



Reports of Cases

OPINION OF ADVOCATE GENERAL COLLINS

delivered on 7 December 2023¹

Case C-547/22

INGSTEEL spol. s. r. o.

v

Úrad pre verejné obstarávanie

(Request for a preliminary ruling from the Okresný súd Bratislava II (District Court, Bratislava II, Slovakia))

(Reference for a preliminary ruling – Public procurement – Review procedures – Directive 89/665/EEC – Non-contractual liability of Member States – Action for damages for breach of EU law by an unsuccessful tenderer – Quantification – Loss of profit – Loss of opportunity)

I. Introduction

1. Does EU law require Member States to admit a claim in damages for loss of opportunity by a tenderer unlawfully excluded from a procedure for the award of a public contract where that procedure has concluded and a contract entered into with the successful tenderer? The answer to that question requires the Court of Justice to determine whether the laws of the Member States regulate the award of damages to which Article 2(1)(c) of 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 contracts² refers. If so, the Court must examine the consequences of the requirement that those laws must comply with the principle of effectiveness.

¹ Original language: English.

² OJ 1989 L 395, p. 33, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) and by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 (OJ 2014 L 94, p. 1).

II. Legal framework

A. European Union law

2. The preamble of Directive 89/665 contains the following text:

‘Whereas in certain Member States the absence of effective remedies or inadequacy of existing remedies deter Community undertakings from submitting tenders in the Member State in which the contracting authority is established; whereas, therefore, the Member States concerned must remedy this situation;

...

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.’

3. Under the fourth paragraph of Article 1(1) of Directive 89/665:

‘Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2014/24/EU or Directive 2014/23/EU, decisions taken by contracting authorities may be reviewed effectively ...’

4. Article 1(3) of Directive 89/665 provides:

‘Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.’

5. Under Article 2(1) of Directive 89/665:

‘Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

...

(c) award damages to persons harmed by an infringement.’

B. Slovak law

6. Paragraph 3(1)(a) of Zákon č. 514/2003 Z. z. o zodpovednosti za škodu spôsobenú pri výkone verejnej moci (Law No 514/2003 on liability for damage caused in the exercise of public authority; ‘Law No 514/2003’) provides that the State is liable for damage caused by public authorities as a result of an unlawful decision.

7. Under Paragraph 5(1) of Law No 514/2003, a party to a procedure which suffered damage as a result of an unlawful decision issued in that procedure has a right to compensation.

8. Paragraph 17(1) of Law No 514/2003 establishes that compensation shall be awarded for actual damage and loss of profits, unless otherwise stipulated by special provisions.

9. Paragraph 442(1) of Zákon č. 40/1964 Zb. Občiansky zákonník (Law No 40/1964 on the Civil Code; ‘the Civil Code’) provides that, in actions for damages, compensation shall be awarded for actual damage and loss of profits.

10. Zákon č. 25/2006 Z. z. o verejnom obstarávaní (Law No 25/2006 on public procurement) does not appear to contain any specific provisions that govern actions for damages arising from the award of public contracts.

III. The dispute in the main proceedings, the request for a preliminary ruling and the procedure before the Court

11. In 2013, the Slovak Football Federation published a call for tenders for the award of a contract for the construction, restructuring and modernisation of football stadiums. INGSTEEL spol s.r.o. (‘Ingsteel’), an undertaking active in the building sector, participated in that award procedure. The Slovak Football Federation excluded Ingsteel from that procedure on the ground that it failed to satisfy the economic and financial requirements in the call for tenders. Ingsteel brought an action to challenge the legality of that decision, in the course of which the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) sought a reference for a preliminary ruling from the Court of Justice.

12. In its judgment of 13 July 2017 in *INGSTEEL and Metrostav* (C-76/16, EU:C:2017:549), the Court held that Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts³ must be interpreted as meaning that, where a call for tenders requires the provision of a statement from a bank undertaking to grant credit to a tenderer and the banks approached by that tenderer refuse to provide such a statement, that tenderer may be permitted to prove its economic and financial standing by other appropriate means. In view of the Court’s judgment, the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) concluded that the decision to exclude Ingsteel was unlawful and annulled it. It then referred the case to the Úrad pre verejné obstarávanie (Public Procurement Regulatory Authority, Slovakia) to take appropriate measures.

13. Since the procedure for the award of the public contract had concluded and the contracting authority had entered into a framework agreement with the successful tenderer, Ingsteel brought an action against the Úrad pre verejné obstarávanie (Public Procurement Regulatory Authority) in which it claimed, inter alia, damages for the loss of opportunity to win the tender. It argued that loss of opportunity and loss of profit are two different heads of claim. It appears that, under Slovak law, the standard of proof to show that damage is sufficiently foreseeable is lower with respect to claims for loss of opportunity than with respect to claims for loss of profit.

14. The Úrad pre verejné obstarávanie (Public Procurement Regulatory Authority) is of the view that Ingsteel’s claim for damages is hypothetical. There was no guarantee that Ingsteel would have been selected as the successful tenderer or that, had it been selected, the contracting authority would have concluded a contract with it.

³ OJ 2004 L 134, p. 114.

15. The Okresný súd Bratislava II (District Court, Bratislava II, Slovakia) wonders whether Directive 89/665 requires it to admit a claim for an award of damages for loss of opportunity by a tenderer where a court has set aside a decision to exclude it from a procedure that led to the award of a public contract and the contracting authority concluded a contract with another tenderer. It decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) Is the practice of a national court hearing a dispute involving a claim for compensation for damage caused to a tenderer who was unlawfully excluded from a public procurement procedure, pursuant to which compensation for loss of opportunity is denied, compatible with Article 2(1)(c), read in conjunction with Article 2(6) and (7), of [Directive 89/665]?’
- (2) Is the practice of a national court hearing a dispute involving a claim for compensation for damage caused to a tenderer who was unlawfully excluded from a public procurement procedure, pursuant to which a claim for lost profits caused by the loss of opportunity to participate in a public contract is not part of the claim for compensation, compatible with Article 2(1)(c), read in conjunction with Article 2(6) and (7), of [Directive 89/665]?’

16. The Úrad pre verejné obstarávanie (Public Procurement Regulatory Authority), the Czech, French and Slovak Governments and the European Commission submitted written observations. At the hearing of 20 September 2023, the Czech and Austrian Governments and the Commission presented oral argument and replied to the Court’s questions.

IV. Assessment

A. Admissibility

17. The Úrad pre verejné obstarávanie (Public Procurement Regulatory Authority) presents two reasons as to why the Court should declare the request for a preliminary ruling inadmissible. First, since Ingsteel participated in the award procedure jointly with Metrostav a.s., which is not a party to the proceedings before the referring court, it does not have standing to bring a damages claim. Second, since Ingsteel originally claimed damages for loss of profit, not loss of opportunity, it cannot make that claim at this stage of the proceedings before the referring court.

18. The Slovak Government also has doubts as to the admissibility of the questions in so far as the referring court appears to ask the Court of Justice whether Ingsteel’s damages claim ought to be allowed. Both the Úrad pre verejné obstarávanie (Public Procurement Regulatory Authority) and the Slovak Government point out that it is for the referring court alone to adjudicate on the merits of Ingsteel’s claim.

19. According to settled case-law, in the context of the cooperation for which Article 267 TFEU provides, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling to enable it to deliver judgment and the relevance of the questions that it submits to the Court of Justice. Where questions submitted by a national court concern the interpretation of EU law, the Court is thus, in principle, bound to give a ruling.⁴ The Court of Justice may refuse to rule on a question referred by

⁴ See judgment of 13 January 2022, *Regione Puglia* (C-110/20, EU:C:2022:5, paragraph 23 and the case-law cited).

a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to enable it to give a useful answer to the questions submitted.⁵

20. The referring court's questions seek an interpretation of Article 2(1)(c) of Directive 89/665. In the light of the facts of the case, the issues the order for reference raises as regards the availability of a damages action for a loss of opportunity to enter into a public contract do not appear to be hypothetical. It is a matter for the referring court to determine whether, as a matter of national law, Ingsteel has standing to bring an action for damages for loss of opportunity and what consequences, if any, may flow from the manner in which it prosecuted its claim. For those reasons, I advise the Court to dismiss the objections taken to the admissibility of the questions referred.

B. Substance

1. The parties' observations

21. The Úrad pre verejné obstarávanie (Public Procurement Regulatory Authority) and the Austrian, Czech, French and Slovak Governments submit that it is for the internal legal order of each Member State to determine the criteria for the assessment of damages that flow from an infringement of EU law in a procedure leading to the award of a public contract. Those parties also accept that such national rules must comply with the principles of equivalence and effectiveness. Since Directive 89/665 provides for minimum harmonisation only, it contains no guidance on the criteria national courts are to take into account when they make that determination. It follows that Directive 89/665 does not oblige Member States to provide a remedy in damages for loss of an opportunity to obtain an award of a public contract.

22. The Czech Government suggests that the concept of damage under Directive 89/665 is not an autonomous concept of EU law. The French Government agrees with that suggestion. It submits that its approach is consistent with the case-law on Member State non-contractual liability for a breach of EU law, whereby the laws of each Member State determine the extent of compensation and the rules relating to the assessment of any loss or harm caused by such a breach.

23. The Úrad pre verejné obstarávanie (Public Procurement Regulatory Authority) agrees with Ingsteel that loss of profit and loss of opportunity are distinct concepts, the latter consisting in the loss of an opportunity to obtain a public contract.⁶ It submits that, as a matter of Slovak law, an unlawfully excluded tenderer that can show that it had a real and sufficiently high chance of obtaining a public contract may be awarded damages for the loss of that opportunity. In contrast, the Czech Government and the Slovak Government consider that loss of opportunity may be considered as a type of loss of profit. The main difference between the two concepts lies in the standard of proof required to establish the existence of damage and the compensation that may be awarded.

⁵ Ibid., paragraph 24 and the case-law cited.

⁶ See, to that effect, judgments of 21 May 2008, *Belfass v Council* (T-495/04, EU:T:2008:160, paragraph 124); of 20 September 2011, *Evropaïki Dynamiki v EIB* (T-461/08, EU:T:2011:494, paragraph 210); and of 28 February 2018, *Vakakis kai Synergates v Commission* (T-292/15, EU:T:2018:103, paragraph 187).

24. The Austrian, Czech and Slovak Governments argue that, although it may provide some guidance, the case-law on the European Union's non-contractual liability in the area of public procurement cannot be transposed to the application of Directive 89/665. While the EU Courts have, in some cases, awarded damages for loss of opportunity to tenderers that the EU institutions unlawfully excluded from award procedures, the EU Courts rejected such claims in most instances, holding that, in order to receive an award of damages, any loss of opportunity must be real and not hypothetical.

25. The Commission observes that although Article 2(1)(c) of Directive 89/665 requires Member States to provide for the award of damages to persons harmed by an infringement of the EU public procurement rules, it does not contain any detailed conditions as to how that requirement is to be satisfied. Since Directive 89/665 provides for minimum harmonisation, Member States remain free to afford a higher degree of protection to persons harmed by an infringement of the public procurement rules. It is for each Member State, in accordance with the principle of the procedural autonomy, to lay down detailed rules governing actions for safeguarding rights that individuals derive from EU law, subject to those rules being compliant with the principles of equivalence and effectiveness. Since Directive 89/665 seeks to ensure the existence of effective review procedures to guarantee respect for the principles underlying the public procurement rules and, ultimately, the internal market, the principle of effectiveness is central to the resolution of this reference.

26. According to the Commission, because the contracting authority entered into a framework contract with another tenderer, in the proceedings before the referring court it is no longer possible to correct the illegality that afflicted the award procedure. In those circumstances, an award of damages is the only effective remedy available to a tenderer who suffered loss as a consequence of that illegality. National laws that do not afford the possibility to claim damages for a loss of opportunity to obtain a contract caused by that illegality deprive Ingsteel of access to an effective remedy, which is contrary to Directive 89/665.

2. Analysis

27. The parties to the proceedings before the Court agree that the referring court's questions should receive a single answer. Since there is merit in that suggestion, I propose that the Court rephrase the referring court's questions as asking whether it is contrary to Article 2(1)(c) of Directive 89/665 for a national court to adopt a practice whereby a tenderer unlawfully excluded from a procedure for the award of a public contract governed by that directive is precluded from claiming damages for a loss of opportunity to obtain that contract. Although the referring court asks the Court to read Article 2(1)(c) of Directive 89/665 in conjunction with Article 2(6) and (7) thereof, the order for reference does not indicate what impact, if any, the latter provisions have for the resolution of the questions referred. Nor does the order for reference indicate whether the Slovak Republic exercised the option, in Article 2(6) of Directive 89/665, whereby a court must set aside an allegedly unlawful decision before an award of damages can be sought.⁷ Article 2(7) of Directive 89/665, which provides that national law determines the effects on a contract concluded subsequent to its award of the exercise of the powers Article 2(1) thereof refers to, appears to be of tangential relevance.⁸ None of the parties that made written or oral observations

⁷ It is apparent from the order for reference that the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) set aside the decision to exclude Ingsteel from the procedure to award the relevant public contract.

⁸ Save in the situations contemplated in Articles 2d, 2e and 2f of Directive 89/665, which have no bearing upon the present case: judgment of 11 September 2014, *Fastweb* (C-19/13, EU:C:2014:2194, paragraph 52). See also Opinion of Advocate General Campos Sánchez-Bordona in *INGSTEEL and Metrostav* (C-76/16, EU:C:2017:226, point 69).

before the Court referred to Article 2(6) or (7) of Directive 89/665 or made any argument by reference thereto. I am therefore of the view that the rephrased question loses none of its pertinence by the omission of those provisions.

28. In accordance with the Court's settled case-law, the need for a uniform application of EU law normally requires that, save where a provision of EU law describes a legal concept by reference to the laws of the Member States, that concept is to be given an independent and uniform interpretation. That interpretation is to be arrived at having regard to the text of the provision in question, the context in which it appears and the objective pursued by the legislation of which it forms part.⁹

29. It is important to point out that this approach does not apply in all cases. Here, several Member States submit that the concept of damage under Directive 89/665 is not an autonomous concept of EU law. I agree with that submission for the following reasons.

30. Article 2(1)(c) of Directive 89/665 makes it clear that Member States are required to ensure that review procedures include a power to award damages to persons harmed by an infringement. It does not describe what those damages consist of, nor does it offer any guidance as to how they might be assessed.¹⁰ It neither provides for the conditions by reference to which a contracting authority may be liable to pay damages nor indicates how that award may be calculated.¹¹

31. The context in which Article 2(1)(c) of Directive 89/665 appears includes its preamble, which states that it is for the Member States to rectify any absence or inadequacy in the remedies available in their legal systems. The fourth paragraph of Article 1(1) thereof provides that Member States shall take the measures necessary to ensure that contracting authorities' decisions are reviewed effectively. Article 1(3) of Directive 89/665 represents that Member States shall ensure the availability of review procedures under detailed rules that those States may establish. Those provisions demonstrate that Directive 89/665 establishes a system of minimum harmonisation whereby the Member States are responsible for the form and nature of the remedies that must be available in the context of a review of the award of public contracts.¹² The parties that submitted observations agree that the case-law supports that conclusion.¹³ Directive 89/665 therefore requires the Member States to provide certain remedies, which must be effective, but does not purport to define what those remedies are.¹⁴

32. As far as the objectives of Directive 89/665 are concerned, Article 1(1) of Directive 89/665, read in combination with the preamble thereof, indicates that that directive seeks to ensure the availability of effective procedures for the review of public procurement decisions. Persons

⁹ Judgment of 25 October 2018, *Anodiki Services EPE* (C-260/17, EU:C:2018:864, paragraph 25 and the case-law cited).

¹⁰ Opinion of Advocate General Cruz Villalón in *Combinatie Spijker Infrabouw v De Jonge Konstruktie and Others* (C-568/08, EU:C:2010:515, point 106).

¹¹ See, to that effect, judgment of 9 December 2010, *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others* (C-568/08, EU:C:2010:751, paragraph 86).

¹² See, to that effect, judgments of 21 October 2010, *Symvoulia Apochetefseon Lefkosias* (C-570/08, EU:C:2010:621, paragraph 37); of 26 March 2020, *Hungeod and Others* (C-496/18 and C-497/18, EU:C:2020:240, paragraph 73); and Opinion of Advocate General Bobek in *Marina del Mediterráneo and Others* (C-391/15, EU:C:2016:651, point 38).

¹³ See, to that effect, judgments of 30 September 2010, *Strabag and Others* (C-314/09, EU:C:2010:567, paragraph 33), and of 7 August 2018, *Hochtief* (C-300/17, EU:C:2018:635, paragraph 35).

¹⁴ Judgment of 18 June 2002, *HI* (C-92/00, EU:C:2002:379, paragraph 58). See also, by analogy, judgment of 11 July 1985, *Foreningen af Arbejdsledere i Danmark* (105/84, EU:C:1985:331, paragraph 26), where the Court found that a concept included in a directive effecting partial harmonisation could not constitute an autonomous concept of EU law because that directive did not intend to establish a uniform level of protection on the basis of common criteria.

affected by infringements of national rules implementing EU public procurement directives must have available effective remedies under national law so as to give tangible effect to the opening up to EU-wide competition of procedures for the award of public contracts.

33. It follows that the award of damages for the purposes of Directive 89/665 is not intended as an independent and uniform concept of EU law, but rather one that the laws of the Member States define. Directive 89/665 emphasises the result that that process is to attain, not the content of the rules to be adopted for that purpose, which will inevitably differ between the Member States. In that context, I observe that the EU legislature has refrained from amending Article 2(1) of Directive 89/665.¹⁵ In addition, the case-law has not sought to set out any detailed criteria to determine the existence of damage and its assessment in the context of breaches of the rules governing the award of public contracts.

34. In the absence of any provisions in EU law for that purpose, it is thus for the legal order of each Member State to determine the criteria by reference to which damage caused by an infringement of EU law in the procedures leading to the award of public contracts is to be assessed.¹⁶ As several of the parties to the present reference for a preliminary ruling have, in my view correctly, pointed out, those matters fall within the scope of the procedural autonomy of the Member States.¹⁷ It is well established that detailed procedural rules governing actions to safeguard EU law rights must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness).¹⁸

35. Two further considerations support the conclusion that the assessment of damages awards under Article 2(1)(c) of Directive 89/665 is to be addressed within the scope of the procedural autonomy of the Member States. First, that autonomy is a practical expression of the principle of subsidiarity in Article 5 TEU, according to which, in areas that do not fall within its exclusive competence, the European Union shall act only if and in so far as the Member States cannot achieve sufficiently the objectives of the proposed action. The second paragraph of Article 19(1) TEU, which states that Member States must provide remedies that ensure effective legal protection in the fields covered by Union law, implicitly acknowledges the relevance of that principle. Second, legal traditions, procedures and remedies can and do vary considerably between Member States. At the present stage of the development of EU law, it is difficult to envisage a homogeneous regime of remedies that would function equally effectively in all Member States in the field of public procurement law.¹⁹ It thus comes as no surprise to me that, as point 33 of the present Opinion observes, the EU legislature has, to date, not sought to design such a system.

¹⁵ See Directive 2007/66 and Directive 2014/23.

¹⁶ Judgment of 9 December 2010, *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others* (C-568/08, EU:C:2010:751, paragraph 90).

¹⁷ Judgment of 30 September 2010, *Strabag and Others* (C-314/09, EU:C:2010:567, paragraph 34).

¹⁸ Judgments of 9 December 2010, *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others* (C-568/08, EU:C:2010:751, paragraph 91 and the case-law cited), and of 26 November 2015, *MedEval* (C-166/14, EU:C:2015:779, paragraph 37).

¹⁹ That circumstance may in part explain why the rules on the award of public contracts in 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; 'the Financial Regulation') are not identical to those in Directive 89/665. See, to that effect, judgment of 23 May 2014, *European Dynamics Luxembourg v ECB* (T-553/11, EU:T:2014:275, paragraph 110), where the General Court held that the regime established by Directive 89/665 could not be transposed by analogy to awards of public contracts by the EU institutions.

36. In its written and oral observations, the Commission referred to the judgments of the EFTA Court in *Fosen-Linjen I*²⁰ and in *Fosen-Linjen II*,²¹ which examined the nature of the award of damages under Directive 89/665 in the context of a claim for loss of profit. The EFTA Court held that although the review procedures that Directive 89/665 requires ought to be as uniform as possible for all undertakings in the internal market, they are required to be neither homogeneous nor identical, since Directive 89/665 provides for minimum harmonisation.²² It observed that an award of damages has a threefold objective: (i) to compensate for losses suffered; (ii) to restore confidence in the effectiveness of the applicable legal framework; and (iii) to deter contracting authorities from acting illegally, thereby improving compliance.²³ Since Directive 89/665 does not lay down conditions for the award of damages, it is for the legal order of each EEA State, in principle, to determine criteria by reference to which harm caused by an infringement of the law on public contracts may be assessed.²⁴ In that context, the legal order of each EEA State must lay down rules, including those governing causation and the burden of proof.²⁵ Such national rules must always comply with the principles of equivalence and effectiveness.²⁶ Whilst it is preferable that breaches of public procurement law be corrected prior to entry into a public contract, in some cases an award of damages is the only remedy for such breaches.²⁷ For those reasons, although Directive 89/665 does not mention any specific heads of damage, the EFTA Court interpreted it as requiring EEA States to allow persons harmed by an infringement of public procurement law in the course of an award procedure to obtain damages for loss of profit.²⁸ Those judgments indicate that the principle of effectiveness may operate so as to prevent the laws of a Member State from excluding claims under certain heads of damage *in limine*.

37. Since the Court has held that Article 2(1)(c) of Directive 89/665 expresses the principle of liability for loss and damage caused to individuals as a result of breaches of EU law for which a Member State is responsible, which is inherent in the legal order of the European Union,²⁹ it is also necessary, as the French Government suggests in its written observations, to examine the Court's case-law on the general conditions under which Member States incur non-contractual liability for breaches of EU law.

38. Since the seminal judgment in *Francovich*, it is well established that individuals harmed by a breach of EU law by a Member State or one of its emanations have a right to reparation provided that they meet three conditions: (i) the rule of EU law infringed is intended to confer rights on those persons; (ii) the breach of that rule is sufficiently serious; and (iii) there is a direct causal link between the breach and the alleged loss or damage.³⁰ In that judgment, the Court also ruled

²⁰ Judgment of the EFTA Court of 31 October 2017, *Fosen-Linjen v AtB* (E-16/16, EFTA Court Report 2017, paragraph 90; 'the judgment in *Fosen-Linjen I*').

²¹ Judgment of the EFTA Court of 1 August 2019, *Fosen-Linjen v AtB* (E-7/18, EFTA Court Report 2019; 'the judgment in *Fosen-Linjen II*').

²² See, to that effect, judgments of the EFTA Court of 31 October 2017, *Fosen-Linjen v AtB* (E-16/16, EFTA Court Report 2017, paragraph 67) and of 1 August 2019, *Fosen-Linjen v AtB* (E-7/18, EFTA Court Report 2019, paragraph 109).

²³ Judgment of the EFTA Court of 31 October 2017, *Fosen-Linjen v AtB* (E-16/16, EFTA Court Report 2017, paragraph 76).

²⁴ Ibid. (paragraphs 69 and 70).

²⁵ See, to that effect, *ibid.* (paragraphs 89 and 108).

²⁶ Judgments of the EFTA Court of 31 October 2017, *Fosen-Linjen v AtB* (E-16/16, EFTA Court Report 2017, paragraph 70) and of 1 August 2019, *Fosen-Linjen v AtB* (E-7/18, EFTA Court Report 2019, paragraph 114).

²⁷ Judgment of the EFTA Court of 31 October 2017, *Fosen-Linjen v AtB* (E-16/16, EFTA Court Report 2017, paragraph 73).

²⁸ Judgments of the EFTA Court of 31 October 2017, *Fosen-Linjen v AtB* (E-16/16, EFTA Court Report 2017, paragraph 90) and of 1 August 2019, *Fosen-Linjen v AtB* (E-7/18, EFTA Court Report 2019, paragraphs 115 and 116).

²⁹ Judgment of 9 December 2010, *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others* (C-568/08, EU:C:2010:751, paragraph 87).

³⁰ Judgment of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428, paragraph 40; 'the judgment in *Francovich*') and judgment of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 51; 'the judgment in *Brasserie du pêcheur*').

that, although the right of individuals to obtain reparation is founded directly on EU law, it is by reference to national law rules on liability that a Member State makes reparation for the consequences of any loss and damage caused as a result of its breach.³¹ It is for the laws of the Member States to lay down the substantive and procedural conditions for the reparation of loss and damage, subject always to compliance with the principle of effectiveness.³²

39. In the judgment in *Brasserie du pêcheur*, the Court further examined the criteria that govern reparation.³³ It concluded that EU law imposes no specific criteria as to the various heads of damage that the referring courts had identified,³⁴ which are a matter for domestic law subject to compliance with the principles of equivalence and effectiveness.³⁵ It added that EU law does not accept the total exclusion of loss of profit as a head of damage, since such an exclusion would be contrary to the principle of effectiveness.³⁶ In another case involving Member States' non-contractual liability for breaches of EU law, Advocate General Léger suggested that recoverable damage may consist not only in loss of profit but also in loss of opportunity, provided that the latter is a sufficiently certain consequence of the alleged breach.³⁷ In the field of employment law, the Court has held that a right to claim damages for loss of opportunity may be adequate to nullify the consequences of a breach of EU law and consonant with the principle of effectiveness.³⁸ Those considerations demonstrate that the scope of the Member States' procedural autonomy is not limitless since the Court may lay down specific obligations to ensure that individuals harmed by an infringement of EU law obtain a minimum standard of protection.

³¹ Judgment of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428, paragraph 42). See also judgments of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 67), of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraph 58), and of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161, paragraph 123).

³² Judgment of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428, paragraph 43). See also, to that effect, judgment of 17 April 2007, *AGM-COS.MET* (C-470/03, EU:C:2007:213, paragraph 89), and Opinion of Advocate General Geelhoed in *GAT* (C-315/01, EU:C:2002:573, point 64).

³³ Judgment of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 81).

³⁴ The national court explicitly referred to expenses, loss of profit, loss of income and losses consequent on sales at an undervalue in that context (*ibid.*, paragraph 14).

³⁵ *Ibid.*, paragraphs 83, 84 and 88.

Academic literature on the non-contractual liability of Member States for breach of EU law appears to take the unanimous view that, while EU law establishes a right to reparation, the precise content of any remedy is a matter for Member State legal systems, subject to compliance with the principles of equivalence and effectiveness. It has also been observed that, by not seeking to define the concept of damage, the Court has left that matter over to national laws. See Van Gerven, W., 'Of rights, remedies and procedures', *Common Market Law Review*, Vol. 37, Issue 3, 2000, pp. 511 and 512. See also Christ, H., 'Compensation for damage: The non-contractual liability of Member States and EU institutions for breaches of EU law', in Colcelli, V. and Arnold, R. (eds), *Europeanization Through Private Law Instruments*, Universitätsverlag Regensburg, 2016, p. 213; Biondi, A. and Farley, M., *The Right to Damages in European Law*, Kluwer Law International, 2009, pp. 76 to 83; Gutman, K., 'Liability for breach of EU law by the Union, Member States and individuals: Damages, enforcement and effective judicial protection', in Lazowski, A. and Blockmans, S. (eds), *Research Handbook on EU Institutional Law*, Edward Elgar Law, 2016, p. 460.

Various authors on the topic of damages in the field of public procurement consider, similarly, that the definition of damage is best left to the laws of the Member States on the basis of the principle of national procedural autonomy, subject to compliance with the principles of effectiveness and equivalence. See Treumer, S., 'Basis and conditions for a damages claim for breach of the EU public procurement rules', in Fairgrieve, D. and Lichère, F., *Public Procurement Law: Damages as an Effective Remedy*, Hart, 2011, p. 150. See also Caranta, R., 'Damages for breaches of EU public procurement law: Issues of causation and recoverable losses', in Fairgrieve, D. and Lichère, F., *Public Procurement Law: Damages as an Effective Remedy*, Hart, 2011, pp. 167 to 184; Schebesta, H., *Damages in EU Public Procurement Law*, Springer International Publishing Switzerland, 2016, pp. 52 to 60.

³⁶ Judgment of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 87). See also judgment of 17 April 2007, *AGM-COS.MET* (C-470/03, EU:C:2007:213, paragraph 89). The Court reached the same conclusion with regard to the non-contractual liability of individuals for breaches of EU law (judgment of 13 July 2006, *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461, paragraphs 95 and 96).

According to certain authors, the Court's case-law on the non-contractual liability of Member States reflects the delicate balance (and tension) between unity and diversity, through the interaction between national procedural autonomy and the principles of equivalence and effectiveness. See Gutman, K., 'Liability for breach of EU law by the Union, Member States and individuals: Damages, enforcement and effective judicial protection', in Lazowski, A. and Blockmans, S. (eds), *Research handbook on EU institutional law*, Edward Elgar Law, 2016, p. 465.

³⁷ Opinion of Advocate General Léger in *Hedley Lomas* (C-5/94, EU:C:1995:193, point 183).

³⁸ Judgment of 7 March 2018, *Santoro* (C-494/16, EU:C:2018:166, paragraph 50).

40. The Austrian, Czech and Slovak Governments submit that the EU Courts' case-law on a loss of opportunity as a consequence of illegalities in the award of public contracts by the EU institutions is not automatically applicable to the circumstances in which this reference arose. I agree with that submission. For whatever reason, the rules governing the review of the award of public contracts by the EU institutions and those governing the award of public contracts by contracting authorities differ.³⁹ Although the General Court has held that a tenderer that has been unlawfully excluded from a procedure for the award of a public contract by an EU institution may claim damages for loss of opportunity,⁴⁰ that case-law relates to the non-contractual liability of the European Union, not that of its Member States.⁴¹ It should be kept in mind that the role the EU Courts play in those circumstances is similar to the one the Member States' courts play when they apply their respective national procedural rules. It is in that specific context that EU law is called upon to regulate all aspects of the law governing the award of public contracts by EU institutions, including the matter of such non-contractual liability as may arise. The case-law on damages for breaches by the EU institutions of the law governing the award of public contracts tends to show that loss of profit and loss of opportunity are different concepts. Whereas loss of profit is assessed by reference to compensation for the loss of a contract, loss of opportunity consists of compensation for a loss of an opportunity to conclude a contract.⁴² The concept of loss of opportunity also appears to be recognised in actions for damages in the context of the EU staff regulations and the European Union's non-contractual liability.⁴³

41. From both the terms in which Article 2(1)(c) of Directive 89/665 is expressed, and the objectives that directive pursues, viewed in the context of the general principles governing the non-contractual liability of Member States for breaches of EU law, one can conclude that it is for the laws of the Member States to define the heads of damage under which a tenderer unlawfully excluded from a procedure for the award of a public contract may claim compensation, provided that those national rules comply with the principles of equivalence and effectiveness.

42. There is no indication from the material before the Court that the present case involves any infringement of the principle of equivalence. The question remains as to whether a judicial interpretation of national legislation that does not envisage the award of damages for loss of opportunity is compliant with the principle of effectiveness, as defined in point 34 of the present Opinion. In that context, neither the effectiveness of Directive 89/665 nor the rights that it confers on individuals may be undermined.⁴⁴ The Court has held that national rules that make the award

³⁹ See, to that effect, judgments of 21 May 2008, *Belfass v Council* (T-495/04, EU:T:2008:160, paragraph 43); of 3 March 2011, *Evropaïki Dynamiki v Commission* (T-589/08, EU:T:2011:73, paragraphs 22 and 23); and of 12 July 2012, *Evropaïki Dynamiki v Frontex* (T-476/07, EU:T:2012:366, paragraphs 39 to 41).

⁴⁰ See, for instance, judgments of 20 September 2011, *Evropaïki Dynamiki v EIB* (T-461/08, EU:T:2011:494, paragraph 66); of 28 February 2018, *Vakakis kai Synergates v Commission* (T-292/15, EU:T:2018:103, paragraphs 186 to 193); of 14 December 2018, *East West Consulting v Commission* (T-298/16, EU:T:2018:967, paragraph 176); and of 12 February 2019, *Vakakis kai Synergates v Commission* (T-292/15, EU:T:2019:84, paragraph 53).

⁴¹ The Financial Regulation governs the award of public contracts by the EU institutions. It does not apply to the award of public contracts by Member States' contracting authorities, which are, in substance, regulated by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

⁴² Judgment of 28 February 2018, *Vakakis kai Synergates v Commission* (T-292/15, EU:T:2018:103, paragraph 188).

⁴³ In the context of staff cases, see judgments of 21 February 2008, *Commission v Girardot* (C-348/06 P, EU:C:2008:107, paragraph 55), and of 27 October 1994, *C v Commission* (T-47/93, EU:T:1994:262, paragraphs 54 and 55). See also Opinion of Advocate General Cruz Villalón in *Giordano v Commission* (C-611/12 P, EU:C:2014:195), which explains that the concept of loss of opportunity in the law of damages is linked to the emergence of 'risk theory', which makes it possible to quantify the degree of probability of future events. As for the general non-contractual liability of the European Union for breaches of EU law, see judgment of 8 May 2007, *Citymo v Commission* (T-271/04, EU:T:2007:128, paragraphs 180 to 182).

⁴⁴ See, to that effect, judgment of 7 August 2018, *Hochtief* (C-300/17, EU:C:2018:635, paragraph 38).

of damages subject to proof of fault or fraud on the part of the contracting authorities infringe Directive 89/665, since such rules impair the full effectiveness of the European Union's policy in the field of public procurement.⁴⁵

43. Where a tenderer obtains a court decision to the effect that it has been unlawfully excluded from a procedure for the award of a public contract, and the contracting authority has concluded that contract with another tenderer, to exclude any possibility to claim damages for the loss of an opportunity to obtain that contract appears to infringe the principle of effectiveness. That situation is inconsistent with the aim of Directive 89/665, which is to guarantee effective remedies against contracting authorities' decisions made in breach of EU law, since a person so harmed would be deprived of the supplemental remedy for which Article 2(1) of Directive 89/665 provides, namely an award of damages. It is for the laws of the Member States to lay down the conditions under which that claim may be made out, including the burden and standard of proof, causation and the calculation of the amount of any award.⁴⁶

44. Paragraph 442(1) of the Civil Code provides that, in actions for damages, compensation shall be awarded for actual damage and loss of profits. The order for reference appears to suggest that the case-law of the national courts does not envisage the award of damages for loss of opportunity to obtain a public contract. The Slovak Government submitted at the hearing that, under the law of that Member State, loss of opportunity is part of the concept of loss of profit capable of grounding an award of damages, provided that the person harmed can demonstrate that it had a very high chance of being awarded the public contract.

45. Since the referring court alone has jurisdiction to interpret and apply its national legislation, it falls to that court to interpret, as far as possible, the rules governing damages claims in such a way as to ensure compliance with the principle of effectiveness. When applying domestic law, the national court must, as far as is at all possible, interpret it in conformity with EU law. Such an interpretation is subject to compliance with recognised limits, notably the prohibition on a *contra legem* interpretation of national law. Where a national court cannot arrive at such an interpretation, it must fully apply EU law so as to protect rights that it confers on individuals, if necessary by disapplying any provision in so far as it would lead to a result contrary to EU law, provided that the relevant provision of EU law has direct effect.⁴⁷ In that context, the Court has already held that the obligation to interpret domestic law in conformity with EU law may require national courts to change established case-law where it is based on an interpretation that is incompatible with EU law.⁴⁸

⁴⁵ Judgment of 10 January 2008, *Commission v Portugal* (C-70/06, EU:C:2008:3, paragraph 42).

⁴⁶ According to Schebesta, the loss of opportunity theory could provide a solution to the recurrent problem of the hypothetical nature of the unsuccessful tenderer's losses. Schebesta, H., *Damages in EU Public Procurement Law*, Springer International Publishing Switzerland, 2016, p. 205.

⁴⁷ See, to that effect, judgments of 27 February 2003, *Santex* (C-327/00, EU:C:2003:109, paragraphs 62 to 64), and judgment of 11 October 2007, *Lämmerzahl* (C-241/06, EU:C:2007:597, paragraphs 62 and 63). See also judgment of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraphs 55, 61 and 62).

⁴⁸ Judgment of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraph 78).

V. Conclusion

46. I propose that the Court answer the questions referred for a preliminary ruling by the Okresný súd Bratislava II (District Court, Bratislava II, Slovakia) as follows:

Article 2(1)(c) of 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 is to be interpreted as meaning that

it is for the laws of the Member States to determine the conditions under which a national court may adjudicate upon a claim for the award of damages by a tenderer unlawfully excluded from a procedure for the award of a public contract governed by that directive. Those conditions include the burden and standard of proof, causation and the calculation of the size of any award. Member State laws for that purpose must comply with the principles of equivalence and effectiveness. The principle of effectiveness requires that a national court may not rely upon a practice whereby a tenderer unlawfully excluded from a procedure for the award of a public contract is precluded from claiming damages for a loss of an opportunity to obtain that contract.