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Damages in public procurement within the framework of European Union law

ABSTRACT

This study examines the role of damages in public procurement under European Union (EU) law, with a focus on the *lost chance* doctrine as a remedy for hypothetical losses suffered by aggrieved bidders. Analysing approaches applied in countries like France and Germany, the paper addresses challenges in proving causation and the likelihood of success, as well as key barriers to successful damage claims. This study emphasises the Court of Justice of the European Union's (CJEU) focus on equivalence and effectiveness principles, as seen in the *INGSTEEL* (C-547/22) case. While the *lost chance* doctrine may enhance fairness in procurement, it also risks overcompensation and inconsistency across Member States, signaling a need for greater harmonisation of EU compensatory remedies.

KEYWORDS: Damages; public procurement; European Union law; loss of profit; loss of chance; legal remedies; Equivalence and effectiveness; Court of Justice of the European Union

I. INTRODUCTION

Public procurement is governed under European Union law by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, which repeals Directive 2004/18/EC (Public Procurement Directive or Directive 2014/24/EU).¹ Public buyers must conduct procurement processes transparently, for example by publishing notices, providing information to bidders, and ensuring openness throughout the process. Additionally, efficiency and effectiveness are emphasised to achieve the best value for money. The Public

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¹ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC. Official Journal of the European Union, L94, 28/03/2014, 65–242.

Procurement Directive also mandates remedies and review processes, granting suppliers the right to challenge procurement decisions. This includes a standstill period, which allows unsuccessful bidders to challenge the decision after the contract award, and review by national authorities or courts if suppliers believe the process was unfair.²

The EU's public procurement law relies heavily on two foundational principles: equivalence and effectiveness. The principle of equivalence requires that EU-based claims are treated no less favorably than comparable national claims. This ensures equal standing for EU rights within national judicial frameworks. Meanwhile, the effectiveness principle mandates that EU rights must be practically enforceable, meaning national procedures must not make it excessively difficult or virtually impossible to exercise these rights. These principles guide Member States' implementation of EU directives, especially in public procurement, and ensure that EU law remains accessible and actionable across jurisdictions.³

The EU Public Procurement Directives do not mandate awarding damages for violations of directly effective provisions. Some cases lack compensation because national courts have found either no direct obligation between the authority and plaintiff or deemed the plaintiff's loss a foreseeable economic risk. In other situations, awarding damages is seen as a constraint on authorities' ability to legislate or make administrative decisions in good faith to protect public interests.

Under the Remedies Directive (Directive 89/665/EEC for the public sector and Directive 92/13/EEC for utilities), complainants seeking damages must show that the contracting entity violated procurement rules, directly causing them loss or damage. However, many Member States do not require proof of a violation if a prior administrative ruling has already annulled the award decision. If there is evidence of a procedural breach, damages for bid preparation costs are usually awarded. However, for lost profits, complainants must demonstrate that they would have secured the contract without the violation.

Individuals harmed by EU procurement law violations are entitled to full restitution, including compensation for actual loss, lost profits, and interest from the time of harm until payment. Member States must enable effective compensation claims, with the option to require the challenged decision to be invalidated first. As per Article 2(1)(c) of the Remedies Directive, review procedures must allow for damages. Article 2c also clarifies that compensation is corrective, not punitive, and does not substitute for other penalties.⁴

² Ibid.

³ European Commission, Report on the Effectiveness of the Remedies Directives (2007/66/EC).

⁴ C. Bovis, Damages in Public Procurement: Triple Damages Claims Available for Breaches of Public Procurement Law, (2024) 19 (2) *European Procurement and Public-Private Partnership Law Review*, 104–109., https://eppl.lexnion.eu/current_issue/EPPL (last accessed: 31.12.2024.).

For the needs of this article, we will focus more closely on compensatory damages, which are monetary awards given to an injured party in a lawsuit to compensate for actual losses, damages, or injuries caused by another party's negligence or unlawful conduct. These can also be divided in other ways, as stated above in relation to actual damages and general compensatory damages. Actual damages are intended to replace what was lost and cover economic losses such as medical bills, rehabilitation expenses, lost wages, property repair costs, or transportation expenses. On the other hand, there are general compensatory damages, which are more complex and do not represent a specific monetary expenditure but include non-economic losses. For example, mental anguish, disfigurement, future medical expenses, long-term physical pain and suffering, loss of enjoyment of life, and loss of opportunity.⁵

Legal causation is mostly based on the fact that harm must result from a culpable act; the defendant's action need not be the sole cause, but must be more than minimal, there cannot be a new intervening act breaking the chain of causation and the defendant must take the victim as they find them. Finally, courts assess compensatory damages proportionately according to the chances rather than using an all-or-nothing balance of probabilities approach. If the chance is low, a small proportion of the value of the chance is awarded; if the chance has a high probability of success, a larger percentage is awarded.⁶

II. ENFORCEMENT AND REMEDIES IN EU PUBLIC PROCUREMENT

The enforcement of European Union law in public procurement involves both private and public mechanisms. Private enforcement is pursued by individuals at the Member State level through damages claims and other remedies. Under Articles 258 and 260 of the Treaty on the Functioning of the European Union (TFEU), the Commission can bring infringement actions for violations of procurement rules. The Remedies Directives provide an expedited infringement mechanism as a complement to these Treaty articles. Public enforcement offers advantages, such as low financial risk and anonymity for complainants. However, the high number of complaints and limited resources significantly restrict the number of complaints that can be actively pursued.

The Remedies Directives set rules for quick and effective national reviews in procurement. Directive 2007/66/EC amended these directives, enhancing transparency and fair competition in EU procurement processes. These directives, among others,

⁵ A. Burrows and E. Peel (eds), *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th ed., Oxford University Press, 2011).

⁶ As for example in *Barker v Corus (UK) Plc.*, where damages were awarded proportionately to the "material increase in risk" of a disease, which equates to a loss of a chance.

establish a ten-day grace period between the award of the contract and the signature of the public contract. The guidelines also require that all applicants be informed of the outcome of the selection process. Also, there are granted further measures relating to remedial measures or the prevention of further damages, annulment of unlawful decisions, award of damages, as well as a period for preliminary remedies, sanctions for “ineffectiveness” and the possibility of introducing alternative sanctions by way of assistance or limitation of the duration of the contract are granted. On the other hand, there are directives and legal traditions associated with the region of the European Union and their procedural autonomy.⁷

The Commission, in its report on the effectiveness of remedies directives, came to the conclusion that:

“Based on the evaluation, the Commission concludes that the Remedies Directives, in particular the amendments introduced by Directive 2007/66/EC, largely meet their objectives in an effective and efficient way although it has not been possible to quantify the concrete extent of their cost/benefits. Even if specific concerns are reported in some Member States, they usually stem from national measures and not from the Remedies Directives themselves. In general, qualitative terms, the benefits of the Remedies Directives outweigh their costs. They remain relevant and continue to bring EU added value.

Despite the overall positive conclusion of the evaluation, certain shortcomings were identified. First, the Commission acknowledges that certain provisions of the Remedies Directives are not entirely clear. In particular, despite the update introduced by the new legislative package on public procurement, some additional needs for clarification have been identified. For instance, references to ‘contract notice’ in the Remedies Directives do not reflect the fact that new Directive 2014/24/EU permits the use of a prior information notice, instead of a contract notice, to call for competition in certain circumstances. It could also be clarified how the Remedies Directives apply to modifications of public procurement contracts and concessions, to the termination of such contracts, and to the light procurement regime.

Furthermore, the Commission concludes that in most Member States, information on national remedies systems has not been collected in a structured manner and has been rarely used for policy making purposes. This makes the assessment of the performance of the Directives more difficult.

Finally, the Commission has concluded that, in general terms, first instance administrative review bodies are more effective than first instance judicial instances in terms of the duration of procedures and standards of review.”⁸

⁷ European Commission. (n.d.). *Remedies Directives*. Single Market Economy, https://single-market-economy.ec.europa.eu/single-market/public-procurement/legal-rules-and-implementation/remedies-directives_en (last accessed: 31.12.2024.).

⁸ Report from the Commission to the European Parliament and the Council on the Effectiveness of Directive 89/665/EEC and Directive 92/13/EEC, as Modified by Directive 2007/66/EC, Concerning Review Procedures in the Area of Public Procurement, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017DC0028> (last accessed: 31.12.2024.).

A frequent argument for the opinion against legislative intervention in relation to damages is that aggrieved tenderers do not want to claim damages.⁹ This argument is based on the belief that tenderers do not want to litigate against a counterparty of their business.

At first glance, this may seem like a relevant argument, but the low number of actions that have been brought suggests another explanation. Damages claims are not perceived as viable, and the reluctance of aggrieved bidders to pursue them stems from doctrinal problems rather than the reasons mentioned above.

The few damage claims might result from the difficulty of bringing such claims, rather than indicating their superfluous nature. Another issue is that damage claims have stagnated without development.¹⁰ The question remains whether public procurement damages claims face inherent legal structural obstacles that, if left unaddressed, will always make such claims difficult. Additionally, specific doctrinal legal criteria often render successful damages claims impossible or limit the claimable damages to an extent that does not outweigh the risks of litigation.

⁹ European Commission. (n.d.). European Commission Conference on 'Remedies in Public Procurement', https://single-market-economy.ec.europa.eu/single-market/public-procurement/legal-rules-and-implementation/remedies-directives_en (last accessed: 31.12.2024.).

¹⁰ See in Commission Staff Working Document, Annex to the Proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC CEE with regard to improving the effectiveness of review procedures concerning the award of public contracts, Impact Assessment Report – Remedies in the field of public procurement, SEC(2006)557 (4 May 2006), 12.

"4.3. Inherent Limits of Damages Action

An aggrieved supplier faced with a signed public contract, is often deterred from bringing a damages action for the following reasons:

- actions in damages have no real corrective effect. Even if the public contract already signed is held to have been awarded illegally, in the great majority of cases it remains in force when it has already been signed. Hence, even if the damages action is successful and some (limited) financial compensation is granted, the economic operator will ultimately not win the public contract and may also feel that he has compromised his future business with the Awarding Authority. This also limits the deterrent effect.

- damages actions are hampered by practical difficulties. Actions are rarely successful as a result of the practical difficulty of needing to prove that the economic operator was genuinely a tenderer who had a serious chance of winning the contract. If this is not proved, no compensation for lost business opportunities is awarded to the complainant and often, in practise, any financial award is limited to the reimbursement of costs incurred in bidding for the contract and may not even cover the legal costs of bringing the action. Such actions are even more difficult to bring for a potential tenderer who has not been able to participate in a public procurement procedure as a result of the lack of transparency.

- the process is lengthy and costly. In all Member States, damages is an action on the merits before ordinary Courts (and not by way of interlocutory procedures as in the case of interim measures) which may therefore last for years. Furthermore, given the requirements of proof, the process can be somewhat protracted, and may incur high litigation costs for both parties (economic operators and Awarding Authority)."

III. THE CJEU'S PERSPECTIVE ON DAMAGES UNDER THE GENERAL EU LAW

In light of the heightened requirements for damages in public procurement legislation, the CJEU plays a pivotal role in defining EU standards for damages claims. This study will briefly explore the general principles of EU law developed by the CJEU that guide national courts in adjudicating damages.

Under the Remedies Directive, the CJEU and national courts collaborate in ensuring the effective enforcement of public procurement rights, with national courts able to request preliminary rulings from the CJEU to clarify the application of EU law in specific damages cases. This decentralised structure means that national courts act within a framework defined by EU principles, balancing procedural autonomy with the need for consistency across Member States.

In the EU legal framework, national courts function as the primary enforcers of EU law, acting as “juge de droit commun” or ordinary judges of EU law, while maintaining national procedural autonomy.¹¹ This principle, developed in foundational cases like *Flaminio Costa v. E.N.E.L.*, affirms that EU law must be uniformly applied across Member States, overriding any national laws that conflict with it. The standstill period in public procurement, during which contracting authorities must pause before finalising a contract, serves as a critical mechanism to allow effective remedies and ensure that EU procurement rules are respected.¹² The *Rewe/Comet* case later clarified that, in the absence of specific EU procedural guidelines, each Member State may set its own procedural rules, provided they uphold two key principles: equivalence and effectiveness. Equivalence ensures that EU-based claims are treated no less favorably than similar national claims, while effectiveness requires that these rules do not make it “practically impossible” or “excessively difficult” to exercise EU rights.¹³ Recent CJEU case law and academic discussions emphasise that, while respecting procedural autonomy, national procedural rules must still not compromise the protection of EU rights. The *Ferrovial* case, for instance, underscored that procedural rules in Member States should facilitate rather than obstruct access to justice under EU law, reinforcing consistency across the EU. National courts are therefore expected to navigate this

¹¹ K. Lenaerts, The Rule of Law and the Coherence of the Judicial System of the European Union, (2007) 44 (6) *Common Market Law Review*, 1645.

¹² Case C-6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 00585, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61964CJ0006> (last accessed: 31.12.2024.).

¹³ Case C-33/76 *Rewe-Zentralfi nanz AG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 01989, para 5, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61976CJ0033> (last accessed: 31.12.2024.).

balance, applying their rules without undermining the substantive protections guaranteed by EU law.¹⁴

Member States maintain procedural autonomy in establishing rules for procurement claims, as long as they align with the EU principles of equivalence (equal treatment for EU and national claims) and effectiveness (ensuring practical enforceability of EU rights). If it is about equivalence, domestic claims cannot receive preferential treatment over claims based on EU law. This principle involves navigating complexities related to discrimination-based tests, including finding appropriate comparators. Effectiveness as a principle has been subject to debate due to its vague requirements. It outlines EU expectations for national rules that are not explicitly defined in relation to the national context. For crystallising EU requirements related to damages, the effectiveness limb is particularly relevant. Overall, damages claims in national courts must align with the requirements of equivalence and effectiveness.

While the classifications of effectiveness and equivalence as “descriptive” and “analytical” accounts offer important insights, they can be synthesised to emphasise their operational implications. Historically, the principle of effectiveness ensures that national procedural rules do not make EU rights practically impossible or overly challenging to enforce. Equivalence requires that procedures for EU-based claims are treated no less favorably than similar national claims.¹⁵

The van Schijndel/Peterbroeck balancing approach remains central to the CJEU’s interpretation of these principles. This test allows for a contextual analysis, assessing national procedural rules based on their function, context, and potential impact on the application of EU law. This approach has proven critical in cases where procedural autonomy intersects with EU requirements, permitting deviations from strict adherence when justified by legitimate national interests, such as legal certainty or the orderly administration of justice.¹⁶

Recent scholarship has emphasised that the principle of effectiveness has evolved to address practical barriers within national systems. This shift has clarified the evaluation of discrimination claims and access barriers, as the CJEU now considers whether national procedural rules indirectly hinder access to EU remedies. This refined perspective encourages national courts to ensure that procedural rules, even when autonomous, do not obstruct substantive EU rights.¹⁷

¹⁴ Case C-719/20 *Ferrovial Agroman SA v Comune di Lerici*, EU:C:2022:372.

¹⁵ H. Schebesta, *Damages in EU Public Procurement Law* (Studies in European Economic Law and Regulation, vol. 6.) (Springer International Publishing, 2016). 32–35.

¹⁶ Joined Cases C-430/93 and C-431/93 *Van Schijndel / Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705, para 19; Case C-312/93 *Peterbroeck, Van Campenhout & Cie / Belgian State* [1995] ECR I-4599.

¹⁷ T. Lock, The doctrine of effective judicial protection in CJEU case law. *Academy of European Law, Applying the Charter Seminar*, 21–22 June 2021., https://era-comm.eu/charter_of_fundamental_rights/kiosk/pdf/Lock_Effective_judicial_protection_EN.pdf (last accessed: 31.12.2024.).

The principle of effectiveness has dual functions in EU law. First, as a standard, it ensures that national procedural rules make EU rights reasonably accessible and not excessively difficult to enforce.¹⁸ Second, it serves as a balancing exercise, where the CJEU weighs national procedural autonomy against the need for consistent application of EU law. The CJEU has revived the *van Schijndel/Peterbroeck* test, emphasising a balancing approach. As a result, the debate over whether ‘procedural autonomy’ constitutes a normative claim for national rules has intensified. The effectiveness/equivalence test now requires assessing the procedural autonomy of Member States in relation to the effectiveness of EU law.¹⁹ A recent example that underscores this balancing of national procedural rules with EU law requirements is the *Ferrovial* case, which further affirmed that procedural rules at the national level must not hinder the enforceability of EU rights, even in complex public procurement disputes.

In *Ferrovial*, the CJEU reaffirmed that effective judicial protection remains a guiding principle when assessing procedural rules within Member States. This case emphasised that procedural autonomy is not absolute; instead, it is circumscribed by EU obligations to ensure that individuals have access to remedies when there are breaches of EU law. Specifically, *Ferrovial* highlighted the need for national courts to apply procedural norms in a way that does not impede the realisation of substantive EU rights, particularly in contexts where the claimant’s access to damages is impacted.²⁰

The principle of judicial protection finds dual grounding in the EU Charter of Fundamental Rights and the European Convention on Human Rights (ECHR).²¹ The ECHR and the EU Charter of Fundamental Rights provide the foundation for effective judicial protection. Article 6(1) of the ECHR ensures a fair and timely hearing, while Article 13 guarantees effective remedy. Article 47 of the Charter²² reaffirms the right to a fair trial and an effective remedy. Article 19 of the Treaty on European Union (TEU) delineates competences between the EU and national courts in enforcing EU law. Historically, the *Johnston* case underscored judicial protection as integral to

¹⁸ R. Widdershoven and A. Prechal, Redefining the Relationship between “Rewe-effectiveness” and Effective Judicial Protection, (2011) 4 (2) *Review of European Administrative Law*, 31. DOI: https://doi.org/10.7590/REAL_2011_02_03

¹⁹ Case C-246/09 *Bulicke* [2010] ECR I-7003.

²⁰ Case C-719/20 *Ferrovial Agroman SA v Comune di Lerici*, EU:C:2022:372.

²¹ Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1663.

²² Article 47 – 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 before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

EU law, while *Kadi* established that EU measures must comply with fundamental rights, reinforcing judicial safeguards.²³

More recent cases like *Kadi II*²⁴ and *LM*²⁵ have strengthened these protections, emphasising procedural fairness and judicial independence as critical to maintaining effective judicial protection across Member States. These cases underscore that EU law requires a balance between national autonomy and compliance with core EU principles to ensure uniform rights protection.

At first, the CJEU developed the *Rewe/Comet* formula, which later became known as the principle of procedural autonomy. This concept of procedural autonomy is often framed in a negative context, and it represents what remains within the boundaries of equivalence and effectiveness demands. Essentially, procedural autonomy emerges as a consequence of the absence of specific Community rules.²⁶ Procedural autonomy becomes a legally relevant concept only when the area delimited by 'equivalence' and 'effectiveness' can also make claims independently. This is also the reason why it is necessary to establish a positive description.

Indeed, the concept of procedural autonomy has evolved from being merely descriptive to becoming increasingly prescriptive. It now has the potential to protect national rules from the effectiveness requirements imposed by European law. Even if it is already possible to confirm the existence of this doctrine, its meaning is not yet so clear.²⁷ Namely, when applying procedural autonomy, the CJEU faces several uncertainties as to whether procedural autonomy is descriptive or normative and what it specifically prescribes.

Procedural autonomy, especially when considering the effectiveness aspect, significantly influences judicial reasoning in cases involving damages. The CJEU has consistently applied the procedural autonomy doctrine to damages claims. Notably, even in the realm of public procurement, legislative action regarding damages has been withheld due to respect for the procedural autonomy of Member States.²⁸

²³ Joined cases C-104/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461.

²⁴ Case C-584/10 P, C-593/10 P, and C-595/10 P *Commission, Council, United Kingdom v Yassin Abdullah Kadi*, EU:C:2013:518 (commonly referred to as *Kadi II*).

²⁵ Case C-216/18 PPU *Minister for Justice and Equality v LM*, EU:C:2018:586.

²⁶ S. Prechal, *Community Law in National Courts: The Lessons from Van Schijndel*, (1998) 35 (3) *Common Market Law Review*, 682 fn. 3.

²⁷ B. Krans and A. Nylund, *Aspects of Procedural Autonomy*, in B. Krans and A. Nylund (eds), *Procedural Autonomy Across Europe* (Intersentia, 2020) 1–12.

²⁸ Commission Staff Working Document, Annex to the Proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC CEE with regard to improving the effectiveness of review procedures concerning the award of public contracts, Impact Assessment Report – Remedies in the field of public procurement, SEC(2006)557 (4 May 2006), 12 in Schebesta, *Damages in EU Public Procurement Law*. 42.

Due to procedural autonomy and the absence of requirements of EU law, it remains for us to replace the damages governed by the domestic legal system, but this does not mean that, due to the absence of regulation through secondary legislative instruments, there are no requirements of the European Union. For example, the effectiveness of EU law must always be ensured if there is a breach of EU law, and the CJEU created a remedy for violations of EU law by Member States (under the general principles of the Treaty). These damage claims are possible under Member State liability.²⁹

The *Frankovich*³⁰ and *Brasserie du Pêcheur*³¹ cases established the foundational principles for Member State liability under EU law. These rulings highlight three key criteria for establishing such liability: (1) a breach of EU law, (2) a sufficiently serious breach, and (3) a direct causal link between the breach and the damages incurred.

In light of recent developments, the *Ferrovial* case illustrates the CJEU's evolving stance on liability, emphasising that national laws limiting the recovery of damages must align with EU principles to ensure effective enforcement of rights. This scrutiny reinforces the necessity for Member States to maintain standards that uphold the fundamental objectives of EU law.³²

The previous section of the study illustrated how general EU law is relevant to procurement. When adjudicating damages claims for EU law breaches, the CJEU faces doctrinal constraints within the evolving EU legal framework. Present EU law sets forth requirements for national damages claims. Procedural autonomy is a fundamental principle that allows Member States to regulate their judicial systems; however, it must operate within the bounds of effectiveness. This means that while national courts have the freedom to establish their own procedures, these must not hinder the enforcement of EU rights. Recent legal analyses indicate a shift in the CJEU's approach toward a more positive definition of procedural autonomy, recognising its limits. The Court is increasingly aware that when national procedures risk obstructing EU rights, such limitations cannot be justified. This evolving perspective underscores the necessity for Member States to balance their procedural autonomy with the overarching goal of ensuring effective judicial protection for individuals under EU law.³³

²⁹ Case C-352/98 P *Bergaderm and Goupil/Commission* [2000] ECR I-5291.

³⁰ C-479/93 *Andrea Francovich v Italian Republic* [1995] ECR I-03843, para 35.

³¹ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte Factortame and others* [1996] ECR I-1029, para 31.

³² Case C-719/20 *Ferrovial Agroman SA v Comune di Lerici*, EU:C:2022:372.

³³ Krans and Nylund, *Aspects of Procedural Autonomy*, 1–12.

IV. THE NATIONAL PERSPECTIVES

Within the scope of the availability of damages for the violation of EU law in the field of public procurement, two main legal systems were further analysed in relation to different legal families. Germany for the Germanic tradition, and France for the Roman tradition.

1. France

The legislative implementation measures for Directives 89/665, 92/502, and 2007/663 in France did not contain specific provisions for damages claims. This can be explained by the fact that damages claims for aggrieved tenderers have long been recognised under French administrative law.³⁴ French law distinguishes between administrative and civil law jurisdictions. This separation also applies to the law of damages and liability of private entities. Generally, administrative courts deal with all contracts under the Public Procurement Code and are competent at the place of contract execution.

French public procurement law falls under administrative law. It highlights the evolving position of aggrieved bidders over the past decade. Various legal avenues are available for aggrieved parties to challenge contracting authorities, including pre-contractual and contractual procedures, as well as proceedings challenging contract validity and abuse of power. Aggrieved bidders can pursue damages claims either independently or within a contract validity challenge procedure.

French case law has progressively expanded the standing and recourse options for aggrieved bidders in public procurement. Landmark cases like *Tropic Travaux* introduced the possibility for third parties to challenge public contracts, allowing them to seek damages for procurement violations. The Département de Tarn-et-Garonne decision further broadened this standing by permitting any third party with a direct interest in a public contract to challenge it, provided they demonstrate potential harm. Together, these cases established a framework for third-party recourse and clarified the conditions under which aggrieved bidders could pursue claims for both contractual and extra-contractual liability.³⁵

³⁴ F. Lichere, Damages for Violation of the EC Public Procurement Rules in France, (2006) (4) *Public Procurement Law Review*, 171–178, citing the cases CE, 19 February 1930, *Société Est et Sud Piketty, lebon*, 196, for ‘bid cost’ and ‘lost profit’, and CE, 13 May 1970, *Sieur Monti c/ Commune de Ranspach, lebon*, 322.

³⁵ E. Langelier, L’évolution du contentieux des contrats administratifs : à quand l’acte IV ?, 47 (2014) *La Semaine juridique Administrations et Collectivités territoriales*, 31–37.

Legal claims against the government, departments, municipalities, and public institutions must be filed within a four-year timeframe. This period begins on the first day of January of the year subsequent to the claimant's awareness of the violation.

In French law, there is a well-established tradition of holding public bodies liable for illegal actions under the strict liability doctrine. This doctrine requires three elements: illegality as fault, harm, and a causal link between the two. Unlike EU law, there is no need to assess the seriousness of the breach; any illegal act automatically implies fault. However, there must be a direct and certain causal link between the fault and the harm suffered. This excludes potential or hypothetical factors from consideration. The principle of full compensation is strongly upheld.³⁶

In cases of public procurement violations, there is essentially an 'objective liability' system, where any breach of procurement law automatically satisfies the requirement of fault. Recent court decisions have also linked causality to the concept of lost opportunity. However, there is ongoing debate about the extent of this new reasoning in establishing causality between specific violations and resulting losses.³⁷

Regarding damages for aggrieved bidders in public procurement, French case law focuses less on fault, harm, and causal links, and more on the likelihood of a bidder winning the contract. The concept of 'the lost chance' plays a central role in determining recoverable losses and has been developed through judicial decisions.

In public procurement cases, courts use a two-step test to assess a tenderer's chances of winning a contract. The first step determines if the tenderer had any chance; if not, no compensation is granted. If yes, the second step evaluates the seriousness of the chance. A 2003 judgment clarified that a tenderer with no chance receives no compensation, while those with serious chances may receive reimbursement for bid costs and lost earnings.

French courts use a structured approach to evaluate an aggrieved bidder's chances of winning a public procurement contract. This evaluation involves a two-step test:

1. Determining if the Bidder Had Any Chance: The first step examines whether the bidder was "devoid of any chance" due to factors such as failing to meet qualification criteria or submitting an invalid bid. If the bidder had no chance, no compensation is granted.³⁸

2. Evaluating the Seriousness of the Chance: If the bidder had some chance, courts then assess its seriousness. Courts consider factors including: (i) Bid Evaluation Criteria – the weighting of criteria like price, quality, and other contract-specific

³⁶ W. Müller-Stoy, *Schadensersatz für verlorene Chancen – Eine rechtsvergleichende Untersuchung* (Albert-Ludwigs-Universität zu Freiburg, 1973) 6, referring to Mazeaud-Tuno and Tournau.

³⁷ CAA Bordeaux, 27 October 2011, *SARL Arts & Batiment*, 10BX00835.

³⁸ Lichere, Damages for Violation of the EC Public Procurement Rules in France, 172, citing a case 4 June 1976.

metrics; (ii) Competitor Comparisons – the quality and validity of competing bids; (iii) Bid Acceptability – whether the bid was realistically acceptable to the contracting authority based on price and feasibility.

A “serious chance” entitles the bidder to claim lost profits, while a “not serious” chance limits recovery to bid costs. For example, in *Golf de Cognac*,³⁹ a non-serious chance led to compensation only for bid costs. Conversely, a serious chance may lead to full recovery of lost profits, as seen in *Groupement entreprises solidaires ETPO Guadeloupe*.⁴⁰ This approach is further illustrated by the *Commune de la Rochelle* case, where courts relied on technical evaluations to assess bid quality.⁴¹

In various legal systems, damages claims typically aim for full compensation. While there are nuances regarding the comprehensiveness of compensation, this is considered a fundamental principle in liability and damages law.

A. The Lost Chance: Courts use the lost chance doctrine to determine the level of compensation based on the likelihood of the aggrieved bidder winning the contract. A serious chance enables claims for both lost profits and bid costs, while a non-serious chance restricts compensation to bid costs. This principle streamlines the compensation process, linking the probability of success with corresponding damages.⁴²

B. Bid Costs and Lost Profit: When an aggrieved bidder is found to have had some chance of winning, they may claim bid costs. However, only those with a “serious chance” may also claim lost profits, a principle established in a 1980 case and consistently upheld since.⁴³ For example, in *Groupeement entreprises solidaires ETPO Guadeloupe*, the court allowed lost profits when the original bidder was found to have a serious chance of securing the contract. Courts typically rule that bid costs are included in lost profits unless specified otherwise in the tender. A 2003 ruling by the *Conseil d’État* further clarified that bid preparation costs are generally the bidder’s own responsibility, barring specific provisions from the contracting authority.⁴⁴

In France, procurement damages cases involving valuation methods are numerous. Damages quantification typically involves estimating turnover and applying a profit rate. Lost profit is calculated based on net profits specific to the market, rather than overall gross profits.⁴⁵ A ruling by the *Conseil d’État* emphasised the importance of correctly calculating lost profits, overturning a lower court’s decision to use gross margin instead of net profits.⁴⁶ Overheads are generally not compensated, but the

³⁹ CE 23 March 1994, *Golf de Cognac*, 1/4 SSR.

⁴⁰ Schebesta, *Damages in EU Public Procurement Law*, 145.

⁴¹ CE, 8 February 2010, *Commune de la Rochelle*.

⁴² CE, 27 January 2006, *Commune d’Amiens*.

⁴³ *Commune de la Rochelle*, above n 34.

⁴⁴ CE 4 June 2003, N° 249630, *Groupeement entreprises solidaires ETPO Guadeloupe, Sté Biwater et Sté Aqua TP*.

⁴⁵ Lichere, *Damages for Violation of the EC Public Procurement Rules in France*, 177.

⁴⁶ CE, 11 février 2011, communauté de communes du pays d’Arlanc.

ability of an aggrieved bidder to secure subsequent contracts does not negate their claim for a lost contract. The level of damages is influenced by competition intensity. Profit rates are determined based on market characteristics, with recent cases accepting relatively generous percentages. Courts are increasingly moving towards the concrete quantification of damages rather than abstract assessment.⁴⁷ Once liability for lost profits is established, damages may cover both material and immaterial losses. For immaterial damages like damage to business reputation, market characteristics, such as competition level, are considered. In one case, the severity of competition limited the benefits expected from contract execution, reducing the claim for damages.⁴⁸

2. Germany

A. The Cascaded System of Sources of Law: Germany's public procurement law, integrated with competition law in 1999, follows a layered, "cascaded" system. Key regulations include the Ordinance on the Award of Public Contracts (VgV) and the Procurement Regulations (VOB/A, VOL/A, VOF). This system has raised concerns regarding its alignment with constitutional principles and European Union law, yet significant reforms have not been implemented.⁴⁹ The inclusion of procurement provisions into the the German Act against Restraints of Competition (GWB) splits German public procurement into national and EU-governed realms, leading to differing levels of judicial protection.⁵⁰

B. Implementation of Directive 2007/66: Directive 2007/66 prompted significant changes in German procurement law, especially after the CJEU's ruling against Germany's "budgetary solution", which blocked court enforcement for aggrieved tenderers. Legal protections were subsequently realigned under the Vergaberechtsmodernisierungsgesetz in 2009.

C. Jurisdiction and Remedies: Special procurement senates handle public procurement disputes overall, but claims for damages as a remedy after a contract are decided by regular civil courts in accordance with §13 of the Courts Constitution Act (GVG), as outlined in §104(3) of GWB. Remedies include primary (such as contract awards) and secondary (damages actions). Damages can be pursued under §126 GWB, §280 of the Civil Code (*Bürgerliches Gesetzbuch*, 'BGB'), and other bases, depending on the nature of the procurement breach.

⁴⁷ Lichere, Damages for Violation of the EC Public Procurement Rules in France, 177.

⁴⁸ CE, 28 March 1980, *Centre Hospitalier de Seclin*.

⁴⁹ M. Knauff, Das Kaskadensystem im Vergaberecht – ein Regelungsmodell mit Zukunft? (2010) *NZBau*, 661.

⁵⁰ C. Braun and C. Hauswaldt, Vergaberechtliche Wirkung der Grundfreiheiten und das Ende der Inländerdiskriminierung? Zugleich eine Anmerkung zum EuGH-Urteil Coname, (2006) 17 (6) *EuZW*, 176.

Damages Under GWB: This statute provides a basis for expectation damages for violations affecting a genuine chance of contract award. It covers bid preparation costs but limits recoverable losses to “negative interest” unless broader liability applies. To qualify, a claim must meet three elements: a protective provision breach, a “real chance” of contract award, and no need for fault, as per Federal Court of Justice (BGH) rulings. While GWB focuses on negative interest, other bases, like culpa in contrahendo, may allow positive interest claims, depending on pre-contractual relationships and implied duties.⁵¹

Culpa in Contrahendo: This doctrine, recognised under BGB, supports claims where a trust relationship or implied duty is breached, offering additional grounds for damages if the GWB criteria are not fully met. Though challenging to prove, it enables broader damages recovery in cases of pre-contractual trust breaches.

Tortuous Liability: Tort claims under BGB are possible but limited due to the *Schutznorm* doctrine, which requires statutory norms to protect specific rights. While claims are theoretically possible, especially if a bidder is unjustifiably excluded, such cases are rare.⁵²

D. Other Liability Bases: Claims may also arise from German State Liability for breaches by state employees, individual employee liability, and competition law violations, such as discriminatory practices by contracting authorities under §20 GWB.⁵³

E. Compensation Principles and Types of Recoverable Damages: Germany’s liability law focuses on restoring parties to their pre-damage state (per §249 BGB). Under §126 GWB, recoverable costs include bid preparation and participation costs, not lost profits. However, reliance damages under culpa in contrahendo may cover additional costs if unjustified contract denial occurs. Positive interest claims are possible if a contract had been awarded under normal circumstances.

Damages claims typically follow a three-year prescription period from the date of damage awareness. Courts have discretion under §287 Code of Civil Procedure (ZPO) to estimate damages when amounts are uncertain, easing the claimant’s burden of proof compared to §286 ZPO. Contributory negligence may reduce claims, particularly if the contracting authority argues procedural flaws, but bidders are generally not responsible for legality checks.⁵⁴

⁵¹ Schebesta, *Damages in EU Public Procurement Law*. 120–124.

⁵² K. Stockmann, §126 GWB, in U. Immenga and E. J. Mestmäcker (eds), *Wettbewerbsrecht: GWB* (5th edition, München, C. H. Beck, 2014) mn 25.K.

⁵³ A. Drügemöller, *Vergaberecht und Rechtsschutz. Der inter- und supranationale Rahmen und seine Ausgestaltung in Deutschland* (Berlin, Springer, 1999) 308.

⁵⁴ LG Stade 6 civil Senate, 19.12.2003, 6 O 405/02.

V. THE LOST CHANCE DOCTRINE

The *lost chance* doctrine offers a potential solution for bidders in public procurement who face hypothetical losses due to procedural breaches. Typically, claimants struggle with two main obstacles – proving causation and demonstrating a realistic likelihood of winning the contract. Additionally, the range of recoverable damages is often limited by these uncertainties, as bidders must establish not only a breach but also its direct impact on their bid's success. The *lost chance* doctrine provides a framework that could address these challenges, either by adjusting causality requirements or allowing for proportional compensation, depending on the legal system's interpretation.⁵⁵

The lost chance doctrine is often perceived as a dynamic legal concept, embodying various forms such as a head of damage, a burden of proof alleviation, or proportional liability. The divergence in understanding and application of the lost chance is evident from country studies, which reveal three main theoretical interpretations:

1. The lost chance as a relaxation of the burden of proof, wherein demonstrating the possibility, even a significant one, of a favorable outcome without the breach suffices. While this lowers the threshold for proving causation, the compensation value remains aligned with full compensation. For instance, if there is a serious chance of receiving €1,000, compensation would equal €1,000.

2. Proportional or relational liability views the lost chance as a portion of the potential total loss, determined by the probability of the advantageous event occurring. Compensation is calculated by multiplying the hypothetical situation's value without the breach by the likelihood of the event happening. For instance, a 10% chance of winning €1,000 would result in compensation of €100.

3. In a robust interpretation, the lost chance theory redefines the loss of opportunity itself as a compensable damage. Grounded in a subjective-relational theory of value, it considers patrimony as the positive relationship between an individual and valuable aspects of life. Damage to this relationship, even in potential scenarios like buying a lottery ticket, constitutes a loss. This autonomous type of loss, while challenging accepted principles of liability, is sometimes quantified using proportional liability, particularly in situations with uncertain probabilities.⁵⁶

Overall, the lost chance doctrine challenges conventional notions of causality, compensation, and recognised types of losses. Legal systems vary in their acceptance and application of different loss of chance arguments.

In relation to the lost chance, there is a strong tendency to differentiate according to specific areas of law, such as medical law. Abstract arguments about the lost chance

⁵⁵ J. T. Oskierski, *Schadensersatz im Europäischen Recht: Eine vergleichende Untersuchung des Acquis Communautaire und der EMRK* (Nomos, Baden-Baden, 2010).

⁵⁶ H. Möller, *Summen- und Einzelschaden. Beiträge zur Erneuerung der Schadenslehre vom Wirtschaftsrecht aus* (Berlin, de Gruyter, 1937), 124.

theory are often influenced by its application in particular legal fields, which have recurring typologies and factual situations that shape the doctrine's implications. This is evident in public procurement, where each legal system has developed unique interpretations of the lost chance that deviate from the general doctrine.

The lost chance doctrine in public procurement law allows bidders to claim damages when they lose a significant opportunity due to procedural errors or violations, even if they cannot definitively prove they would have won the contract. This doctrine aims to address hypothetical damages by assessing the probability of success and awarding partial compensation based on this likelihood. In public procurement, this doctrine is particularly useful for aggrieved bidders facing challenges in proving direct causation between the violation and the loss of a contract. Application of the lost chance doctrine varies widely across EU Member States, as each country interprets it according to national legal frameworks.⁵⁷

In various jurisdictions, the implementation of the lost chance doctrine in public procurement disputes varies significantly. France applies the lost chance doctrine quite extensively, including in public procurement. French courts often consider a "serious chance" of securing a contract as sufficient for awarding damages, aligning compensation proportionally to this chance, even if a contract ultimately is not awarded. This reflects France's broader acceptance of the doctrine as a legitimate head of damage in various legal areas, including public procurement.⁵⁸ On the other hand, in Germany, the lost chance doctrine is not formally recognised in public procurement, as the legal system emphasises strict causation requirements. Only once a contract has actually been awarded might a claimant be entitled to damages for lost profits. German law prioritises legislative provisions over the lost chance doctrine, which is limited to isolated cases with specific legislative backing.⁵⁹

There are two approaches to the doctrine of loss of chance. The first is based on doctrinal principles of compensation, examining how the constitutive criteria of liability relate to each other and fitting the concept of chance within this framework. The second approach is a bottom-up, fact-based perspective that considers the nuanced versions of chances in different situations. This method allows for justice-based arguments, taking into account the recurring disadvantages faced by certain parties, who might otherwise be systematically excluded from successful damages claims through a rigid doctrinal application of the law.

⁵⁷ K. Lenaerts, The Rule of Law and the Coherence of the Judicial System of the European Union. (2007) 44 (6) *Common Market Law Review*, 1645. DOI: <https://doi.org/10.54648/cola2007138>

⁵⁸ Conseil d'État (France), Judgment of 18 December 2020 – Société Architecture Studio, No. 429768, published in Recueil Lebon, https://www.legifrance.gouv.fr/ceta/id/CETATEXT000042701983?init=true&page=1&query=429768&searchField=ALL&tab_selection=all (last accessed: 31.12.2024.).

⁵⁹ Federal Court of Justice (BGH), Judgment of 8 December 2020 – Case No. XIII ZR 19/19, <https://datenbank.nwb.de/Dokument/849520/> (last accessed: 31.12.2024.).

In the EU, the predominant approach to damages is the all-or-nothing method,⁶⁰ granting full compensation only when causation is definitively established. This binary system can result in starkly different outcomes with minimal changes in certainty, often perceived as unfair. To address this, some legal systems incorporate proportionality, aligning compensation with the probability of causation. The lost chance doctrine attempts to navigate this uncertainty by recognising partial causation. However, this approach varies across legal systems, categorised under causality or as a head of damage. The lost chance doctrine arises from a desire to mitigate the injustices of the all-or-nothing approach, acknowledging the difficulties in proving causation and aiming to prevent unjust results. Despite resistance due to concerns about excessive claims and overcompensation, the doctrine serves as a compromise to balance fairness and practicality.⁶¹

The lost chance theory faces significant criticism on several fronts. Firstly, it undermines the fundamental principle of causality in liability by disconnecting the direct link between action and consequence.⁶² Secondly, it breaches the principle of full compensation by either providing partial compensation when unwarranted or leading to overcompensation. Thirdly, it relies on statistical probabilities to predict outcomes, which opponents argue is inappropriate for determining liability. Critics maintain that liability should be based on the specific details of each case rather than generalised probabilities.

Comparative analyses of the lost chance doctrine often group cases involving competition, such as legal malpractice, career advancement, and medical malpractice. The acceptance and practicality of this doctrine are heavily influenced by the specific legal context and factual scenarios.⁶³ Key factors include whether the claim is contractual or delictual, the material versus procedural conditions, and judicial discretion in damage evaluation. The doctrine typically excludes minimal or speculative chances and is often used only when no other damage claims are possible. Critics like Savatier accept the doctrine in specific contexts, such as competitions or legal processes, but reject it in situations like medical accidents where probabilities are less appropriate.⁶⁴ Public procurement shares similarities with competitions, offering structured indicators that make outcomes more predictable and thus suitable for applying the lost chance theory.⁶⁵

⁶⁰ Oskierski, *Schadensersatz im Europäischen Recht*.

⁶¹ A. Bénabent, *La Chance et le Droit* (Librairie Générale de Droit et de Jurisprudence, 1973) 191, fn. 4, as cited in Müller-Stoy, *Schadensersatz für verlorene Chancen*, fn. 96.

⁶² R. Savatier, Une faute peut-elle engendrer la responsabilité d'un dommage sans l'avoir causé? (1970) *Dalloz*, 123.

⁶³ Müller-Stoy, *Schadensersatz für verlorene Chancen*.

⁶⁴ Savatier, Une faute peut-elle engendrer la responsabilité d'un dommage sans l'avoir causé?

⁶⁵ H. Reece, Losses of Chances in the Law, (1996) 59 (2) *The Modern Law Review*, 188–209, <https://www.jstor.org/stable/1097413> (last accessed: 31.12.2024.).

There are three main interpretations of the ‘loss of chance’ doctrine – (i) as an autonomous type of damage, (ii) a means to alleviate causality, and (iii) a form of proportional liability. This conceptual distinction is particularly significant at the EU level, where the term lacks a precise definition and varies across national legal systems, leading to potential misalignments in EU law implementation.⁶⁶ Within individual legal systems, there is also internal inconsistency regarding the best application of the doctrine, which is further complicated when compared across countries. While some jurisdictions, like France, broadly accept the doctrine in public procurement claims, others, like Germany, have specific legislative frameworks, and the doctrine is largely overlooked. Thus, there is no unified tradition of the lost chance doctrine in public procurement across EU Member States.

Reich outlines several key arguments for making procurement damages more accessible: compensating bidders for unjust losses, restoring confidence in procurement processes, and creating a deterrent effect.⁶⁷ He advocates for a proportional approach to the lost chance doctrine, as seen in the English *Harmon* case, and suggests reversing the burden of proof. This would mean that if a material breach is proven, the court would estimate the bidder’s chance of winning the contract and award damages accordingly. Reich proposes that the aggrieved bidder should be presumed to have had a 100% chance of winning, with the contracting authority having the opportunity to provide contrary evidence. While this method is straightforward and efficient, it faces criticism for potentially violating principles of full compensation and causality and may lead to excessive litigation.⁶⁸

The *lost chance doctrine* is significant in public procurement, particularly where bidders face procedural breaches leading to hypothetical losses. In CJEU Case C-547/22, the Slovak Supreme Court addressed whether EU law mandates compensation for lost opportunity in public procurement disputes. The case involved a Slovak bidder, INGSTEEL, who was unlawfully excluded from a procurement contract, seeking damages based on lost opportunity – a concept not recognised in Slovak law for public procurement cases. This led the Slovak court to request a preliminary ruling from the CJEU on whether Directive 89/665/EEC requires Member States to compensate for loss of chance in such situations.⁶⁹

⁶⁶ G. Ajani, L. Lesmo, G. Boella, A. Mazzei and P. Rossi, Terminological and Ontological Analysis of European Directives: Multilingualism in Law, (2007) *International Conference on Artificial Intelligence and Law Journal*, 43. DOI: <https://doi.org/10.1145/1276318.1276327>

⁶⁷ A. Reich and O. Shabat, The Remedy of Damages in Public Procurement in Israel and the EU: A Proposal for Reform, SSRN eLibrary (2013) at <http://ssrn.com/abstract=2244909> (last accessed: 31.12.2024.), 28–29.

⁶⁸ L. W. Gormley (ed.), *Gordian Knots in European Public Procurement Law: Government Procurement Agreement: Standards, Utilities, Remedies* (Bundesanzeiger, Köln, 1997), 5.

⁶⁹ Case C-547/22 *INGSTEEL*, <https://curia.europa.eu/juris/error.jsf;jsessionid=85BC5011D56A35919CBC6A6FFF1D0A06?cid=5244576> (last accessed: 31.12.2024.).

As part of the intervention, the European Commission, the Czech Republic, Austria, and France participated in the proceedings.

The European Commission argued that Article 2(1)(c) of Directive 89/665/EEC obliges Member States to ensure that remedies are effective, accessible, and equitable. The Commission emphasised that while Member States retain procedural autonomy in defining specifics, these remedies must align with equivalence (equal treatment with similar domestic claims) and effectiveness (non-restrictive access to EU rights). According to the Commission, denying compensation for lost opportunity where a material breach has occurred would conflict with the directive's goal to protect bidders' rights and ensure competitive public procurement processes.⁷⁰

Czech Republic and Austria argued that Directive 89/665/EEC establishes minimum requirements for review procedures but does not compel Member States to recognise lost opportunity claims in public procurement damages. They both have similar legal frameworks for compensation for damages as Slovakia; their legal systems do not recognize the "lost chance doctrine" in the context of damages caused in public procurement. The Slovak legal system recognises the "lost chance doctrine" only in the context of compensation for damages in medical disputes, because in medicine, it is often difficult to precisely prove that a specific error by a doctor directly caused harm to the patient.

France, where the lost chance doctrine is more common compared to other EU countries, asserts that in the absence of explicit EU provisions, it is up to Member States' legal systems to define criteria for identifying and assessing damages from breaches of EU public procurement laws, adhering to the principles of equivalence and effectiveness. These principles ensure that remedies for breaches are not less favorable than those for similar domestic claims and do not render the exercise of EU rights practically impossible or excessively difficult. Article 2(1)(c) of Directive 89/665 requires Member States to ensure effective remedies, including compensation for damages caused by breaches of procurement law. However, it does not explicitly define "damages" regarding loss of opportunity or lost profits. The French government interprets that assessing such damages, including lost profits, falls within the national legal systems' purview, provided they adhere to equivalence and effectiveness principles. Compensation for lost profits due to loss of opportunity involves evaluating damages under national procedures, ensuring they meet EU standards. Member States must provide legal instruments within their frameworks to compensate bidders unlawfully excluded from procurement processes. The Directive emphasises the need for effective and rapid remedies and judicial protection for economic operators, balancing effective legal protection and legal certainty. The French government highlights the economic implications of annulling a contract and the EU law's priority on legal certainty. This is

⁷⁰ European Commission opinion in Case C-547/22.

supported by the *MedEval* case and reflected in Directive 2007/66/EC. While the Directive mandates compensation for damages, including potential lost profits, it leaves the specific criteria and extent of such compensation to national jurisdictions, provided they respect EU principles.⁷¹

The Advocate General recommended that Directive 89/665/EEC does not explicitly prescribe specific types of damages, such as loss of opportunity. However, it does require that Member State laws provide effective remedies in line with EU principles. The Advocate General's opinion supported allowing national courts discretion to apply lost chance principles if national law permits, while maintaining the equivalence and effectiveness principles. They advised that the CJEU could clarify that excluding lost opportunity claims could infringe on effective judicial protection under Article 47 of the EU Charter if it impedes legitimate claims.⁷²

The CJEU confirmed that under Article 2(1)(c) of Directive 89/665/EEC, damages for loss of opportunity must be considered a legitimate head of damage if an unlawful exclusion causes a tenderer to miss the chance to win a contract. This interpretation aligns with the Directive's intent to ensure effective remedies. Although the CJEU did not specify a required standard of proof for such claims, it left room for national courts to set this standard within the bounds of the effectiveness and equivalence principles. This judgment strengthens the enforceability of public procurement rights by acknowledging lost opportunity as compensable. It also suggests that while national law can set the proof standard for lost opportunity, it must be feasible enough to ensure effective judicial protection for affected parties in public procurement cases.⁷³

VI. CONCLUSION

The *INGSTEEL* judgment introduces a significant challenge for EU Member States regarding damages in public procurement cases, particularly where the concept of loss of opportunity is concerned. The Court's decision mandates that Member States must permit damages claims for lost opportunity if an unlawful exclusion has denied a tenderer the chance to compete for a contract. This judgment emphasises that Directive 89/665/EEC should be interpreted broadly to include all types of damages associated with infringements, not limited to actual losses or lost profits.⁷⁴

⁷¹ Opinion of France in Case C-547/22.

⁷² Opinion of Advocate General in Case C-547/22, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=280442&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5578759> (last accessed: 31.12.2024.).

⁷³ Case C-547/22 *INGSTEEL spol. s r. o. v Úrad pre verejné obstarávanie*, EU:C:2024:478.

⁷⁴ K. Strømsnes, New CJEU Judgment on Damages for Breach of EEA Public Procurement Law Contract: Vindication for the EFTA Court's About-Turn in Fosen-Linjen, *EFTA Studies*, (Aug 26,

The decision could force many Member States to re-evaluate their procurement damages frameworks. Traditionally, legal systems which limit claims to actual losses or lost profits when the contract has already been awarded often require a high probability of success to substantiate such claims. These systems might now need adjustments to accommodate claims for lost opportunities without imposing overly restrictive proof requirements. The CJEU left it to Member States to determine the standard of proof for lost opportunity claims, which could lead to variability in implementation. While some countries may apply a lower threshold, others may continue using higher proof requirements, potentially creating inconsistencies across the EU. Critics suggest this could complicate efforts toward uniformity in the EU procurement regime and may raise concerns over legal certainty, especially in countries with stricter causation principles. For countries like Germany, where the loss of opportunity is unsuitable for compensation, this ruling may be challenging. German law, for example, generally confines compensation in procurement cases to participation costs and lost profits when causation is clear. With the *INGSTEEL* ruling, such systems must navigate a balance between ensuring effective protection of tenderers and avoiding speculative claims, possibly by adopting new standards for probabilistic or proportional damages.

This ruling will likely drive broader harmonisation across the EU, compelling Member States to ensure effective remedies that include lost opportunity. However, adapting national laws to fit this framework could strain legal systems that traditionally exclude hypothetical damages. As each Member State interprets and applies this doctrine within its procedural rules, the practical challenges of maintaining uniform EU-wide standards may require additional guidance or future judgments from the CJEU.⁷⁵

2024), <https://www.efra-studies.org/post/new-cjeu-judgment-on-damages-for-breach-of-eea-public-procurement-law-contract-vindication-for-the> (last accessed: 31.12.2024.).

⁷⁵ Bovis, Damages in Public Procurement. 104–109.