffective, interim measures and compensation. If this action is inadmissible, an ordinary judicial review may be brought before the High Court (Article 84 of the Superior Court Rules).
16. Under the conditions for admissibility relating to the legal standing of a competitor in a special judicial review (Order 84A), it is apparent from the *obiter dictum* of certain courts that, in the event of an action brought following an NPwPP, it is possible to gain 'eligible person' status by way of exception to the standard condition of participation in the public procurement procedure at issue. The competitor would then need to demonstrate that it has a past or current interest in obtaining the contract (without being required to participate in the procedure), actual or potential harm connected with the contract and a 'commercial relationship'. As regards the conditions to be met for an ordinary judicial review (Order 84), the competitor must demonstrate it has a 'sufficient interest'.
17. In **Italy**, a standard action for annulment can be brought before the administrative courts. The purpose of this action is, inter alia, to obtain the cancellation of the contract, interim measures and compensation.
18. Under the conditions for admissibility relating to the legal standing of a competitor, that competitor must demonstrate that it has a legitimate interest which, in the specific case of an NPwPP, requires solely that it operates in the activity sector covered by the procedure. In addition, that interest in bringing proceedings must be real and current, and of practical and immediate use.
19. In **Romania**, at first instance, as an alternative to dispute settlement proceedings before the National Dispute Settlement Council (NDSC),⁶ a competitor may bring an action seeking a review of legality before the Court of First Instance. The purpose of this action is to obtain the cancellation of the contract, interim measures and compensation. An appeal may be brought

⁵ See paragraph 12.

⁶ See paragraph 30.

before the Court of Appeal against the decision of the Court of First Instance or a decision of the NDSC.

20. Under the conditions for admissibility relating to the legal standing of a competitor, that competitor must demonstrate infringement of a right or legitimate interest, namely a past or present interest connected with a public procurement procedure (the potential eligibility to tender is sufficient) and actual or potential harm resulting from the actions or behaviour of the contracting authority.

2. LEGAL ACTION CONDITIONAL UPON A PRIOR ADMINISTRATIVE APPEAL

21. In **Spain**, an ordinary action for annulment may be brought before the administrative litigation divisions of the courts of first instance, provided that a prior administrative appeal has been brought before the authority which issued the act or, as the case may be, the authority to which it reports. The purpose of this action is, inter alia, to obtain a declaration of illegality of the act, the annulment of the decision to award the contract, interim measures and compensation.
22. Under the conditions for admissibility relating to the legal standing of a competitor, that competitor must assert a right or legitimate interest, characterised by an unequivocal material relationship between the subject and object of the claim.

3. LEGAL ACTION CONDITIONAL UPON A PRIOR APPEAL TO AN INDEPENDENT BODY

23. In four Member States (**Germany, Poland, Czech Republic and Romania**), an action for annulment or a review of legality may be brought provided a prior appeal has first been brought before an independent body.
24. In **Germany**, a legal action against decisions made in the context of a public contract award procedure (hereinafter a 'PCAP') may be lodged with the "Vergabesenate" Public Procurement Boards of Appeal of the 'Oberlandesgerichte' (Higher Regional Courts) provided that the case has first been referred to the 'Vergabekammern' (Independent Public Procurement Boards). The purpose of this action is to review the public procurement procedure. It may result in a finding that the contract is ineffective due to an infringement, in particular, of the conditions governing the use of an NPwPP. By contrast, compensation is not available in such actions.
25. Under the conditions for admissibility relating to the legal standing of a competitor, that competitor must demonstrate, before the Vergabekammern, an interest in the public procurement contract, an infringement of its subjective right to compliance with the legislation at issue and actual or potential harm resulting therefrom. It should be noted that the aim of this action is to accelerate the procedure.
26. In **Poland**, an action for a review of legality may be brought, provided that, at first instance, an appeal has first been lodged with the National Appeals Board (an independent, quasi-judicial body). The purpose of this action is to obtain the cancellation of the contract and a finding that the law has been infringed. By contrast, compensation is not available in such actions.
27. Under the conditions for admissibility relating to the legal standing of a competitor, that competitor, as 'another entity', must demonstrate an interest in obtaining the contract and the likelihood of harm due to an infringement of public procurement law.

28. In the **Czech Republic**, an action for annulment may be made to the Regional Court (Administrative Division) provided that – following a complaint made to the contracting authority – a prior appeal has first been lodged with the Competition Authority (an independent central administrative authority) and, next, its President. The purpose of the action for annulment is, inter alia, to set aside the decision of the President of the Competition Authority. The court can, on request, grant interim measures, such as an injunction prohibiting the performance of the contract. By contrast, compensation is not available in such actions. It should be noted that where a contract is concluded while proceedings are in progress, the Competition Authority must, in the absence of an application to prohibit performance of the contract, close the proceedings with no further action. In such a case, the power of the court is limited to reviewing the legality of the decision to close the proceedings.
29. Under the conditions for admissibility relating to the legal standing of a competitor, these appear connected to that competitor's standing to bring proceedings before the Competition Authority in which the competitor must demonstrate that the contracting authority has infringed the law and actual or potential harm resulting therefrom; this requires at the very least the potential capacity to tender in the business sector covered by the contract.
30. In **Romania**, at first instance, as an alternative to an action for review of legality,⁷ the competitor may bring dispute settlement proceedings before the National Dispute Settlement Council (NDSC) (an independent body with administrative and judicial functions). The purpose of this action is, inter alia, to obtain annulment, interim measures and recognition of a right or interest. By contrast, compensation is not available in such actions. A decision of the NDSC, like a court of first instance judgment, may be appealed before the Court of Appeal.
31. Under the conditions for admissibility relating to the legal standing of a competitor, that competitor must demonstrate an infringement of a right or legitimate interest, namely a past or present interest connected with a public contract award procedure (the potential capacity to tender is sufficient) and actual or potential harm resulting from the actions or behaviour of the contracting authority.

B. SPECIAL ACTIONS FOR ANNULMENT OR A REVIEW OF LEGALITY LAID DOWN IN LAW (*LEX SPECIALIS*)

32. Three of the 12 Member states examined (**Estonia, Netherlands and Slovenia**) provide for the possibility to have recourse to actions for annulment or a review of legality in special legislative provisions pertaining to NPwPPs.

1. DIRECT LEGAL ACTIONS BEFORE THE COURT HAVING JURISDICTION

33. In the **Netherlands**, in the specific case of an NPwPP, except where a pre-contractual application for interim measures is admissible (in particular, in case of 'voluntary *ex-ante* publication'), a special legislative provision allows an action for annulment to be brought before the court adjudicating on the substance seeking the cancellation of the contract as a matter of law where it has been concluded unlawfully without publication, interim measures and compensation.
34. Under the conditions for admissibility relating to the legal standing of a competitor, in the case of an NPwPP and provided it did not participate in the procedure, that competitor must

⁷ See paragraph 19.

demonstrate, *mutatis mutandis*, a 'sufficient interest' if the unlawful actions of the contracting authority denied it the opportunity of being awarded the contract. It also must demonstrate infringement of the procurement rules and that, as an economic operator, it suffered harm.

35. Still in the Netherlands, under ordinary law, except where a pre-contractual application for interim measures is admissible (in particular, in case of 'voluntary *ex-ante* publication'), the competitor may lodge a post-contractual application for interim measures, the purpose of which is to obtain, inter alia, an injunction preventing the performance of the contract.
36. Under the conditions for admissibility relating to the legal standing of a competitor, in the case of an NPwPP and provided it did not participate in the procedure, that competitor must demonstrate, *mutatis mutandis*, a 'sufficient interest' if the unlawful actions of the contracting authority denied it the opportunity of being awarded the contract.
37. In **Slovenia**, a special provision allows for an action for annulment before the ordinary courts in order to check compliance with the conditions for conducting an NPwPP. The purpose of this action is, inter alia, to obtain the cancellation of the contract, interim measures and compensation.
38. Under the conditions for admissibility relating to the legal standing of a competitor, that competitor must demonstrate a past or present interest in obtaining the contract and actual or potential injury.
39. In addition, under ordinary Slovenian law, a competitor may, concurrently with an action for annulment, make applications for interim measures in order to obtain (i) in the event of alleged 'simple' harm, a temporary suspension of the performance of the contract or (ii) in the event of alleged harm, which it would be difficult to remedy, the adoption of interim measures to prevent the harm from occurring.

2. LEGAL ACTION CONDITIONAL UPON A PRIOR ADMINISTRATIVE APPEAL

40. In **Estonia**, a special legislative provision provides that the only remedy available to a competitor against a contract concluded following the close of an NPwPP is an action brought before the Administrative Court seeking a finding that the contract is null and void, provided it has first lodged an administrative complaint with the Public Procurement Disputes Committee. The sole purpose of this action is confirmation that the contract concluded following the close of an NPwPP is null and void, thereby depriving it of any legal effect, where at least one of the grounds for nullity, expressly provided for by law, is upheld.
41. Under the conditions for admissibility relating to the legal standing of a competitor, that competitor must demonstrate a public law relationship, a legitimate interest and a subjective right to defend by means of that legal action. It should be noted that the first condition is always satisfied in public procurement cases, as is the second in the specific context of an NPwPP. As regards the third condition, by law, if the NPwPP is unlawful, the contract is inevitably null and void.

II. NON-CONTRACTUAL LIABILITY ACTIONS

42. In eight Member States (**Germany, Belgium, Estonia, Italy, Netherlands, Poland, Czech Republic** and **Slovenia**), concurrently to or independently from an action for annulment or a review of legality, the competitor of a successful tenderer, which has not participated in an

NPwPP, may bring a non-contractual liability action, once a contract has been concluded following the close of an NPwPP. For the purposes of this note, those actions for damages were not considered in cases where, as is the case under Spanish, French, Irish and Romanian law, the claim for compensation is an integral part of the action for annulment or a review of legality, without however excluding the possibility that a remedy may be available under the ordinary law of those national legal systems.

43. In **Germany**, according to the ordinary law on civil procedure rules, an action for damages may be brought either on the basis of the improper use of a public procurement procedure or in respect of non-contractual liability.
44. In **Belgium**, according to the rules of ordinary law, a competitor may bring either an action for damages before the Council of State (concurrently with an action for annulment) or an independent civil liability action before the ordinary courts.
45. Under the conditions for admissibility relating to the legal standing of a competitor, that competitor must, inter alia, before the Council of State, invoke the illegality claimed in its action for annulment and a causal link with the harm suffered by the competitor. In ordinary court proceedings, it must invoke misconduct and a causal link with the harm caused.
46. In **Estonia**, under ordinary law, exceptionally, in the specific case of an action for a declaration that a contract is null and void (the only action admissible against a contract concluded following the close of an NPwPP), the competitor may, in parallel, bring an action for compensation.
47. Under the conditions for admissibility relating to the legal standing of a competitor, that competitor must demonstrate a public law relationship, a subjective right to defend and a claim for compensation of the financial harm.
48. In **Italy**, under ordinary law, concurrently to or independently from a standard action for annulment, a competitor may bring an action for enforcement or for damages.
49. Under the conditions for admissibility relating to the legal standing of a competitor, exceptionally, in the specific case of an NPwPP in which it has not participated, that competitor need only, in order to demonstrate that it has the required legitimate interest, challenge the use of an NPwPP or, where appropriate, the award of the contract, and operate in the sector covered by the contract.
50. In the **Netherlands**, under ordinary law, a competitor may bring an action for damages before the court adjudicating on the substance.
51. Under the conditions for admissibility relating to the legal standing of a competitor, that competitor must show that it has a 'sufficient interest' similar to that required for a *post-contractual*⁸ application for interim measures, and that obtaining the contract was plausible in order to demonstrate a causal link between the alleged illegality and the harm suffered.
52. In **Poland**, under ordinary law, a competitor may bring a civil liability action, independent from proceedings before the National Appeals Board, for infringement of the law on public contracts.

⁸ See paragraph 30.

53. Under the conditions for admissibility relating to the legal standing of a competitor, that competitor must demonstrate infringement of that law, harm and a causal link.
54. In the **Czech Republic**, under ordinary law, the competitor may bring an action for damages, independently from an action for annulment.
55. Under the conditions for admissibility relating to the legal standing of a competitor, that competitor must demonstrate the existence of an unlawful act, harm, a causal link and the misconduct of the party causing the harm.
56. In **Slovenia**, under ordinary law, the competitor may bring a non-contractual liability action before the ordinary court, independently from the action for annulment.
57. Under the conditions for admissibility relating to the legal standing of a competitor, that competitor must demonstrate illegality, harm and a causal link.

CONCLUSION

58. Overall, it is clear from the analysis of the 12 legal systems of the Member States covered by this note that, in principle, a competitor of a successful tenderer does have a right to bring a legal action concerning a contract concluded following the close of an NPwPP in which that competitor did not participate.
59. In the majority of the Member States studied, the legal basis of the action falls within a *lex generalis*. However, in the category of actions for annulment or a review of legality, we were able to identify a *lex specialis* in three Member States, namely **Estonia, Netherlands and Slovenia**.
60. As regards the conditions for admissibility of the different types of actions envisaged, concerning contracts concluded following the close of an NPwPP, there essentially appear to be four categories of admissibility conditions. They are:
 - a competitor's 'economic' interest in the subject matter of a public contract;
 - the existence of an infringement of the legislation governing public procurement procedures;
 - proof of harm to that interest resulting therefrom; and
 - in two Member States (**Germany and Estonia**), the existence of a subjective right to protect.
61. In addition, in eight of the 12 Member States studied (**Germany, Belgium, Estonia, Italy, Netherlands, Poland, the Czech Republic and Slovenia**), the competitor has a right to bring a concurrent or independent non-contractual liability action, following the conclusion of a contract after the close of an NPwPP, in relation to the action for annulment or a review of legality.

[...]

DETAILED SUMMARY TABLE ^{9 10}

⁹ [...]

¹⁰ **Abbreviations:** PP (public procurement); DAPC (decision to award a public contract); PCAP (public contract award procedure); NPwPP (negotiated procedure without prior publication of a contract notice); CL (case-law).

Does a competitor have judicial remedies once a contract is concluded after the close of an NPwPP in which that competitor did not participate?	Typology of the judicial remedies	Nature of the legal basis of the remedies (<i>lex generalis</i> or <i>lex specialis</i>) ¹¹	Admissibility criteria as regards legal standing, in the context of judicial remedies available to a competitor once a contract is concluded after the close of an NPwPP in which it did not participate	Subject of the legal action/ Powers of the court	Observations
GERMANY					
YES (with examples of CL) ¹²	Appeal against a DAPC ¹³ <ul style="list-style-type: none"> ➤ before the Vergabesenat (Public Procurement Appeal Boards) of the Oberlandesgerichte,¹⁴ ➤ provided that public procurement appeals are lodged with the Vergabekammern¹⁵ (Public Procurement Boards). 	<i>Lex generalis</i> ¹⁶	In the Vergabekammern, demonstrate: ¹⁷ <ul style="list-style-type: none"> ➤ an interest in the PP contract; ➤ an infringement of a subjective right compliant with the law governing PP;¹⁸ ➤ actual or potential harm resulting from the infringement. Appeals to the Vergabesenat against decisions of the Vergabekammer. ¹⁹	Possibility of (at the first stage before the Vergabekammern): <ul style="list-style-type: none"> ➤ a finding that the contract is ineffective because it was awarded unlawfully or <i>de facto</i> without complying with the applicable legislation²⁰ (in particular, the conditions for use of an NPwPP);²¹ ➤ annulment of the PCAP; ➤ court order for the organisation of a new PCAP that complies with the rules.²² 	The aim of the action against PCAPs is, inter alia, to accelerate the review procedure.

¹¹ **Observation:** For the purposes of this research note, in the light of the request addressed to the RDD, classification as *lex specialis* is strictly reserved for legislative sources relating directly or explicitly to a legal action sought by a competitor following the conclusion of a contract after the close of an NPwPP in which the competitor did not participate.

¹² See, for example, the case of a negotiated procedure without prior publication of a contract notice under Paragraph 14(4)(2)(b) of the Regulation on public procurement (Verordnung über die Vergabe öffentlicher Aufträge, Vergabeverordnung; the '[VgV](#)'), which corresponds to Article 32(2)(b)(ii) of Directive 2014/24, Oberlandesgericht Düsseldorf (Higher Regional Court of Düsseldorf), [Order of 12 July 2017, VII-Verg 13/17, ECLI: DE: OLGD: 2017: 0712.VII.VERG13.17.00](#).

¹³ Paragraph 155 et seq., in particular, Paragraph 171 et seq. of the Law against restrictions on competition (Gesetz gegen Wettbewerbsbeschränkungen; the '[GWB](#)'), and the [VgV](#), in particular, Paragraph 14(4)(3) thereof.

¹⁴ Paragraph 171 et seq. of the [GWB](#).

¹⁵ Paragraph 155 et seq. of the [GWB](#). These are 'bodies, which are granted exclusive jurisdiction to hear and determine at first instance disputes between economic operators and contracting authorities', classified as a 'court or tribunal' within the meaning of Article 267 TFEU (judgment of 18 September 2014, *Bundesdruckerei*, [C-549/13, EU:C:2014:2235](#), paragraphs 22 and 23).

¹⁶ Law against restrictions on competition ([GWB](#)) and the Regulation on public procurement ([VgV](#)).

¹⁷ Paragraph 160(2) of the [GWB](#).

¹⁸ In particular, Paragraph 97(6) of the [GWB](#).

¹⁹ Paragraph 171(1) of the [GWB](#).

²⁰ Paragraph 135 of the [GWB](#). The contracting authority may avoid a finding that the contract is ineffective where it demonstrates its conviction that the award of the contract was lawful (Paragraph 135(3)(1) of the [GWB](#)).

²¹ See Burgi, Dreher, Opitz (editors), Beck'scher Vergaberechtskommentar, Vol. 1, 4th ed., C.H. Beck, Munich, 2022 ('Burgi/Dreher/Opitz, Beck'scher Vergaberechtskommentar'), Annotation 30 under Paragraph 135 of the [GWB](#).

²² See, for example, *Ziekow v Völlink*, Vergaberecht, annotation 127 under Paragraph 135 of the [GWB](#).

	Action for damages	<i>Lex generalis</i> Under the GWB, ²³ for improper use of a PCAP.	As a general rule, according to the civil procedure rules.	➤ Compensation.	
		<i>Lex generalis</i> Action for damages. ²⁴	In accordance with the civil procedure rules.	➤ Compensation.	

²³ Paragraph 180(1) of the [GWB](#), provision reserved for very specific cases.

²⁴ In particular, Civil Code provisions (Bürgerliches Gesetzbuch; the '[BGB](#)') on actions for damages, for example under tort law, such as Paragraph 826 of the [BGB](#) and Paragraph 823(2) of the [BGB](#), read together with Paragraph 263 of the Penal Code ([Strafgesetzbuch](#)) or *culpa in contrahendo* according to Paragraph 311(2), read together with Paragraph 241(2) and Paragraph 280(1) of the [BGB](#). See Burgi/Dreher/Opitz, Beck'scher Vergaberechtskommentar, annotation 25 under Paragraph 180 of the [GWB](#). See also, referring in addition to other competition law provisions, Mestmäcker (editors), Wettbewerbsrecht, Vol. 4, 6th ed., C.H. Beck, Munich, 2021, annotation 13 under Paragraph 180 of the [GWB](#).

Does a competitor have judicial remedies once a contract is concluded after the close of an NPwPP in which that competitor did not participate?	Typology of the judicial remedies	Nature of the legal basis of the remedies (<i>lex generalis</i> or <i>lex specialis</i>)	Admissibility criteria as regards legal standing, in the context of judicial remedies available to a competitor once a contract is concluded after the close of an NPwPP in which it did not participate	Subject of the legal action/Powers of the court	Observations
BELGIUM					
YES (with examples of CL) ²⁵	Action for annulment (before the Council of State or the ordinary courts, depending on the circumstances).	<i>Lex generalis</i> ²⁶	Any person: ²⁷ <ul style="list-style-type: none"> - having or having had an interest in obtaining the contract; ²⁸ - having been or likely to suffer harm as a result of the alleged infringement; ^{29 30} - may challenge a decision which constitutes misuse of powers or which infringes a legal rule, general legal principles or the documents in the procurement procedure. 	Possibility of: <ul style="list-style-type: none"> ➤ annulling the decisions of the contracting authorities; ³¹ suspending 'all unilateral decisions awarding a public contract', even where the contract has already been concluded, with a right to order interim measures, ³² UNLESS, where despite there being no mandatory publication, there was prior publication of a 'voluntary <i>ex ante</i> transparency' notice, expressing the intention to conclude; ➤ a declaration that the contract is ineffective, ³³ UNLESS there is a 'voluntary <i>ex ante</i> transparency' notice, ³⁴ ➤ alternative sanctions ³⁵ (proceeds paid to the public purse). 	<ul style="list-style-type: none"> ➤ No compensation in an action for annulment. ➤ No proceedings for interim measures after the contract is concluded.

²⁵ [Conseil d'État \(Council of State, Belgium\), judgment of 23 November 2021, No 252.191, p. 3](#) (the competitor-applicant was nevertheless aware of the NPwPP) and [Conseil d'État \(Council of State\), judgment of 15 December 2017, No 240.205, p. 9](#) (regardless of the fact that the disputed contract had been fully performed at the date of the judgment and even if the decision of the contracting authority to use an NPwPP had not been challenged by the applicants).

²⁶ [Loi du 17 juin 2013 relative à la motivation, à l'information et aux voies de recours en matière de marchés publics, de certains marchés de travaux, de fournitures et de services et de concessions](#) (Law of 17 June 2013 on the grounds, information and remedies available in relation to public contracts, certain works contracts, supplies and services contracts and concessions, published in *Moniteur Belge* on 21 June 2013).

	EITHER ³⁶ an action for damages before the Council of State <ul style="list-style-type: none"> ➤ provided it is brought concurrently with the action for annulment. 	<i>Lex generalis</i> ³⁷	Demonstrate: ³⁸ <ul style="list-style-type: none"> ➤ illegality alleged in the action for annulment, ➤ harm which arose before the contract was concluded, ➤ a causal link. 	<ul style="list-style-type: none"> ➤ Compensation, taking into account the 'private and public interests involved'. 	
	OR a civil liability claim before the ordinary courts <ul style="list-style-type: none"> ➤ separate from the action for annulment. 	<i>Lex generalis</i> ³⁹	Demonstrate ⁴⁰ : <ul style="list-style-type: none"> ➤ wrongful act or omission (infringement of legislation, a general principle of law or contract documents), ➤ harm, ➤ a causal link. 	<ul style="list-style-type: none"> ➤ Right to full compensation. 	

²⁷ Article 14 of the Law of 17 June 2013.

²⁸ For example: a disputed contract concerning activities within the specific skillset of the applicant [Conseil d'État \(Council of State\), judgment of 23 November 2021, No 252.191, p. 3](#).

²⁹ For example, due to a refusal to include the applicant in the list of the operators consulted, thus thwarting its opportunity to win the contract, and which might have led the contracting authority to award it to another operator ([Council of State, judgment of 23 November 2021, No 252.191, p. 3](#)).

³⁰ The fact that the disputed contract has already been performed is irrelevant to the appraisal of whether the appeal is admissible ([Conseil d'État \(Council of State\), judgment of 15 December 2017, No 240.205, p. 9](#)).

³¹ Article 14 of the Law of 17 June 2013.

³² Article 15 of the Law of 17 June 2013.

³³ Article 17 of the Law of 17 June 2013.

³⁴ Article 18 of the Law of 17 June 2013.

³⁵ Article 22 of the Law of 17 June 2013.

³⁶ Article 11a, last two paragraphs of the [lois coordonnées sur le Conseil d'État](#) (Consolidated Laws on the Council of State).

³⁷ Article 11a of the [lois coordonnées sur le Conseil d'État](#) (Consolidated Laws on the Council of State).

³⁸ Article 14 of the Law of 17 June 2013.

³⁹ Article 16 of the Law of 17 June 2013.

⁴⁰ Article 14 of the Law of 17 June 2013.

Does a competitor have judicial remedies once a contract is concluded after the close of an NPwPP in which that competitor did not participate?	Typology of the judicial remedies	Nature of the legal basis of the remedies (<i>lex generalis</i> or <i>lex specialis</i>)	Admissibility criteria as regards legal standing, in the context of judicial remedies available to a competitor once a contract is concluded after the close of an NPwPP in which it did not participate	Subject of the legal action/Powers of the court	Observations
SPAIN					
A priori YES ⁴¹ (but no examples of CL)	Ordinary court actions for annulment ⁴² (courts of first instance – administrative litigation section) ➤ BUT prior mandatory administrative appeal to the authority which issued the act ⁴³ or the authority to which it reports. ⁴⁴	<i>Lex generalis</i>	Any party (including a competitor which did not participate in an NPwPP) ⁴⁵ which has: ➤ a right or legitimate interest; ⁴⁶ ➤ which is characterised by an unequivocal material relationship between the subject and object of the claim, so that its annulment will automatically produce an actual or future, positive or negative but certain effect. ⁴⁷	Possibility of: ⁴⁸ ➤ declaration of illegality of the act; ➤ annulment of the act (decision awarding the contract); ➤ application for and grant of interim measures; ⁴⁹ ➤ claim for compensation for the harm caused	➤ The compensation claim is an integral part of the legal action. ➤ The special, optional administrative appeal in PP cases ⁵⁰ was not upheld in so far as it cannot be directed against a concluded contract. ⁵¹

⁴¹ While making it clear that, even if the contract has already been concluded, the action must be brought against the decision to award it (see the Tribunal Supremo (Supreme Court) judgment of 17 February 2020 ([STS 204/2020, ECLI: ES: TS: 2020: 443](#))).

⁴² Article 2(b) of [Ley 29/1998](#), reguladora de la Jurisdicción Contencioso-administrativa (Law 29/1998 governing the jurisdiction of the administrative courts) of 13 July 1998 (BOE No 167 of 14 July 1998; the 'LCJA').

⁴³ An informal administrative appeal or 'reposición' (Article 121 et seq. of [Ley 39/2015](#) del Procedimiento Administrativo Común de las Administraciones Públicas (Law on the common administrative procedure of public authorities) of 1 October 2015, BOE No 236 of 2 October 2015).

⁴⁴ 'De alzada' appeal (Article 121 et seq. of [Ley 39/2015](#)).

⁴⁵ In a judgment of the Tribunal Supremo (Supreme Court) of 17 February 2020 ([STS 204/2020, ECLI: ES: TS: 2020: 443](#)), it was recognised that a competitor which did not participate in an NPwPP had a legitimate interest to take action against the award of a public contract (in this case, the contract had already been concluded). Without ruling more broadly on the issue, the Supreme Court merely referred to a 2004 judgment, which did not concern an NPwPP, in which that court had held that 'what bestows standing to take legal action is a legitimate interest to apply for the annulment of the contested administrative act. Participation in a procurement procedure cannot be a mandatory requirement to take action against an act connected with a competitive process for the award of a public contract. In other words, although participation demonstrates an interest in the result of a public procurement procedure, a legitimate interest in challenging a notice of that procedure cannot be ruled out even if it is not possible to participate by reason of the very terms and conditions of the call for tenders ([STS 5810/2004, ECLI: ES: TS: 2004: 5810](#) of 20 September 2004).

See also the Tribunal Superior de Justicia de Canarias (High Court of Justice of the Canary Islands), judgment No 688/2019 of 19 November 2019 (ECLI: ES: TSJICAN: 2019: 4509) which recognises the legitimate interest of the applicant (an uninvited competitor) to take action against an award decision in the context of an NPwPP because it had previously participated in open PCAPs covering contracts with the same subject matter.

⁴⁶ Article 19(1) of the [LCJA](#).

⁴⁷ Settled case-law of the Tribunal Constitucional (Constitutional Court, Spain) ([STC 52/2007](#) of 12 March 2007, ECLI: ES: TC: 2007: 52), which has been endorsed by the Tribunal Supremo (Supreme Court, Spain) (STS [5817/2011](#) of 30 May 2011, ECLI: ES: TS: 2011: 5817).

⁴⁸ Article 71(1)(a) of the [LCJA](#).

⁴⁹ Article 129 et seq. of the [LCJA](#).

⁵⁰ Article 44 of [Ley 9/2017](#), de 8 de noviembre, de Contratos del Sector Público, por la que se transponen al ordenamiento jurídico español las Directivas del Parlamento Europeo y del Consejo 2014/23/UE y 2014/24/UE, de 26 de febrero de 2014 (Law 9/2017 on public contracts, which transposes Directives 2014/23/EU and 2014/24/EU of the European Parliament and of the Council of 26 February 2014 into Spanish law) of 8 November 2017 (BOE No 272 of 9 November 2017, p. 107714; the 'Law on public contracts').

Does a competitor have judicial remedies once a contract is concluded after the close of an NPwPP in which that competitor did not participate?	Typology of the judicial remedies	Nature of the legal basis of the remedies (<i>lex generalis</i> or <i>lex specialis</i>)	Admissibility criteria as regards legal standing, in the context of judicial remedies available to a competitor once a contract is concluded after the close of an NPwPP in which it did not participate	Subject of the legal action/Powers of the court	Observations
ESTONIA					
A priori YES (but no examples CL)	Legal action seeking a declaration that the contract is null and void ⁵² (Administrative Court) ➤ BUT a mandatory prior administrative appeal before the Disputes Committee for PP cases. ⁵³	<i>Lex specialis</i> ⁵⁴	Existence of: ➤ a public law relationship; ⁵⁵ ➤ a legitimate interest ⁵⁶ (review by the court of its own motion, ⁵⁷ not difficult to prove); ⁵⁸ ➤ a subjective right to defend by means of this action. ⁵⁹	In the specific case of a contract concluded pursuant to an NPwPP, possibility of: ➤ finding that the contract is null and void (not possible to annul the award decision or the PP award procedure), ⁶⁰ ➤ where at least one of the heads of nullity expressly provided for by law is upheld. ⁶¹	➤ An action for a declaration is only possible where no other effective means are available. ⁶² In a case like the one forming the subject matter of this note, no other effective means are available because an action for annulment against an award decision is only admissible up to the conclusion of the contract. ⁶³

⁵¹ Under Paragraph 44 of the Law on public contracts, the review powers for the special, optional administrative appeal relating to PP concerns acts connected with the PCAP, including the award decision, and not the contract concluded subsequently.

⁵² Paragraph 267(3) of the [halduskohtumenetluse seadustik](#) (Code of Administrative Procedure, in force since 1 June 2022; 'HKMS').

⁵³ Paragraph 267(1) of the [HKMS](#) read in conjunction with Paragraph 185(4)(2) and (3) of the [riigihangete seadus](#) (Law on public contracts, in force since 15 July 2020; hereinafter the 'RHS').

⁵⁴ Paragraph 267(3) of the [HKMS](#) is *stricto sensu* a *lex specialis* in so far as this provision determines the scope of the court's powers in the light of the specific situation of an action brought by a competitor which was not able to participate in an NPwPP. Thus, exceptionally, the court is vested with the power to rule that the contract is null and void (which renders it ineffective), and not only the power, which it generally is granted, to rule that the contract is unlawful. In addition, without this special provision, we might consider that an action seeking a declaration that the contract is null and void is also possible on the basis of general rules (Paragraph 37(2)(6); Paragraph 38(4), Paragraph 44(1) and Paragraph 45(2) of the [HKMS](#) combined with Paragraph 266(1) of the [HKMS](#)).

⁵⁵ Paragraph 4(1) and (2) and Paragraph 266(1) of the [HKMS](#) which show that this first condition is always satisfied in public procurement cases.

⁵⁶ Paragraph 38(4) of the [HKMS](#). This condition is also always satisfied in the specific case of an NPwPP (see Paragraph 267(3) of the [HKMS](#)).

⁵⁷ Supreme Court judgment of 20 January 2011, [3-3-1-74-10](#), EE: RK: 2011: 3.3.1.74.10.40, paragraph 15.

⁵⁸ Tallinna Halduskohus (Administrative Court of Tallinn) judgment of 8 December 2016, [3-16-2129](#), EE: TLHK: 2016: 3.16.2129.9773 and Tallinna Ringkonnakohus (Court of Appeal of Tallinn) judgment of 27 January 2017, [3-16-2129](#), EE: TLRK: 2017: 3.16.2129.2150.

⁵⁹ Paragraph 268(1) and, in general, Paragraph 44(1) of the [HKMS](#); see Supreme Court judgment of 15 January 2015, [3-3-1-68-14](#), EE: RK: 2015: 3.3.1.68.14.393, paragraph 11; see also, by analogy, regarding the criterion of the 'existence of a subjective right' in an action for the annulment of the award decision, orders of the Supreme Court of 20 December 2001, [3-3-1-8-01](#), EE: RK: 2001: 3.3.1.8.01.444, paragraph 22 and [3-3-1-15-01](#), EE: RK: 2001: 3.3.1.15.01.445, paragraph 22, in which the Supreme Court ruled that 'the rights and freedoms to be protected in the context of an action for annulment of an administrative act must be understood as the subjective public rights of an individual – fundamental rights and freedoms, statutory rights and other legislative acts, administrative acts and administrative contracts. When interpreting a law or other legal act which has allegedly been infringed, the court must assess whether the provision it contains protects only the public interest or also the interests of the individual. If a provision protects not only the public interest but also interests of the individual, this provision gives rise to a subjective right of the individual to request compliance with that provision. [...]'

	<p>Legal action for damages ⁶⁴ (Administrative Court)</p> <ul style="list-style-type: none"> ➤ brought exceptionally in the specific case of a contract concluded after the close of an NPwPP; ➤ in parallel with an appeal for a declaration of nullity. 	<p><i>Lex generalis</i> ⁶⁵</p>	<p>Demonstrate:</p> <ul style="list-style-type: none"> ➤ a public law relationship, ⁶⁶ ➤ a subjective right to defend, ⁶⁷ ➤ a claim for compensation of financial harm. ⁶⁸ 	<p>Compensation for harm, provided that:</p> <ul style="list-style-type: none"> ➤ the illegality of the legal or tangible act in the public law relationship; ⁶⁹ ➤ accordingly, breach of a subjective right of the applicant; ⁷⁰ ➤ financial harm (to be more specific direct material damage or loss of income); ⁷¹ ➤ causal link between the legal or tangibly unlawful act and the harm suffered by the applicant. ⁷² 	
--	---	---	---	--	--

⁶⁰ Paragraph 267(3) and (4) of the [HKMS](#).

⁶¹ In the case of heads of nullity relative to the conditions for using an NPwPP, Paragraph 121(1)(1) of the [RHS](#) provides: 'A contract is null and void if: (1) the contracting authority failed to submit a contract notice to the register and this omission was not authorised by the present law, including where the use of a negotiated procedure without prior publication of a contract notice was not authorised by the present law and where, as a result of the contracting authority's action, the economic operator lost the opportunity to defend its interests in the procedure before the Public Procurement Disputes Committee [...]'.
⁶² Paragraph 45(2) of the [HKMS](#).

⁶³ Paragraph 267(3) and (4) of the [HKMS](#).

⁶⁴ Paragraph 37(2)(4) of the [HKMS](#) and Paragraph 202(1) of the [RHS](#). A competitor which has not participated in the NPwPP may, alternatively, make a claim for compensation before the PP Disputes Committee prior to bringing an action before the courts, but this is irrelevant in this context because, in any event, ordinary judicial channels are available to it.

⁶⁵ Paragraph 7(1) and (3) of the [riigivastutuse seadus](#) (Law on State liability, in force since 1 July 2016; '[RVastS](#) ') provides that: 'A person whose rights have been infringed by an unlawful act of a public authority in a public law relationship (hereinafter referred to as the 'injured party') may claim compensation for any harm caused to it if that harm could not have been avoided and cannot be remedied by the rights in Paragraphs 3, 4 and 6 of this Law being protected or restored' and 'under paragraphs 1 and 2 of this article, compensation is available for direct material damage and losses of earnings.'

⁶⁶ Paragraph 202(1) of the [RHS](#); Article 4(1) and (2), and Paragraph 266(3) of the [HKMS](#).
⁶⁷ Paragraph 44(1) of the [HKMS](#).
⁶⁸ Paragraph 37(2)(4) of the [HKMS](#).

⁶⁹ See Supreme Court judgment of 23 March 2020, [3-16-1634](#), EE: RK: 2020: 3.16.1634.3690, paragraph 21.

⁷⁰ See Supreme Court judgment of 23 mars 2020, [3-16-1634](#), EE: RK: 2020: 3.16.1634.3690, paragraph 20.

⁷¹ Paragraph 7(3) of the [RVastS](#); see Supreme Court judgment of 23 March 2020, [3-16-1634](#), EE: RK: 2020: 3.16.1634.3690, paragraphs 29 and 30.

⁷² See Supreme Court judgment of 7 October 2015, [3-3-1-11-15](#), EE: RK: 2015: 3.3.1.11.15.787, paragraph 12.

Does a competitor have judicial remedies once a contract is concluded after the close of an NPwPP in which that competitor did not participate?	Typology of the judicial remedies	Nature of the legal basis of the remedies (<i>lex generalis</i> or <i>lex specialis</i>)	Admissibility criteria as regards legal standing, in the context of judicial remedies available to a competitor once a contract is concluded after the close of an NPwPP in which it did not participate	Subject of the legal action/Powers of the court	Observations
FRANCE					
YES (but no examples of CL)	'Référé contractuel' (to the Administrative Court).	Lex generalis ⁷³	<p>Application reserved to parties which have:</p> <ul style="list-style-type: none"> ➤ 'an interest in concluding the contract; and ➤ which are likely to suffer harm due to breaches of the publication and competitive tendering obligations'. ⁷⁴ <p>Inadmissible if:</p> <ul style="list-style-type: none"> ➤ a <i>référé précontractuel</i> has been lodged; ⁷⁵ ➤ the contracting authority has made public its intention to conclude the contract after a public procurement procedure which is not subject to a prior publication obligation. ⁷⁶ 	<p>Possibility of ⁷⁷ (at the applicant's request or at the court's own motion): ⁷⁸</p> <ul style="list-style-type: none"> ➤ suspending performance of the contract; ➤ reduced the contract term; ➤ cancellation of the contract; ➤ termination of the contract; ➤ financial penalties (not compensation). 	

⁷³ [Articles L551-13 to L551-23 of the code de justice administrative \(Code of Administrative Justice \(CJA\)\)](#).

⁷⁴ Article L551-14, first paragraph, of the CJA.

⁷⁵ Article L551-14, second paragraph, of the CJA.

⁷⁶ Article L551-15 of the CJA.

⁷⁷ Articles L551-17 to L551-20 of the CJA.

⁷⁸ Article L551-21 of the CJA.

	<p>Action challenging the validity of the contract</p> <ul style="list-style-type: none"> ➤ against administrative contracts, before the court with jurisdiction to examine administrative contracts ('unlimited jurisdiction action'). 	<p>Lex generalis</p> <p>(created by judicial decisions of the Council of State).⁷⁹</p>	<p>Any 'competitor excluded' (judgment in <i>Tropic</i>)⁸⁰</p> <p>THEN 'any third party to an administrative contract' whose interests are likely to suffer direct and certain harm through the award of that contract or its clauses' (CS judgment in <i>Tarn et Garonne</i>);</p> <ul style="list-style-type: none"> ➤ HAS standing to 'bring before the court with unlimited jurisdiction over the contract an action challenging the validity of the contract or some of its unlawful terms which may be severed from the contract' (CS judgment in <i>Tarn et Garonne</i>); ➤ BUT 'can only rely on irregularities directly related to the interest harmed on which it is seeking to rely or those of such gravity that the court should raise them of its own motion' (judgment in <i>Tarn et Garonne</i>); ➤ SO THAT 'third parties acting as competitors excluded from concluding the administrative contract may only, aside from defects offending public policy, [...] claim infringements of the rules applicable to the award of this contract directly related to the reason for its exclusion'.⁸¹ 	<p>Possibility of:⁸²</p> <ul style="list-style-type: none"> ➤ immediate or deferred termination of the contract; ➤ rescission of the contract (total or partial cancellation); ➤ compensation remedying the rights infringed; ➤ suspending performance of the contract (Article L521(1) of the CJA); ➤ correcting defects in the contract. 	
--	---	--	---	---	--

⁷⁹ Judgment of the Conseil d'État, Assemblée (Council of State, France) of 16 July 2007, 291545, *Société Tropic Travaux Signalisation*, reported in Recueil Lebon, ECLI: FR: CEASS: 2007: 291545.20070716, and Conseil d'État, Assemblée (Council of State), judgment of 4 April 2014, 358994, *Département de Tarn-et-Garonne*, reported in Recueil Lebon, ECLI: FR: CEASS: 2014: 358994.20140404.

⁸⁰ Namely, 'any applicant with an interest in concluding the contract, even though it was not permitted to submit a tender or submitted an inappropriate, non-compliant or unacceptable tender' (Opinion of the Conseil d'État (Council of State), 7th – 2nd sub-sections combined, 11 April 2012, 355446, *Société Gouelle*, reported in Recueil Lebon, ECLI: FR: XX: 2012: 355446.20120411).

⁸¹ Conseil d'État, Section (Council of State), 5 February 2016, *Syndicat mixte des transports en commun Hérault Transport*, 383149, reported in the Recueil Lebon, ECLI: FR: CESEC: 2016: 383149.20160205, recital 2.

⁸² Conseil d'État (Council of State) judgment in the *Département de Tarn-et-Garonne* case.

Does a competitor have judicial remedies once a contract is concluded after the close of an NPwPP in which that competitor did not participate?	Typology of the judicial remedies	Nature of the legal basis of the remedies (<i>lex generalis</i> or <i>lex specialis</i>)	Admissibility criteria as regards legal standing, in the context of judicial remedies available to a competitor once a contract is concluded after the close of an NPwPP in which it did not participate	Subject of the legal action/Powers of the court	Observations
IRELAND					
<p>A priori</p> <p>YES</p> <p>(as regards the <i>obiter dictum</i> of certain judges,⁸³ for cases not based on an NPwPP, to illustrate an <u>exception to the rule of having to participate in a PP procedure</u> to be considered an 'eligible person').</p>	<p>Special PP judicial review procedure (Order 84A of the SCR)^{84 85}</p> <ul style="list-style-type: none"> ➤ Court of First Instance (High Court, Ireland). 	<p><i>Lex generalis</i> (as interpreted by the courts in NPwPP cases)</p>	<p>Subject to an exception from the <u>requirement to participate in the PP procedure</u> to be an 'eligible person',⁸⁶ demonstrate:</p> <ul style="list-style-type: none"> ➤ A past or present interest in obtaining the public contract (and having, for this reason, participated in an NPwPP);⁸⁷ ➤ actual or potential harm related to this contract for which a remedy is available under EU PP law or the Member State's law; ➤ AND that the PP has 'business relevance'⁸⁸ (in other words, an economic dimension) so that the Court can assess whether a PP procedure is at issue. 	<p>Possibility of:⁸⁹</p> <ul style="list-style-type: none"> ➤ order to correct an infringement; ➤ re-examining the award decision; ➤ re-examining the decision, even an interim decision, in a PCAP; ➤ declaration that the contract is ineffective; ➤ interlocutory/interim measures (application for interim measures); ➤ compensation. 	

⁸³ See the opinion of Judge Hogan in the High Court judgment of 29 May 2013, in *Copymoore Ltd. and Others v Commissioner of Public Works in Ireland* (2013) IEHC 230 (paragraph 43), in which he noted that, generally speaking, an applicant wishing to challenge the outcome of a tender award must have participated in that process in order to be accounted an 'eligible person' for the purposes of the 2010 Regulation. However, he held that exceptions to this rule could be made in special cases, for example, where the failure to advertise properly may have resulted in a potential tenderer not submitting a tender.

⁸⁴ Superior Court Rules (the 'SCRs').

⁸⁵ <https://www.courts.ie/rules/review-award-public-contracts>.

⁸⁶ Article 4 of the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (statutory instrument No. 130 of 2010), as amended subsequently (hereinafter the '2010 Regulations').

⁸⁷ See judgments in *Copymoore Ltd. and Others v. Commissioner of Public Works in Ireland* and *Word Perfect Translation Services Ltd v. The Minister for Public Expenditure and Reform*, cited above.

⁸⁸ High Court judgment of 23 October 2012, *Student Transport Scheme Ltd v. The Minister for Education and Skills and Another* (2012) IEHC 425.

⁸⁹ Order 84A, Rule 2, of the SCRs; Articles 8 and 9 of the 2010 Regulations.

	<p>Ordinary judicial review procedure (Order 84 of the SCRs) ⁹⁰</p> <p>➤ alternative to a special PP judicial review procedure where the applicant is not an 'eligible person'. ⁹¹</p>	<i>Lex generalis</i>	<p>Demonstrate:</p> <p>➤ 'a sufficient interest' (namely, to be adversely affected by the decision.)</p>	<p>Possibility of: ⁹²</p> <p>➤ annulment;</p> <p>➤ amendment;</p> <p>➤ interlocutory/interim measures;</p> <p>➤ compensation.</p>	
--	--	----------------------	---	---	--

⁹⁰ <https://www.courts.ie/rules/judicial-review-and-orders-affecting-personal-liberty>.

⁹¹ High Court judgment of 24 March 2021, *Payzone Ireland Ltd v. National Transport Authority* (2021) IEHC 212, paragraph 57.

⁹² Order 84 of the SCRs, in particular Rule 18 (application for annulment), Rule 25 (damages) and Rule 26 (interlocutory application).

Does a competitor have judicial remedies once a contract is concluded after the close of an NPwPP in which that competitor did not participate?	Typology of the judicial remedies	Nature of the legal basis of the remedies (<i>lex generalis</i> or <i>lex specialis</i>)	Admissibility criteria as regards legal standing, in the context of judicial remedies available to a competitor once a contract is concluded after the close of an NPwPP in which it did not participate	Subject of the legal action/Powers of the court	Observations
ITALY					
YES (with examples of CL) ⁹³	Standard action for annulment ⁹⁴ (administrative courts).	<i>Lex generalis</i>	<ul style="list-style-type: none"> ➤ Exceptionally, when a competitor has not been invited to take part in an NPwPP, in order to have a legitimate interest in challenging the administration's choice to use an NPwPP, it is sufficient to operate in the business sector covered by the PP procedure. ⁹⁵ ➤ Alternatively, in principle, the interest in bringing proceedings must be real and current, and be of practical, direct and immediate use. ⁹⁶ 	Possibility of: <ul style="list-style-type: none"> ➤ cancelling the contract; ⁹⁷ ➤ by an additional application or a separate act, interim measures in a case of extreme gravity and urgency ⁹⁸ (for example, suspension of the contract); ➤ damages. ⁹⁹ 	

⁹³ Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), judgment of 4 September 2018, [No 9145/2018](#), ECLI: IT: TARLAZ: 2018: 9145SENT.

⁹⁴ Article 29 and Article 119(1)(a) of the [Decreto legislativo No 104 – Attuazione dell'articolo 44 della legge 18 giugno 2009, No 69, recante delega al governo per il riordino del processo amministrativo](#) (Legislative Decree No 104 implementing Article 44 of Law No 69 of 18 June 2009, delegating powers to the government to reform the administrative procedure) of 2 July 2010, as amended (GURI No 156 of 7 July 2010, Ordinary Supplement No 148) (the 'Code of Administrative Procedure').

⁹⁵ Consiglio di Stato (Council of State, Italy), judgments of 5 April 2006, [No 1789/2006](#), ECLI: IT: CDS: 2006: 1789SENT and 7 April 2011, [No 4/2011](#), ECLI: IT: CDS: 2011: 4APLE, Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio), judgment of 4 September 2018, [No 9145/2018](#), ECLI: IT: TARLAZ: 2018: 9145SENT.

⁹⁶ Consiglio di Stato (Council of State), judgment of 5 June 2007, [No 2982/2007](#), ECLI: IT: CDS: 2007: 2982SENT; Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio), judgment of 10 January 2022, [No 153/2022](#), ECLI: IT: TARLAZ: 2022: 153SENT.

⁹⁷ Article 29 of the [Code of Administrative Procedure](#).

⁹⁸ Article 56 and Article 119(3) and (4) of the [Code of Administrative Procedure](#).

⁹⁹ Article 30 of the [Code of Administrative Procedure](#). Article 30(1) provides that the action may be brought simultaneously with another action or also, where there is exclusive jurisdiction and in circumstances provided for in this article, independently.

	Action for enforcement (concurrent or independent) / Action for damages. ¹⁰⁰	<i>Lex generalis</i>	<ul style="list-style-type: none"> ➤ Exceptionally, where a competitor has not been invited to take part in an NPwPP, in order to have a legitimate interest in challenging the administration's choice to use an NPwPP, it is sufficient to operate in the business sector covered by the PP procedure. ¹⁰¹ ➤ Alternatively, in principle, the interest in bringing proceedings must be real and current, and be of practical, direct and immediate use. ¹⁰² 	Compensation.	
--	---	----------------------	---	---------------	--

¹⁰⁰ Article 30 of the [Code of Administrative Procedure](#).

¹⁰¹ Consiglio di Stato (Council of State), judgments of 5 April 2006, [No 1789/2006](#), ECLI: IT: CDS: 2006: 1789SENT, and 7 April 2011, [No 4/2011](#), ECLI: IT: CDS: 2011: 4APLE and Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio), judgment of 4 September 2018, [No 9145/2018](#), ECLI: IT: TARLAZ: 2018: 9145SENT.

¹⁰² Consiglio di Stato (Council of State), judgment of 5 June 2007, [No 2982/2007](#), ECLI: IT: CDS: 2007: 2982SENT; Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio), judgment of 10 January 2022, [No 153/2022](#), ECLI: IT: TARLAZ: 2022: 153SENT.

Does a competitor have judicial remedies once a contract is concluded after the close of an NPwPP in which that competitor did not participate?	Typology of the judicial remedies	Nature of the legal basis of the remedies (<i>lex generalis</i> or <i>lex specialis</i>)	Admissibility criteria as regards legal standing, in the context of judicial remedies available to a competitor once a contract is concluded after the close of an NPwPP in which it did not participate	Subject of the legal action/Powers of the court	Observations
NETHERLANDS					
A priori YES (but no examples of CL)	Application for interim measures (post-contractual) (to the court hearing applications for interim measures) ➤ UNLESS a precontractual application for interim measures is admissible, in particular where there is a ' voluntary ex ante publication '. ¹⁰³	<i>Lex generalis</i> ¹⁰⁴	Conditions for demonstrating a 'sufficient interest.' ➤ In the case of an NPwPP , it may be admissible , <i>mutatis mutandis</i> , for a competitor which has not taken part in an NPwPP , if it has not had a fair opportunity to be awarded the contract due to the unlawful actions of the contracting authority ¹⁰⁵ (by contrast , it is inadmissible if it simply challenges, in writing, the choice of using an NPwPP, without bringing a legal action, but participates in the NPwPP). ¹⁰⁶ Alternatively, demonstrate: ➤ A 'sufficient interest' ¹⁰⁷ <ul style="list-style-type: none">• if more than two tenders, request a new PCAP and have valid grounds.¹⁰⁸	Possibility of: ➤ prohibition on implementing the contract ¹⁰⁹ ; ➤ order to organise a new PCAP, if the contracting authority still wishes to award the contract. ¹¹⁰	Post-contractual applications for interim measures¹¹¹ and actions for annulment are rare because PP disputes in the Netherlands are dominated by pre-contractual applications for interim measures. ¹¹²

¹⁰³ Cumulative conditions provided for in Article 4.16(1)(a) to (c), read together with Article 4.15(1)(a) of the [Aanbestedingswet 2012](#) (Law on the new rules for awarding public contracts); *Kamerstukken II* 2008/2009, [32027](#), No 3, p. 20.

¹⁰⁴ Article 254(1) of the [Wetboek van Burgerlijke Rechtsvordering](#) (Dutch Code of Civil Procedure).

¹⁰⁵ See, by analogy, in the context of a [precontractual application for interim measures](#), the decisions of the judge hearing applications for interim measures of the Court of First Instance of Zeeland-West-Brabant of 6 March 2014, *JCDecaux Nederland v Gemeente Tilburg*, [ECLI: NL: RBZWB: 2014: 1551](#), paragraph 4.3; the judge hearing applications for interim measures of the Court of First Instance of Amsterdam of 27 September 2018, *Iron Mountain v UWV*, [ECLI: NL: RBAMS: 2018: 7380](#), paragraphs 2.3, 2.4 and 4.5 to 4.7; the judge hearing applications for interim measures of the Court of Second Instance of Amsterdam of 16 April 2019, *UWV v Iron Mountain*, [ECLI: NL: GHAMS: 2019: 1332](#), paragraphs 2.3, 2.4 and 3.7 to 3.10 and the judge hearing applications for interim measures of the Court of First Instance of Midden-Nederland of 17 June 2020, *Siemens Mobility v NedTrain*, [ECLI: NL: RBMNE: 2020: 2212](#), paragraphs 2.2, 4.1 and 4.23; academic legal writings concur with the approach of the judges hearing applications for interim measures: see E.E. Zeelenberg, *Geen inschrijving, geen procesbelang*, *Tijdschrift Aanbestedingsrecht en staatssteun*, 2019-3, pp. 19 and 20.

¹⁰⁶ Decision of the judge hearing applications for interim measures of the Court of First Instance of Midden-Nederland of 12 July 2018, *Connexion v GVS*, [ECLI: NL: RBNE: 2018: 3625](#), paragraph 4.3.2.

	<p>Action for annulment ¹¹³ (before adjudicating on the substance)</p> <p>UNLESS a pre-contractual application for interim measures is admissible, in particular, in case of ‘voluntary ex-ante publication’. ¹¹⁴</p>	<p>Lex specialis ¹¹⁵</p>	<p>Demonstrate:</p> <ul style="list-style-type: none"> ➤ a ‘sufficient interest’ (same observations as for a post-contractual application for interim measures); <p>Being an:</p> <ul style="list-style-type: none"> ➤ ‘economic operator which considers that it has suffered harm’; ¹¹⁶ ➤ on grounds, in particular, of infringements of the PCAP rules; ¹¹⁷ <p>AND taking action against:</p> <ul style="list-style-type: none"> ➤ the contracting authority and the economic operator which was awarded the contract. ¹¹⁸ 	<p>Possibility of:</p> <ul style="list-style-type: none"> ➤ cancelling the contract by operation of law (with retroactive effect) ¹¹⁹ if the contract was concluded unlawfully without publication; ¹²⁰ ➤ interim measures (for example, suspending performance of the contract); ¹²¹ ➤ cash compensation ¹²² if the independent basis for annulment justifies compensation. ¹²³ 	
--	--	--	---	---	--

¹⁰⁷ Article 3:303 of the [Burgerlijk Wetboek](#) (Dutch Civil Code).

¹⁰⁸ Decision of the judge hearing applications for interim measures of the Court of First Instance of the Hague of 13 April 2016, *Compass v de Staat der Nederlanden (het Ministerie van Infrastructuur en Milieu)*, [ECLI: NL: RBDH: 2016: 5098](#), paragraph 5.2 and judgment of the judge hearing applications for interim measures of the Court of Second Instance of the Hague of 17 April 2018, *Dura Vermeer and Others v Gemeente Dordrecht*, [ECLI: NL: GHDHA: 2018: 751](#), paragraph 19.

¹⁰⁹ Decision of the court hearing applications for interim measures of the Court of First Instance of Noord-Nederland of 21 June 2019, *Croonwolter & Dros and Others v RUG*, [ECLI: NL: RBNNE: 2019: 2681](#), paragraphs 4.12 (ruling that the contracting authority, Groningen Public University, did not have valid grounds for using an NPwPP because it had not satisfied the conditions of Article 2.32(c) of the Aanbestedingswet) and Articles 5.1 and 5.3 (operative part).

¹¹⁰ Decision of the court hearing applications for interim measures of the Court of First Instance of Noord-Nederland of 16 December 2020, *Eurofiber v Gemeente Leeuwarden*, [ECLI: NL: RBNNE: 2020: 4445](#), paragraphs 4.16 to 4.19 (no technical grounds) and 5.2 (operative part).

¹¹¹ Judgment of the Court of Second Instance of the Hague of 20 April 2021, *X v Staat der Nederlanden (Ministerie van Infrastructuur en Waterstaat, Rijkswaterstaat)*, [ECLI: NL: GHDHA: 2021: 638](#), paragraphs 3.3, 5.4 to 5.6, 6.8 to 6.10, 10 and 11 (correction of a decision at first instance without a material assessment).

¹¹² Opinion of Advocate General Campos Sánchez-Bordona in *Connexion Taxi Services* (C-171/15, [EU:C:2016:506](#), points 79 to 81).

¹¹³ Article 4.15(1)(a) Aanbestedingswet 2012; and see judgment of the Hoge Raad (Supreme Court, Netherlands) of 18 November 2016, *Xafax*, [ECLI: NL: HR: 2016: 2638](#), paragraphs 3.7.3 to 3.9 (no annulment for infringement of the public procurement rules beyond the ‘exhaustive’ grounds set out in Article 4.15(1) of the Aanbestedingswet 2012).

¹¹⁴ Cumulative conditions provided for in Article 4.16(1)(a) to (c) of the Aanbestedingswet 2012.

¹¹⁵ Article 4.15(2)(a) of the Aanbestedingswet 2012 (provision relating specifically to an action for annulment on grounds of an unlawful use of an NPwPP).

¹¹⁶ Article 4.15(2) of the Aanbestedingswet 2012.

¹¹⁷ Article 4.15(1)(a) of the Aanbestedingswet 2012.

¹¹⁸ Article 3:51(2) of the Burgerlijk Wetboek, <https://wetten.overheid.nl/jci1.3:c:BWBR0005291&boek=3&titeldeel=2&artikel=51&z=2021-07-01&g=2021-07-01>; *Kamerstukken II* 2008/2009, [32027, No 3](#), p. 11; court hearing applications for interim measures of the Court of First Instance of Amsterdam of 1 May 2013, *Duosport v Stichting Ijscomplex Jaap Eden*, [ECLI: NL: RBAMS: 2013: BZ9202](#), paragraphs 4.30 and 4.32 (the judge may stay the proceedings to give the applicant the opportunity to summon the missing parties).

¹¹⁹ Article 3:53 of the Burgerlijk Wetboek, <https://wetten.overheid.nl/jci1.3:c:BWBR0005291&boek=3&titeldeel=2&artikel=53&z=2021-07-01&g=2021-07-01>, *Kamerstukken II* 2008/2009, [32027, No 3](#), p. 11.

¹²⁰ Art 4.15(1)(a) of the Aanbestedingswet 2012.

¹²¹ [Article 223 of the Wetboek van Burgerlijke Rechtsvordering](#) (Dutch Code of Civil Procedure).

¹²² [Articles 6:96 et 6:162 of the Burgerlijk Wetboek](#) (Dutch Civil Code); see, for example, the Rechtbank Noord-Holland (Court of First Instance of Noord-Holland) judgment of 5 January 2022, *de Combinatie v Gemeente Den Helder*, [ECLI: NL: RBNHO: 2022: 26, paragraph 4.2](#).

¹²³ See, by analogy, the Hoge Raad (Supreme Court) judgment of 11 October 2013, *Vano v Foreburghstaete*, [ECLI: NL: HR: 2013: CA3765](#), RCR 2014/2, paragraphs 3.5.2 and 4.

	Action for compensation of the harm suffered (before the court adjudicating on the substance).	Lex generalis	Demonstrate: <ul style="list-style-type: none"> ➤ a 'sufficient interest (same observations as for a post-contractual application for interim measures); ➤ that obtaining the contract was plausible, in order to demonstrate the causal link between the illegality and the harm.¹²⁴ <p>Admissibility based on the assumption that the substantive conditions to allow a court action have been met.¹²⁵</p>	Possibility of: <ul style="list-style-type: none"> ➤ cash compensation (inter alia, loss suffered and loss of earnings, reasonable expenses to avert and limit the damage, reasonable costs to determine harm and liability, reasonable expenses to reach an out-of-court settlement).¹²⁶ <p>NO other remedy such as an order to rescind the contract or terminate its performance.¹²⁷</p>	
--	---	----------------------	--	---	--

¹²⁴ See the Rechtbank Den Haag (Court of First Instance of the Hague) judgment of 5 May 2022, *Connexion Taxi Services v de Staat der Nederlanden (Ministerie van Volksgezondheid, Welzijn en Sport)*, [ECLI: NL: RBDHA: 2022: 4332](#), in particular, paragraph 4.14.

¹²⁵ A.J. van Heeswijck, *Rechtsbescherming van ondernemers in aanbestedingsprocedures*, R&P nr. VG7, 2013, paragraph 7.2.4.

¹²⁶ Articles 6:96 and 6:162 of the Burgerlijk Wetboek.

¹²⁷ See, by analogy, the Hoge Raad (Supreme Court) judgment of 18 November 2016, *Xafax*, [ECLI: NL: HR: 2016: 2638](#), paragraph 3.7.5.

Does a competitor have judicial remedies once a contract is concluded after the close of an NPwPP in which that competitor did not participate?	Typology of the judicial remedies	Nature of the legal basis of the remedies (<i>lex generalis</i> or <i>lex specialis</i>)	Admissibility criteria as regards legal standing, in the context of judicial remedies available to a competitor once a contract is concluded after the close of an NPwPP in which it did not participate	Subject of the legal action/Powers of the court	Observations
POLAND					
YES (but no examples of CL)	Action for a review of legality (at first instance, must be before the National Appeals Board ¹²⁸ (an independent, quasi-judicial body)). ¹²⁹	<i>Lex generalis</i>	A competitor not taking part in an NPwPP must, as 'another entity' ¹³⁰ demonstrate: ¹³¹ ➤ Interest in obtaining the contract; ➤ AND likelihood of suffering harm due to infringement of the terms of the Pzp.	Where the contract has been concluded, possibility of: ¹³² ➤ total/partial cancellation of the contract; ➤ financial penalty (proceeds paid to the public purse); ➤ shortening the term of the contract; ➤ finding of infringement of the law	No possibility of claim for compensation in an appeal before the National Appeals Board
YES	Civil liability action (civil law) for infringement of the Pzp before the ordinary courts ¹³³ (independent of the appeal before the National Appeals Board). ¹³⁴	<i>Lex generalis</i>	Demonstrate: ¹³⁵ ➤ infringement of the Pzp; ➤ harm; ➤ causal link.	➤ Compensation.	

¹²⁸ Article 513 of the Ustawa z dnia 11 września 2019 r. – Prawo zamówień publicznych ([Law of 11 September 2019 on public contracts, consolidated wording of the Dziennik Ustaw of 2021, position 1129, as amended](#)) (hereinafter the 'Pzp').

¹²⁹ The National Appeals Board (Krajowa Izba Odwoławcza, Poland) is a non-judicial body established by the Pzp which has exclusive jurisdiction to hear and determine disputes at first instance between economic operators and contracting authorities. An appeal can be lodged against its decisions to the Public Procurement Court. In turn, an appeal against the Public Procurement Court's decision can be brought before the Supreme Court ([W. Dzierżanowski, Prawo do sądu w zamówieniach publicznych, Warszawa 2018, s. 91](#)). The Court of Justice has nevertheless recognised the National Appeals Board as a court or tribunal within the meaning of Article 267 TFEU ([judgment of 13 December 2012, Forposta and ABC Direct Contact, C-465/11, EU:C:2012:801, paragraph 18](#)).

¹³⁰ In a judgment of 31 May 2019 ([KIO 904/19, LEX nr 2700928](#)), the National Appeals Board held that, 'another entity' (within the meaning of [Article 179\(1\) of the Prawo zamówień publicznych \(Law of 29 January 2004 on public procurement, consolidated text of the Dziennik Ustaw of 2019, position 1843, hereinafter the 'Pzp'\)](#), which, after amendment of the Law, became Article 505(1) of the Pzp) means, inter alia, the potential economic operators which call into question the proper application of non-competitive tendering procedures by the contracting authority (for example, in the case of an NPwPP). According to the Appeals Board, these entities are denied the opportunity they would have had to participate in the procedure, had the contracting authority conducted that procedure as required by law, according to the modus of commencing with a contract notice. See also, judgment of 5 September 2016 ([KIO 1556/16, LEX nr 2151627](#)).

¹³¹ Article 505(1) of the Pzp.

¹³² Article 554(3) of the Pzp.

¹³³ Article 415 of the Ustawa – Kodeks cywilny (['Civil Code', Law of 23 April 1964, Dz.U. of 1964, No 16, position 93, as amended](#)) or Article 417 of the Civil Code in a case involving the Treasury, a local authority or other legal person exercising public powers under the Law on harm occasioned by an unlawful act or omission in the exercise of public powers.

Does a competitor have judicial remedies once a contract is concluded after the close of an NPwPP in which that competitor did not participate?	Typology of the judicial remedies	Nature of the legal basis of the remedies (<i>lex generalis</i> or <i>lex specialis</i>)	Admissibility criteria as regards legal standing, in the context of judicial remedies available to a competitor once a contract is concluded after the close of an NPwPP in which it did not participate	Subject of the legal action/Powers of the court	Observations
CZECH REPUBLIC					
<p>A priori</p> <p>YES ¹³⁶</p>	<p>Action for annulment (Regional Court – Administrative Division) ¹³⁷</p> <ul style="list-style-type: none"> ➤ BUT mandatory prior administrative appeal (to the Competition Authority, then its President), after lodging complaints with the contracting authority. ➤ HOWEVER, where the contracting authority has concluded the contract and in the absence of any request for an injunction prohibiting performance of this contract, ¹³⁸ the Competition Authority must close the proceedings with no further action. ¹³⁹ In this case, the court's examination is limited to reviewing the legality of this closure. ¹⁴⁰ 	<i>Lex generalis</i>	<p>Demonstrate:</p> <ul style="list-style-type: none"> ➤ as the appeal is directed against the decision of the President of the Authority, that rights have been infringed by a decision/act of the Competition Authority; ¹⁴¹ ➤ standing to bring an action for annulment appears to originate from the standing to bring proceedings before this Authority, ¹⁴² which is contingent on: ¹⁴³ <ul style="list-style-type: none"> - the existence of an act or omission of the contracting authority in contravention of the law; - actual or potential harm (the potential capacity to tender is sufficient, however, an activity connected with the PP procedure is required) without having to quantify the harm precisely; - causal link between the unlawful act of the Authority and the harm. ¹⁴⁴ 	<p>Possibility for the courts and tribunals:</p> <ul style="list-style-type: none"> ➤ to set aside the decision of the President of the Competition Authority (and potentially the decision of the Authority as well) ➤ to declare the decision of the Authority null and void ¹⁴⁵ <p>AND, on request, together with the action for annulment:</p> <ul style="list-style-type: none"> ➤ to grant the appeal a suspensory effect; ¹⁴⁶ ➤ to grant interim measures, ¹⁴⁷ such as an injunction prohibiting performance of the contract ¹⁴⁸ (where there is a threat of serious harm should the contract be performed). 	<ul style="list-style-type: none"> ➤ It is not possible to claim compensation in an action for annulment.

¹³⁴ In a resolution of 25 February 2021 ([III CZP 16/20, OSNC 2021, nr 7-8, poz. 48](#)), the Polish Supreme Court held that unsuccessful entrepreneurs may claim damages without the National Appeals Board ruling that there was an infringement beforehand.

¹³⁵ Article 415 of the Civil Code; [G. Karaszewski \[w:\] Kodeks cywilny. Komentarz aktualizowany, red. J. Ciszewski, P. Nazaruk, LEX/el. 2022, Article 415.](#)

¹³⁶ It should however be mentioned that the closest case-law example, unlike the situation covered in the research note, concerns a case in which the contracting authority gave notice of its intention to conclude the contract in an NPwPP in a voluntary *ex ante* transparency notice. See judgment of the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic) of [30 May 2014, No 5 Afs 48/2013-272](#).

	Action for damages, independent of the action for annulment (Court of First Instance – Civil Division). ¹⁴⁹	Lex generalis	<ul style="list-style-type: none"> ➤ unlawful act; ➤ harm; ➤ causal link; ➤ potential misconduct on the part of the party causing the harm (presumed where there is a breach of a legal obligation).¹⁵⁰ 	Compensation for a harm and loss of earnings in the context of a public contract.	
--	--	----------------------	--	---	--

¹³⁷ Paragraph 65 of the [zákon č. 150/2002 Sb.](#), soudní řád správní (Law No 150/2002, hereinafter the 'Code of Administrative Justice') of 21 March 2002 (Č. 61/2002).

¹³⁸ This request must be lodged, at the latest, six months after the conclusion of the contract, in accordance with Article 254 of the [zákon č. 134/2016 Sb., o zadávání veřejných zakázek](#) (Law No 134/2016 on public procurement) of 19 April 2016 (Č. 51/2016).

¹³⁹ Paragraph 257(j) of the Law on public procurement. Although this provision was held compatible with the Constitution by the judgment of the I'Ústavní soud (Constitutional Court, Czech Republic) of [2 November 2021, No Pl. ÚS 24/21](#), its consistency with EU law is currently under scrutiny in the *CROSS Zlín* reference for a preliminary ruling (C-303/22).

¹⁴⁰ Where the contract is concluded after the decision of the President of the Competition Authority is final, the court may set this decision aside but the Authority is still bound to close the proceedings thereafter.

¹⁴¹ Paragraph 65 of the Code of Administrative Justice and associated observations (Blažek, T. et al. *Soudní řád správní – online komentář*. 3. aktualizace. Praha: C.H. Beck, 2016).

¹⁴² Judgment of the Nejvyšší správní soud (Supreme Administrative Court) [of 30 May 2014, No 5 Afs 48/2013-272](#), according to which the administrative procedure for checking compliance with the conditions of an NPwPP must be available to as many applicants as possible.

¹⁴³ Judgment of the Nejvyšší správní soud (Supreme Administrative Court), [of 30 May 2014, No 5 Afs 48/2013-272](#), according to which the administrative procedure for checking compliance with the conditions of an NPwPP must be available to as many applicants as possible.

¹⁴⁴ Šebesta, M. et al. *Zákon o zadávání veřejných zakázek. Komentář*. 2. vydání. Praha: C.H. Beck, 2022, Articles 241 and 250(1).

¹⁴⁵ Paragraph 78 of the Code of Administrative Justice.

¹⁴⁶ Paragraph 73 of the Code of Administrative Justice.

¹⁴⁷ Paragraph 38 of the Code of Administrative Justice.

¹⁴⁸ See, by way of example, an order of the Krajský soud v Brně (Regional Court of Brno, Czech Republic), [of 26 November 2019, No 62 Af 85/2019-91](#); these interim measures have been criticised by [academic legal writings](#).

¹⁴⁹ Paragraph 2910 et seq. of the [zákon č. 89/2012 Sb., občanský zákoník](#) (Law No 89/2012 on the Civil Code) of 3 February 2012 (Č. 33/2012) [...]

¹⁵⁰ Hulmák, M. et al. *Občanský zákoník VI. Závazkové právo. Zvláštní část (§ 2055–3014). Komentář*. 1. vydání. Praha: C.H. Beck, 2014, Articles 2910 and 2911.

Does a competitor have judicial remedies once a contract is concluded after the close of an NPwPP in which that competitor did not participate?	Typology of the judicial remedies	Nature of the legal basis of the remedies (<i>lex generalis</i> or <i>lex specialis</i>)	Admissibility criteria as regards legal standing, in the context of judicial remedies available to a competitor once a contract is concluded after the close of an NPwPP in which it did not participate	Subject of the legal action/Powers of the court	Observations
ROMANIA					
Choice of two types of reviews at first instance ¹⁵¹ BUT in both cases , the Administrative and Tax Litigation Division of the Court of Appeal will make the final decision in the case.					
YES (with a single CL example relating to an action for a declaration that a contract is null and void ¹⁵² ; alternatively, numerous CL examples favourable or not to admissibility, without it being possible to determine with certainty whether the contract was concluded)	Option , at first instance, to bring dispute settlement proceedings before the National Dispute Settlement Council (NDSC). ¹⁵³	<u><i>Lex generalis</i></u>	Demonstrate infringement of a right or a legitimate interest , ¹⁵⁴ namely: ¹⁵⁵ ➤ a past or present interest connected with a PCAP ¹⁵⁶ (the potential capacity to tender is necessary and sufficient) ¹⁵⁷ ➤ AND where there is actual or potential harm ¹⁵⁸ as a result of an action or behaviour of the contracting authority.	Possibility for the NDSC to: ¹⁵⁹ ➤ annul; ➤ order the adoption of an act or corrective measures; ➤ recognise a right or legitimate interest; ➤ suspend the award procedure (NOT of the contract).	The NDSC does not have jurisdiction to rule on claims for damages.

¹⁵¹ Article 4(1)(a) and (b) of the legea nr. 101/2016 privind remediile și căile de atac în materie de atribuire a contractelor de achiziție publică, a contractelor sectoriale și a contractelor de concesiune de lucrări și concesiune de servicii, precum și pentru organizarea și funcționarea Consiliului Național de Soluționare a Contestațiilor (Law No 101/2016 on the available appeals and reviews regarding the award of public contracts, sectoral contracts, public works concessions and public service concessions, and concerning the organisation and operation of the National Dispute Settlement Council) of 19 May 2016 (*Monitorul Oficial al României*, part I, No 393 of 25 May 2016 ('Law No 101/2016)).

¹⁵² [Award No 2363](#) of the Court of First Instance of Bucharest of 17 September 2010. An appeal was lodged against Award No 2363 but was dismissed by [Decision No 495](#) of 3 March 2011 handed down by the Court of Appeal of Bucharest. In essence, the Court of Appeal of Bucharest upheld the approach taken by the Court of First Instance of Bucharest on the merits. Nevertheless, the issue of legal standing was not reviewed because it was not raised in the appeal petition.

¹⁵³ Article 4(1)(a) and Article 8(1) of Law No 101/2016. A 'complaint' can be made against decisions of the NDSC which falls under the jurisdiction of the Administrative and Tax Litigation Division of the Court of Appeal (Article 32 and Article 35(2) of Law No 101/2016).

¹⁵⁴ Decision [No 5944](#) of the Court of Appeal of Timisoara of 19 June 2013.

¹⁵⁵ Article 2(1) and Article 3(1)(f) of Law No 101/2016.

¹⁵⁶ [Decision No 3756](#) of the Court of Appeal of Bucharest of 2 October 2017 and [Decision No 2771](#) of the Court of Appeal of Suceava of 10 June 2015.

¹⁵⁷ For example, if a tenderer holds an authorisation to carry on a business in the relevant sector; an example of the dismissal of an appeal would be the inability to perform the contract or not holding the necessary authorisations, see Decision No 982 of the Court of Appeal of Cluj of 29 July 2020.

¹⁵⁸ [Decision No 415](#) of the Court of Appeal of Targu Mures of 7 September 2021.

¹⁵⁹ Article 22(1) and Article 26(2) of Law No 101/2016.

	Judicial review of legality [First instance before the Court (Administrative and Tax Litigation Division)] ¹⁶⁰	<u><i>Lex generalis</i></u>	Same conditions as before the NDSC. ¹⁶¹	Possibility for the courts and tribunals: ¹⁶² <ul style="list-style-type: none"> ➤ to set aside the NDSC decision; ➤ to rule that contracts are null and void; ➤ to suspend the contract; ➤ Damages (only the courts and tribunals have jurisdiction) + the other powers of the NDSC.	
--	---	-----------------------------	--	---	--

¹⁶⁰ Article 49(2) and Article 53 of Law No 101/2016. 'Appeal' to the Administrative and Tax Litigation Division of the Court of Appeal (Article 49(2) and Article 51(3) of Law No. 101/2016).

¹⁶¹ Article 8(1), read in the light of Article 3(1)(f) of Law No 101/2016.

¹⁶² Article 50(8) and Article 53(1) of Law No 101/2016.

Does a competitor have judicial remedies once a contract is concluded after the close of an NPwPP in which that competitor did not participate?	Typology of the judicial remedies	Nature of the legal basis of the remedies (<i>lex generalis</i> or <i>lex specialis</i>)	Admissibility criteria as regards legal standing, in the context of judicial remedies available to a competitor once a contract is concluded after the close of an NPwPP in which it did not participate	Subject of the legal action/Powers of the court	Observations
SLOVENIA					
YES (by law, but no examples of CL)	Legal action ➤ before an ordinary court; ➤ mainly, seeking annulment ➤ in addition, possible claim for compensation/prohibition on performance/interim measures.	<u><i>Lex specialis</i></u> (application for a review of compliance with the conditions of the NPwPP). ¹⁶³	Demonstrate: ¹⁶⁴ ➤ a past or present interest in obtaining the contract ➤ actual or potential harm (interest harmed). ➤ Same admissibility conditions as non-contractual liability.	Possibility of: ➤ cancelling the contract (FOR not respecting the conditions for using an NPwPP); ➤ compensation.	
	Applications for interim measures (brought concurrently with an action for annulment). ¹⁶⁵	<u><i>Lex generalis</i></u> with respect to PP procedures. ¹⁶⁶	➤ If harm.	➤ Suspend performance of the contract or procurement procedure until a final decision has been reached on the substantive issues).	
		<u><i>Lex generalis</i></u> with respect to PP procedures. ¹⁶⁷	➤ Where harm is difficult to remedy.	➤ Adopt interim rules to prevent causing harm which is difficult to remedy.	

¹⁶³ [Zakon o pravnem varstvu v postopkih javnega naročanja \(Law on the legal protection in public procurement procedures\)](#), Uradni list Republike Slovenije, No 43/11, 60/11 – ZTP-D, 63/13, 90/14 – ZDU-11, 60/17 and 72/19 (the 'ZPVPJN'), Article 42 and Article 43(1)(4).

¹⁶⁴ See, Matas, Sašo e.a., Zakon o pravnem varstvu v postopkih javnega naročanja (ZPVPJN) s komentarjem, Založba Uradni list, 2018, p. 203. Article 42(1) of the ZPVPJN.

¹⁶⁵ See, Matas, Sašo e.a., Zakon o pravnem varstvu v postopkih javnega naročanja (ZPVPJN) s komentarjem, Založba Uradni list, 2018, p. 211.

¹⁶⁶ Article 43(1) and (2) of the ZPVPJN.

¹⁶⁷ Article 43(3) of the ZPVPJN.

	Non-contractual liability actions <ul style="list-style-type: none"> ➤ claim separate to judicial review; ➤ by the ordinary courts. 	<u>Lex generalis in a PP case when claiming compensation.</u> ¹⁶⁸	Objective liability conditions ¹⁶⁹ : <ul style="list-style-type: none"> ➤ illegality; ➤ harm; ➤ causal link. 	➤ Compensation.	
--	--	---	--	-----------------	--

¹⁶⁸ Article 49 of the ZPVPJN.

¹⁶⁹ Strohsack, Boris, Odškodninsko pravo in druge neposlovne obveznosti (Obligacijska razmerja II), Tretja spremenjena in dopolnjena izdaja, Časopisna založba Uradni list Republike Slovenije, Ljubljana, 1996, p. 24.