Editorial

*Fosen-Linjen*¹ has re-opened the chapter of reforming the Public Procurement Remedies Directive, a chapter which has been deliberately avoided by the EU Commission and the EU Member States, as the Remedies Directives has been left untouched during the recent reforms of the EU Public Procurement acquis. In the heart of potential reform agenda of the Remedies Directive, a test of authority needs to be solved in the sense of whether Member States liability for breach of EU law has any interplay with the specific rules on damages stipulated in the Remedies Directive.

The Remedies Directives² brought a decentralised dimension into the application of public procurement rules. The Remedies Directives suffered from serious shortcomings, in the sense that they did not provide for effective review procedures between the stages of contract award and contract conclusion respectively. That gave rise to direct awards and the so-called race to sign the relevant contract to assume immunity from any redress based on the *pacta sunt servanta* principle. In addition, at both pre-contractual and post-contractual stages there were no effective deterrents for breach of either procedural or substantive public procurement laws. The amending Remedies Directive³ is predominately based on the previous instruments but it introduced new themes such as a clear divide between pre-contractual and post-contractual stages, a balance between effective review of public contracts and need of efficient public procurement, a strict standstill requirement for contract conclusion, including direct awards by contracting authorities, extensive communication and monitoring requirements and a substantial refocus of the corrective mechanism. The amending Remedies Directive extended its coverage to jurisdictions in the countries of the EEA.

The European Court of Justice (ECJ) has used three principles to address issues relevant to the traction of the Remedies Directives and the judicial review of public contracts; on the one hand, the principle of procedural autonomy and on the other hand the principle of effectiveness and the principle of procedural equality.

The principle of procedural autonomy affords discretion to Member States to organise public procurement review procedures in alignment with national review procedures. The principle of effectiveness of review procedures under the Remedies Directive covers the ability of aggrieved tenderers to set aside decisions of contracting authorities taken unlawfully or to remove discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure. Set aside procedures are deemed as legitimate conditional remedy for the award of damages. The principle of procedural equality obliges Member States to treat public procurement review procedures equally to domestic review procedures.

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1 Judgment of the EFTA Court of 31 October 2017 in *Fosen-Linjen AS v AtB AS* (E-16/16) ('*Fosen-Linjen I*'). Judgment of the EFTA Court of 1 August 2019 in *Fosen-Linjen AS, supported by Næringslivets Hovedorganisasjon (NHO) v AtB AS* (E-7/18) ('*Fosen-Linjen II*').

2 See the public sector Remedies Directive 89/665: Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L 395/33, and the utilities Remedies Directive 92/13: Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1992] OJ L 76/14.

3 See 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 [2007] OJ L 335/31.

The public procurement Directives do not require the provision of a remedy for the award of damages when there is a breach of a directly effective provision. The reasons for that absence vary: in some cases a national court has held that the authority in breach of EU law did not owe any obligation directly to the plaintiff or that the plaintiff's losses were the result of foreseeable economic risk; in others, the award of damages was seen as an unacceptable restraint on the freedom of authorities to enact legislative measures or administrative rules in good faith, pursuant to their general duty to safeguard the public interest. Damages in public procurement may be available as a consequence of breaches of provisions of national law which make a national authority liable to compensate for the breach of its obligations. However, in the context of the Remedies Directives, a pattern has emerged where a complainant seeking damages must prove that the contracting authority has committed an infringement of the procurement rules and as a direct result and consequence of that infringement, he or she has suffered harm or loss. In some legal orders, the complainant does not have to prove a breach of procurement rules on the part of the contracting authority, if a previous set aside or annulment judgment of an administrative court or tribunal had declared the award decision unlawful. In most Member States, the burden of proof concerning damages is set at a relatively high level. The mere presence of a breach of procurement procedures, which could be proved by the applicant or through a previous set aside or annulment order of the award decision of a contracting authority, would be a sufficient ground to trigger the award of damages relating to bid costs and costs necessary for the preparation and submission of a tender. However, the recovery of damages relating to losses of profit is subject to the complainant proving that, in the absence of the alleged breach, he would have been awarded the contract.⁴

Anyone who has suffered harm caused by an infringement of Union procurement law shall be able to claim full compensation for that harm. Full compensation shall place anyone who has suffered harm in the position in which that person would have been, had the infringement not been committed. It shall consequently take account of compensation for actual loss and for loss of profit, and payment of interest from the time the harm occurred until the compensation in respect of that harm has in fact been paid. The Member States shall ensure that an injured tenderer can in effect exercise the right to be awarded damages⁵.

Member States may provide that where damages are claimed on the grounds that a decision was taken illegally, the contested decision must first be set aside by a body having the necessary powers. Excepting the cases where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract in accordance with Article 1(5)(3) or Article 2a-2f, the powers of the body responsible for review procedures shall be limited to awarding damages to any person harmed by an infringement⁶.

Article 2(1)(c) of the Remedies Directive stipulates that the Member States shall ensure that the measures taken concerning the review procedures include provisions granting powers to award damages to persons harmed by an infringement. Moreover, Article 2(e) states that the award of damages does not constitute an appropriate penalty for the purposes of replacing ineffectiveness with an alternative sanction.

4 The public sector Remedies Directive 89/665 is silent on this issue, whereas Directive 92/13 provides some clarification as regards the recovery of bid costs as against utilities. Directive 92/13 provides that where an aggrieved tenderer establishes that an infringement deprived him of a real chance of winning the contract, he is entitled (at least) to damages covering his bid costs.

5 See to that effect Case C-271/91 *Marshall* [1993] I-4367, paras 24-32, and Case C-568/08 *Combinatie Spijker*, Opinion of AG Villalón [2010] I-12655, points 109-111.

6 Directive 2007/66/EC, fn 41, art 2(6).

The Remedies Directive must be interpreted as precluding national legislation, which makes the right to damages for an infringement of public procurement law conditional on the culpable character, including where the application of that legislation rests on a presumption that the contracting authority is at fault and on the fact that the latter cannot rely on a lack of individual abilities, hence on the defence that it cannot be held liable for the alleged infringement⁷.

A court responsible for hearing review procedures connected with an action for damages is not precluded from raising of its own motion the unlawfulness of a decision of the contracting authority other than the one contested by the complainant. In this case the court may dismiss the application for damages, because the award procedure was in any event unlawful and the harm, which the tenderer may have suffered, would have been caused even in the absence of the unlawfulness alleged by the tenderer⁸.

It is unclear from the wording of the Remedies Directives, whether damages are available for all violations of the Union public procurement rules or only for certain serious violations that entail the ineffectiveness of the contract. In *Alcatel* it has been established that the Member States are not allowed to restrict the powers of the review bodies to merely awarding damages, but decisions taken by the contracting authority during the public award procedure that occur before the conclusion of the contract must be open to review and if necessary, the contract must be set aside regardless of the possibility to obtain damages⁹.

Furthermore, the principle of effectiveness requires that the time limits with regard to an application for a declaration of illegality having the effect of dissolving the contract made in preparation for bringing an action for damages should not start to run before the plaintiff was aware or ought to have been aware of the injury¹⁰. Moreover, where no alternative methods of achieving knowledge about the occurrence of an injury and subsequently of producing the supporting evidence are available to a potential claimant for damages, a refusal to grant him access to the procurement documents renders nugatory the right to compensation, which they derive from Union law¹¹.

Article 2(1)(c) in both Remedies Directives provides for the award of damages to persons harmed by an infringement of public procurement law. The purpose behind this provision is to mobilise interested stakeholders in order to supervise the application of the EU public procurement Directives. However, the most important issue emerging from actions for damages in the legal systems of Member States relates to the burden of proof on the part of the aggrieved tenderer seeking damages. In most legal orders, the recovery of damages relating to losses of profit is subject to the complainant proving that, in the absence of the alleged breach, he would have been awarded the contract. The public sector Remedies Directive 89/665/EC is silent on this issue, whereas Directive 92/13/EC provides some clarification as regards the recovery of bid costs as against utilities. Directive 92/13/EC provides that where an aggrieved tenderer establishes that an infringement deprived him of a real chance of winning the contract, he is entitled (at least) to damages covering his bid costs. General principles and relevant case law in a number of Member States suggest that this real chance test would apply more generally to any claim for damages under either Remedies Directive.

7 Case C-314/09 *Strabag and Others* [2010] I-0000, para 45.

8 Case C-4/03 *GAT* [2006] I-06509, fn 11, para 56.

9 Case C-81/98 *Alcatel Austria AG and Others* [1999] I-07671, fn 10, para 43.

10 Case C-454/06 *APA Austria Presse* [2008] I-04401, Opinion of AG Kokott, point 167.

11 By analogy, Case C-536/11 *Donau Chemie* [2013] I-00000, para 32.

Award of damages in public procurement is limited to persons economically harmed by an infringement on the part of the contracting authority. After the conclusion of the contract, damages represent the only remedy available. The amending Remedies Directive¹² has introduced contract ineffectiveness as a new type of remedy to restore equilibrium after the conclusion of an illegally awarded public contract.

The Remedies Directive contains no further requirements, as to the burden of proof nor the method of calculation of damages. The national legislator is free to decide; it must however comply with the principle of equivalence and the principle of effectiveness. The degree of the effective award of damages in breach of public procurement law varies enormously within the legal orders of the Member States. Some national courts may award punitive damages on the grounds of likelihood of harm; others, in order to award damages for breaches of public procurement law, require proof that the contract would have been awarded to the claimant. Difficulties also arise in cases where no bid was submitted or in cases of direct awards, where contracting authorities failed to publish a contract notice and no tender procedures were carried out nor any award criteria were stipulated.

Commission v Germany,¹³ recognised that the principle *pacta sunt servanda* and the prospect of litigation for damages for termination of illegally awarded contracts cannot act as a defence of contracting authorities. German municipalities concluded service contracts for a term of at least 30 years without publishing notices in the Official Journal of the EU. The conclusion of the contracts and the threat of damages arising from potential termination of the contracts were used as arguments for not rescinding illegally awarded contracts. Germany argued that any breach of public procurement law was cured by the conclusion of the relevant contracts and after that time, there is no actual breach. The Court held that the effects of unlawful contract awards go beyond the conclusion of the contract because of its long duration and any breach of obligations under the public procurement Directives and EU law in general remain as long as the unlawfully concluded contract is valid.

In *Wall v Frankfurt*,¹⁴ the Court held that the principles of equal treatment and non-discrimination and the consequent obligation of transparency do not require the national authorities to terminate a contract or grant a restraining order in every case of an alleged breach of that obligation in connection with the award of service concessions. However, it is for the national law to regulate the legal procedures for safeguarding the rights which individuals derive from the transparency obligation in such a way that those procedures, provided these procedures are no less favourable than similar domestic procedures according to the principle of equivalence and they do not make the exercise of those rights practically impossible or excessively difficult according to the principle of effectiveness.

In *Commission v Portugal*,¹⁵ the conditionality of procedures related to the award of damages upon proof of fraud or fault on the part of the contracting authority was found to contravene the Remedies Directives. Portuguese law made the award of damages to persons harmed by a breach of EU procurement law conditional on proof of fault or fraud conditions which substantially reduced the likelihood of aggrieved tenderers obtaining damages.

In *Aktor ATE v ESR*,¹⁶ the ECJ expanded *de lege ferenda* the coverage of the Remedies Directives to bodies which are not contracting authorities but their decisions are capable

12 See Directive 2007/66/EC.

13 See Joined Cases C-20/00 and C-28/01 *Commission v Germany* [2003] ECR I-3609.

14 See Case C-91/08 *Wall AG v City of Frankfurt* [2010] ECR I-2815.

15 See Case C-275/03 *Commission v Portugal*, and Case C-70/06 *Commission v Portugal* [2004] ECR I-0000.

16 See Case C-145/08 *Club Hotel Loutraki AE and Others v Ethnico Symvoulío Radiotileorasis and Ypourgos Epikrateias*, and Case C-149/08 *Aktor Anonymi Techniki Etaireia (Aktor ATE) v Ethnico Symvoulío Radiotileorasis* [2010] ECR I-0000.

of having a certain effect on the outcome of a procurement procedure. The Court found that the national law did not comply with principles of equivalence and effectiveness, as it rendered impossible to seek annulment of a decision and to obtain compensation for any damage incurred, whereas this was not the case in other areas by virtue of national law applicable to damages incurred by virtue of unlawful acts of public authorities. As a result, those bodies should be deemed as contracting authorities, by applying the functionality test, and their decisions or acts in relation to public procurement procedures must be subject to review procedures to satisfy the effectiveness principle of the Remedies Directives. The Court reiterated that in the absence of EU rules governing damages, it is for each Member State to designate the courts having jurisdiction and to lay down detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law as long as they are not less favourable than those governing similar domestic actions in accordance with the principle of equivalence.

The Remedies Directive is ripe for reform to take into consideration the instances of judicial activism in the field of redress for public contract awards and align its traction as legal instrument with the newly enacted substantive EU public procurement Directives. It is with pleasure to welcome academic discourse on the issues *Fosen-Linjen* has brought upon EU Public Procurement law.

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