



Državne komisije za kontrolu
postupaka javne nabave

PRAVNA ZAŠTITA U JAVNOJ NABAVI





DAMAGES IN EU PUBLIC PROCUREMENT LAW



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- The law
- The case law
- (Further) issues
- Conclusions





Directive 89/665/EEC: The main rule.

- Whereas it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement; (Rec.)
- Article 2(1)(c): MS shall ensure that review procedures include powers to award damages to persons harmed by an infringement.



Choices **specifically** left to MS (Art. 2)

- 5. where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.
- 6. Except where 5 is chosen, after the conclusion of a contract following its award, remedies be limited to awarding damages.

The EU Constitution

- Article 19(1) TEU: MS shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.
- Article 47 EU Charter (Right to an effective remedy and to a fair trial): Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy.

On effective JP as a matter of EU law general principle

- Damages are essential component of effective judicial protection (*Francovich, Brasserie du Pêcheure*)
 - 3 conditions: breach of right, MSB, causal link & damages
 - Residual procedural autonomy of the MS
 - E.g. Case C-45/15 P, *Safa Nicu Sepahan Co*,
 1. obligation to provide info or evidence for restrictive measures was already apparent from well-established case-law
 2. therefore breach over a period of almost 3 years amounts to MSB of a rule of law intended to confer rights on individuals.

MSB?

- while certain objective and subjective factors connected with the concept of 'fault' under nat. law may be relevant, for the purpose of determining whether or not a given breach of EU law is sufficiently serious, the obligation to make reparation for loss or damage **cannot** depend upon a condition based on any concept of fault going beyond that of a MSB of EU law

(Case C-571/16, *Kantarev*, par. 127)



Procedural autonomy in PP

- Article 2(1)(c) clearly indicates that MS must make provision for the possibility of awarding damages, but
- “contains no detailed statement either as to the conditions under which an awarding authority may be held liable or as to the determination of the amount of the damages which it may be ordered to pay”.

(C-568/08 - Combinatie Spijker Infrabouw para 86)

PP: FAULT? MSB?

1: CASE C-275/03, *COMMISSION V PORTUGAL*

- Damages conditioned upon proof of fault;
- This rule «ne saurait néanmoins être considérée comme un système de protection juridictionnelle **adéquat** dans la mesure où elle exige la preuve d'une faute ou d'un dol commis par les agents» publics;
- ???



PP: FAULT? MSB?

2. C-314/09 - Strabag and Others

- damages can constitute a procedural alternative which is compatible with the principle of effectiveness **only where** they are no more dependent than the other legal remedies provided for in Article 2(1) of Directive 89/665 on a finding that the contracting authority is at fault
- it makes little difference that fault is presumed



PP: FAULT? MSB?

3. C-568/08 - Combinatie Spijker Infrabouw

- Directive 89/665 gives concrete expression to the principle of MS liability for loss and damage as a result of breaches of EU law
- right to reparation subject to 3 *Brasserie du Pêcheur* conditions (incl MSB)



PP: FAULT? MSB?

4. Case E-16/16 - *Fosen-Linjen AS* (EFTA COURT)

- Based on effectiveness and *Strabag*
- Specifically referring to damages as ‘procedural alternative’ to annulment
- No need for MSB

Case law in 2 MS

- UK/England: SC follows *Spijker in Nuclear Decommissioning Authority v ATK Energy EU Ltd (formerly Energy Solutions EU Ltd)* [2017 UKSC 34]
- IT: no need for fault or MSB, based on *Strabag*, domestic provision cast over Art. 2(6)Dir. 89/665/EEC and strong preference for ineffectiveness (e.g. Cons. Stato Sez. V, 31-10-2016, n. 4562, *Arcobaleno Costruzioni*; Cons. Stato Sez. V, 31-12-2014, n. 6450, *Soc. Strabag*)



A short list

- Causation
- Damages
- Procedural issues



CAUSATION

- Certainty v balance of probability
- Depends on stage of procurement process
- CA's residual discretion relevant?
- MIND burden of proof



DAMAGES

- Bidding costs
- Lost profit?
- Others?
- **MINDMIND** burden of proof

Procedural Issues

- MS residual procedural autonomy
 1. C-300/17 - *Hochtief AG*
- BUT:
 1. C-315/01 - *GAT*
 2. C-166/14 - *MedEval*

Preclusions:

C-300/17 - *Hochtief AG*

- EU law not precluding a rule making a civil law damages claim for breach of PP rules subject to the condition that the infringement be definitively established by an arbitration committee or, in the context of JR of arbitration decision, by a court.
- EU law, incl 47 Charter, not precluding a rule restricting JR of arbitral decisions to the pleas raised before that committee.

Ex officio: Case C-315/01, *GAT*

EU law precludes the court from dismissing an application by a tenderer on the ground that, owing to the unlawfulness raised of its own motion, the award procedure was in any event unlawful and that the harm which the tenderer may have suffered would therefore have been caused even in the absence of the unlawfulness alleged by the tenderer



Deadlines: C-166/14 - *MedEval*

principle of effectiveness precludes national law which makes an action for damages subject to a prior finding that PP procedure was unlawful because of the lack of prior publication of a contract notice, where the action for a declaration of unlawfulness is subject to a six-month limitation period running on the day after the date of the award of the public contract in question, irrespective of whether or not the applicant was in a position to know of the unlawfulness

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CONCLUSION

GUIDANCE BADLY NEEDED!





HVALA!

Gracids
MERCİ
ARIGATO
thank you

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ARIGATO
thank you