After *Fosen-Linjen*: Rethinking the Norwegian approach to damages for breach of public procurement law?

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Fosen-Linjen as an opportunity to rethink?

- The law before *Fosen-Linjen*
  - The criteria for compensation for loss of profit ("positive contract interest") left entirely to the courts (i.e. to the Supreme Court)
    - Essentially 'only' two hurdles: 'substantial errors' [≈ 'sufficiently serious breach'] and qualified preponderance of evidence that the aggrieved tenderer would have been awarded the contract
    - An aggrieved tenderer is not required to run to the courts in an attempt to prevent the signing of the contract (≠ Swedish law)
  - Both these hurdles have been lowered by (some of) the Courts of appeals (without the Supreme Court weighting in)
    - E.g. a tendency to regard any breach of 'fundamental principles' and any error that wrongfully rejects a tenderer as 'substantial'
    - Reversal of the burden of proof (and return to mere preponderance of evidence) in cases where the contracting authority argues that it would not have awarded the contract to the claimant in any event

The law before Fosen-Linjen (cont.)

- The practical consequences:
  - Damages claims rather than interim measures as the preferred remedy
    - Related legislative problem: Not possible to obtain an interim measure from the courts after the contract has been signed (Public Procurement Act 2016 section 9)
  - Numerous claims for compensation for loss of profit
  - Quite a few successful ones (but also many unsuccessful)
    - In the successful cases: Assessment of the loss based on 'mere' preponderance of evidence (≠ case-law of the ECJ and the GC)
      - Several very substantial awards
  - Norway stands out as one of the most 'damages-friendly' jurisdiction in the whole EEA
    - This invites even more litigation, even though damages cases are costly for the parties (and resource-draining for the courts)

→ Need for a rethink?

Fosen-Linjen as an opportunity to rethink?

- If the Supreme Court accepts that a simple breach of public procurement law is in itself sufficient to trigger the liability of contracting authorities, it will have to address the questions of contributory negligence, causation, assessment of harm etc.
  - At least if it wants to keep the weighing of the interests of tenderers and contracting authorities established in its earlier case-law (*Nucleus, SB Transport, Trafikk & Anlegg)*
- Even if the Supreme Court eventally rejects the EFTA Court's view, it should still seize the opportunity to address these questions
    - [Will the Supreme Court follow the EFTA Court?]
      - The self-imposed 'significant weight'-problem…

The EFTA Court on the requirement of causation

89 In the *absence of specific EEA provisions on the requirement of causation* it is for the legal order of each EEA State to lay down the respective conditions in this respect, which are subject to the principles of equivalence and effectiveness. […]

91 It is a prerequisite for the fulfilment of the *requirement of a direct causal link* that the aggrieved tenderer has suffered an actual loss of profits. Such a loss could not exist where the aggrieved tenderer had no *valid claim to the contract*.

92 … requiring that a tenderer must provide proof with «clear, that is, qualified preponderance» that the tenderer would have been awarded the contract had public procurement law not been breached, does not by itself fail the test of effectiveness.

The EFTA Court on the requirement of causation

- This hands-off approach is difficult to fit with the Court's reasoning concerning strict liability:
  - 78 … A requirement that only a breach of a certain gravity may give rise to damages could also run contrary to the objective of creating equal conditions for the remedies available in the context of public procurement. Depending on the circumstances, a breach of the same provision on EEA public procurement could lead to liability in one EEA State while not giving rise to damages in another EEA State.
    - Doing away with the "sufficiently serious"-requirement whilst leaving causation to national law may *increase* rather than decrease the differences between the EEA States…
- But the problem is the reasoning concerning strict liability, not so much the approach taken to the requirement of causation
  - Even though the State liability approach of the ECJ in *Combinatie* suggests that the requirement of causation is *not* left to national law, this matters little in practice

But what about the burden of proof?

108 The Remedies Directive does not govern the burden of proof in an aggrieved tenderer's claim for damages. It is therefore, in principle, for the legal order of each EEA State to determine the rules on the burden of proof, subject to the principles of equivalence and effectiveness.

109 It must however be recalled that a decision to cancel an award procedure must be open to judicial review and comply with EEA law. It is for the contracting authority to provide reasons for its decision to withdraw the procedure in order to enable effective judicial review of that decision. […] Thus, *where a contracting authority invokes an error as a defence against a claim for damages because it led it to cancel the award procedure, it must bear the burden of proof for the existence of that error and justify that the decision to withdraw complies with EEA law*.

But what about the burden of proof? (cont.)

- Who bears the burden of proof in cases where the contracting authority argues that it would not have awarded the contract to the claimant in any event?
  - Practical example: the award procedure would have been cancelled if the authority knew that the winning bid had to be rejected (e.g. because the claimants price was too high)
- The Supreme Court in *SB Transport*: Burden of proof remains with the claimant (and the standard of proof remains qualified preponderance of evidence)
  - But not always followed up by lower courts…
- Is the EFTA Court suggesting that the principle of effectiveness hinders this?
- Case-law of the EU Courts concerning the liability of EU institutions suggests that the Supreme Court's view is OK
  - But note the Danish Supreme Court in UfR 2012 p. 2952H

Some suggestions for the future – Norway

- An aggrieved tenderer should be required to run to the courts in an attempt to prevent the signing of the contract (= Swedish law)
  - Can be introduced by the Supreme Court under the heading 'contributory negligence'
  - Or, preferably, by the legislator as prerequisite for a claim for compensation for loss of profit
- A court faced with an application for an interim measure to prevent the signing of the contract should always have to rule on the alleged breach of the public procurement rules
  - Requires legislative action
- The possibility to grant interim measures should remain even after the contract has been signed
  - Requires legislative action
- The standard of proof for the assessment of the lost profit should be reconsidered (= ECJ and GC case-law?)
  - Can be done by the Supreme Court (or the legislator)

Some suggestions for the future – the EU

- The elephant in the room: the EU institutions liability for losses caused by breaches of the EU's internal procurement rules
  - The link established in *Brasserie* and in *Bergaderm*:
    - 'the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage'
  - Settled case-law that the EU institutions will only be liable if they have committed a 'sufficiently serious' breach of EU procurement rules, and the claimant adduces 'conclusive proof' as to the existence and extent of the alleged loss of profit and a 'sufficiently direct causal nexus' between the breach and the loss
- Possible for the EU legislator to neglect this logic and enact a stricter liability regime for the member states, but difficult to defend as a matter of legal politics ('double standards')
- Need to rethink the liability of the EU institutions?

“The discussions we have had in the Court of Justice on various concepts of the law of damages verifies that in this area one can easily ‘agree’ on different matters based on a very confused discussion about what to compensate, for example indirect damage. Everybody talks based on their own premises and the confusion becomes total.”

Leif Sevón (1999)

Does the ECJ (and the EFTA Court) understand the methodology of comparative legal research?

- The only meaningful way to compare the approach to damages for breach of public procurement law in different EEA States is through a functional approach
- Contracting authorities' liability for loss of profit can be limited in very different ways
  - Obligation to attack the decision to award the contract (Sweden)
  - Standard of proof: Loss of profit (almost) never 'certain' (ECJ/GC)
  - Liability threshold: 'Sufficiently serious breach' (ECJ/GC)
  - 'Direct' causal link (ECJ/GC)
- Harmonizing only one criteria – e.g. the liability threshold – may well increase rather than decrease the difference between the EEA States
- The ECJ's piecemeal application of the principle of effectiveness is misguided when applied to the national law of damages

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