Public Procurement Analysis

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What role should damages play in public procurement regulation?

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Framing the question

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- Does the possibility of damages being awarded increase compliance with the rules?
- Does it contribute to the fairness of the system?

If yes to either (or both) of these…

- Is it an efficient use of public and private resources?
- What rules should apply to the award of damages in public procurement cases?
- Should they be harmonised at EU level?

Relevant Law

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- Remedies Directives 89/665/EEC and 92/13/EEC as amended, in particular by Directive 2007/66/EC
- Implemented in Ireland by S.I. 130 and 131/2010; S.I. 192 and 193/2015
- CJEU case law – in particular C-70/06 *Commission v Portugal*; C-314/09 *Strabag* and C-568/08 *Combinatie Spijker Infrabouw* – but also *Alcatel, GAT, Fastweb* and *Francovich/Brasserie de Pecheur/Bergaderm*
- National case law, in particular *Nuclear Decommissioning Authority v EnergySolutions* [2017] UKSC 34

Remedies Directives

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- Art. 2(1) of Directive 89/665/EC requires that damages be available in addition to interim measures and the setting aside of decisions taken by contracting authorities
- No rules regarding scope or calculation of damages, cp Art. 2(7) Utilities Remedies Directive which specifies that bid costs can be recovered based on having a real chance of winning which was adversely affected (not *but for*)
- General principles of ***equivalence*** and ***effectiveness*** apply to remedies defined in national law
- What is an equivalent action to a claim under the EU procurement rules? Breach of statutory duty/*ultra vires*?

Damages in different EU countries

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Germany: damages can be claimed including for below-threshold contracts, but generally limited to bid costs (relatively few claims)

Sweden: Recent Supreme Court judgments confirm damages (incl loss profits) available for 'non-trivial' breaches

France: damages as a remedy in tort, need only to show breach, loss (incl loss of chance) and causal link, 4 year limit

Portugal: large number of claims, no responsibility for costs of other side if unsuccessful, no 'sufficiently serious' requirement.

CJEU judgments

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- *Francovich/Brasserie de Pecheur* – breach must be **sufficiently serious** (but this does not require fault)
- *Commission v Portugal* – CJEU set aside national legislation which required proof of fault or fraud for damages to be awarded in public procurement claims. Equivalence applies not only between national & EU remedies, but also between the different EU remedies available
- *Strabag* – cannot require culpability as a condition for award of damages
- *Combinatie Spijker*- emphasised national discretion over causation, determination of liability

UK case law

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- *Harmon* (1999) established availability of damages based on contractual approach, calculating loss of chance
- Application of *American Cyanamid* principles at interim stage requires consideration of whether damages would be an adequate remedy (for both parties)
- *European Dynamics v HM Treasury* set out principles for calculating damages based on loss of chance, see also *Mears v Leeds City Council*, *Alstom v Eurostar*
- Northern Irish courts have been more willing to award damages in cases such as *FP McCann v Dept Regional Dev*

NDA v EnergySolutions (UKSC)

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- Main judgment of Fraser J in TCC found 'many manifest errors' without which contract would have been awarded to consortium including EnergySolutions
- **Q1**: Does the Remedies Directives only require damages to be available for breaches of procurement rules which are 'sufficiently serious' as set out in *Francovich?*
- **Q2**: Did the PCR 2006 go beyond EU law in making damages available?
- **Q3**: Is access to damages restricted where claimant has failed to mitigate by bringing a pre-contractual claim?

Answers: Yes, No, No

NDA v EnergySolutions (critique)

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- UKSC did not consider equivalence and effectiveness requirements under Remedies Directives, nor the travaux préparatoires which emphasise differences in national law. These suggest *Francovich* is not sufficient.
- If it was, why did the EU legislature feel the need to legislate on public procurement remedies at all? Does *Francovich* apply equally to below-threshold contracts?
- UKSC did not say which claims in domestic UK law are equivalent to claims under PCR, or ask whether *Francovich* provides effective protection for rights in this context
- 'No gold-plating' argument doesn't really stand up as Remedies Directives do not create harmonised rules but refer to equivalent claims in national law

Irish case law

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- IESC in *Dekra Éireann Teoranta* held that damages available regardless of applicability of other remedies
- Equivalent action? Breach of statutory duty (*Pine Valley/ Glencar* suggest no right to damages for *ultra vires* actions)
- *Clare Civil Engineering v Mayo Co Co* [2004] IEHC 135 – damages awarded for unlawful rejection of tender but no judgment on quantum
- *BAM PPP and Balfour Beatty v National Roads Authority* [2017] IEHC 157 – no separate breach of contract action, claims must be brought under Regulations

Do damages improve compliance?

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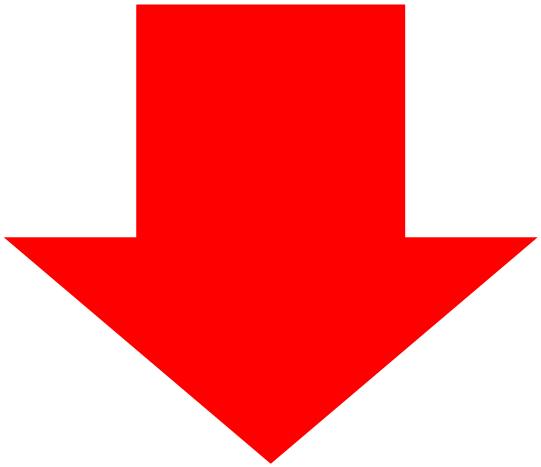

- Potential for damages claims may increase avoidance/evasion of rules
- Can lead to settlements rather than set aside of poorly awarded contracts
- Increases fear of admitting mistakes on the part of contracting authorities

- May have strong deterrent effect on poor procurement practices
- Can encourage voluntary set aside or re-run of flawed procedures
- Balances cost of compliance with a clear (potential) cost of non-compliance

Fairness

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- Fairness to claimant: damages cannot really place it in the situation it would have been in if it won the contract, and may prevent full use of pre-contractual remedies
- Fairness to other bidders: damages may in some cases be considered fairer than setting aside a contract, which deprives the erstwhile successful bidder of a contract despite it not having committed any fault.
- Fairness to contracting authorities/taxpayers: even a successful bidder does not have a unconditional right to its profit, so why should an unsuccessful bidder have this if an error deprives it of its chance to win?

Costs & Efficiency

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- The possibility of damages being awarded increases costs of procurement litigation for both sides because it leads to the requirement of a cross-undertaking by the claimant
- NDA settlement involved £9 m in costs – it only takes a few settlements of this order to pay for better (early) handling of public procurement complaints
- Even if damages do increase compliance, they are unlikely to be the most efficient way of doing so given the high costs of litigation in the UK and Ireland
- Administrative fines are used in some jurisdictions, and are mentioned in Remedies Directives as alternative to ineffectiveness – but not as a substitute for damages

Access to justice

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- Both the requirement for a cross-undertaking in damages, and the high costs of litigation, can be seen to impede access to justice in public procurement law
- Effect may be to counteract widespread attempts to increase SME participation in procurement
- Time limits – compare 30 days with 1 year under EU Damages Directive for competition law infringements
- Administrative systems may increase access, but do they increase justice?
- Public interest enforcement of procurement rules has not really been tested at CJEU level, although see case C-100/12 *Fastweb* – which shows a certain reluctance to extend the 'harm' principle

What could be done differently?

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- Restrict damages to bid costs (as in US, some EU jurisdictions)
- Clarify availability of remedies for below-threshold contracts, especially if *Francovich* is the test
- Focus on improving record-keeping and disclosure practices to reduce the length and complexity of proceedings, thereby reducing costs
- Develop an 'early warning' system which actually works to prevent flawed procedures from continuing all the way

Summary

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- Damages claims may contribute to compliance but they are an inefficient and inequitable way of promoting this
- Damages claims are better seen as a way of vindicating individual rights in tender procedures – however there is a case for limiting this to bid costs for many claims
- *NDA v EnergySolutions* may be the right result for the wrong reasons –still leaves considerable discretion over what is 'sufficiently serious' & below-threshold contracts
- In the absence of EU harmonisation, need to consider which domestic claims are equivalent and also the interaction between standstill, time limits for bringing claims, suspension, set aside, ineffectiveness and damages
- Also relevant under GPA, CETA…future EU/UK deal?

Thank you.

Questions/Discussions

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