THE UNIVERSITY OF TARTU
SCHOOL OF LAW
DEPARTMENT OF PUBLIC LAW

Kristiina Pralla

DAMAGES REMEDY IN THE EUROPEAN UNION PUBLIC PROCUREMENT LAW

Master thesis

Supervisor
PhD Carri Ginter

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Table of Contents

List of abbreviations

CJEU	Court of Justice of the European Union
EEA	European Economic Area
EFTA Court	Court of Justice of the European Free Trade Association States
EU	European Union
HHJ	His Honour Judge
LOA	(Estonian) Law of Obligations Act
SLA	(Estonian) State Liability Act
PPA	(Estonian) Public Procurement Act

Introduction

Substantive public procurement law is highly harmonized on the EU level[1]. Furthermore, the EU lawmaker has harmonized the procurement remedies system on the EU level as well. This has been done by Council Directives 89/665/EEC[2] and 92/13/EEC[3] as amended by Directive 2007/66/EC (hereinafter also the Remedies Directives). As the contents of Directives 89/665/EEC and 92/13/EEC are to large extent identical, this work will not differentiate between them unless expressly stated otherwise.

The Remedies Directives establish the minimum requirements of procurement remedies system under EU law, e.g., types of remedies which must be available to persons injured by procurement breaches. In 2007, EU procurement remedies system was reformed to significant extent – to name a few important additions, compulsory standstill period and remedy of ineffectiveness were introduced. As the EU lawmaker has bestowed high importance on achieving compliance with EU law at a time when infringements can still be corrected[4], the 2007 amendments were aimed at increasing the effectiveness of pre-contractual remedies[5]. Nevertheless, the post-contractual remedies (i.e., damages and ineffectiveness) still carry practical importance as reliance on pre-contractual remedies is not possible in all cases.

The 2007 reform left the remedy of damages for procurement breaches completely unchanged. By virtue of Art. 2(1)(c) of 89/665/EEC and Art. 2(1)(d) of 92/13/EEC, it remains a mere requirement that damages remedy must be available for persons harmed by an infringement. The EU lawmaker has thus left it under procedural autonomy of Member States to "add flesh to the bare provisions"[6]. The Remedies Directive give some subtle hints about possible ways to transpose the procurement damages remedy national laws of Member States. For instance, Member States can establish in their national laws that the contested decision must be first set aside as a precondition for damages claim[7]. Those hints are however of minor

[1] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, 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 & Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.
[2] Council Directive 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.
[3] Council Directive of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.
[4] A. Reich & O. Shabat. The remedy of damages in public procurement in Israel and the EU: a proposal for reform. Public Procurement Law Review, 2014, 2, p 68.
[5] A. J. van Heeswijck. The Dutch system of legal protection in public procurement procedures. Public Procurement Law Review, 2015, 6, p 193.
[6] D. Fairgrieve & Licéhre. Public Procurement Law Damages as an Effective Remedy, United Kingdom, Hart Publishing Ltd, 2011, p 171 (R. Caranta).
[7] Art. 2(7) of 89/665/EEC & Art. 2(6) of 92/13/EEC.

practical importance. The substantive conditions of procurement damages remedy are not stipulated in the Remedies Directives. Consequently, there is no uniform understanding of what the minimum requirements are to claim damages for procurement breaches under EU law.

Presumably not entirely coincidentally the main issue with the procurement damages is the fact that they are not really available for aggrieved tenderers. That is despite the fact that the EU lawmaker has expressly required availability of damages remedy in the Remedies Directives. In practical terms, the success rate of procurement damages claims in most Member States is slim to none. C. Ginter and M. A. Simovart note that although EU law requirement of procurement damages remedy stands unchanged since 1989, "it has not proven a popular nor effective remedy for practical purposes"[8]. According to H. Schebesta "damages claims have remained what they were over 20 years ago … a mere theoretical possibility"[9].

The factual unavailability of an effective damages remedy is illustrated by relatively low number of damages claims for procurement law breaches across the Member States. P. Trepte argues that the lack of practical effect of damages claims in the field of EU procurement is the result injured parties' unwillingness to claim damages since the monetary consequences of such actions are unforeseeable[10]. According to M. Burgi, aggrieved tenderers consider damages secondary in effect and thus importance because of severe unlikelihood to achieve the award of a "real compensation for lost contract" in most cases. Such result can be attributed to the fact that the required standard of proof tends to stand out of reach for the aggrieved tenderers[11]. S. Treumer argues that the limited sources of law on damages is the reason behind the absence of an effective damages remedy. National legal systems are unclear on the matter and courts usually rely on their national case law on damages which is sometimes not even from procurement related field[12].

The lack of practical enforceability of damages claims for procurement breaches does not render the remedy unnecessary. On the contrary, the question of EU law conditions on procurement damages is an important topic largely because of the significant contribution damages remedy (theoretically) has on the functionality of EU procurement system as a whole. Foreseeable and regular award of damages by national courts creates a deterrent effect to

[8] C. Ginter & M.A. Simovart in Brussels Commentary. EU Public Procurement Law (eds M. Steinicke & P.L. Vesterdorf). Nomos Verlagsgesellschaft, Verlag C.H.Beck oHG & Hart Publshing, 2018, pp 1413 § 24.
[9] H. Schebesta. Damages in EU Public Procurement Law. Springer International Publishing, Switzerland, 2016, p 29.
[10] P. Trepte. Public Procurement in the EU: A Practitioner's Guide, 2nd edition, New York, Oxford University Press, 2007, p 558.
[11] *Supra note* 6, pp 38 & 39 (M. Burgi in Damages as an Effective Remedy).
[12] S. Treumer. Damages for breach of the EC public procurement rules – changes in European regulation and practice. Public Procurement Law Review, 2006, 4, p 164.

potential future breaches by contracting authorities[13]. Furthermore, aggrieved tenderers rely on damages claims for protection of their individual rights because in most cases, damages claim is the only post-contractual remedy available to aggrieved tenders[14]. Although the Directive 2007/66/EC focused on a reform of pre-contractual remedies, it did not make infringements of procurement rules by contracting authorities obsolete in practice. The need for post-contractual remedies such as damages, still persists[15]. As put by M. A. Raimundo, "in the system of Remedies Directives, the importance of damages is obvious". While Member States can, on some conditions, refrain from setting aside an unlawful decision (i.e., "exclude primary compensation"), exclusion of liability for damages is not possible under the Remedies Directives. Otherwise, damages "would be a fiction" deprived of any practical effect[16].

The topic of procurement damages remedy remains actual until availability of this remedy is in practical terms ensured to aggrieved tenderers across Member States under the Remedies Directives. After all, the inherent purpose behind any legal rule is to have actual effect. Consequently, a situation like this one in which a legal rule entitles individuals a right to claim damages, but which cannot be enforced in practical terms by those individuals, must not be tacitly accepted. Moreover, a right of an individual to compensation for harm caused by public authority should be a basic right inherent to legal system of all Member States by virtue of general EU law[17]. Therefore, actual need exists to scrutinize the substantive meaning behind EU procurement damages remedy in an attempt to find some much-needed clarity in the matter. Clarity of a legal rule is of paramount importance for achieving effective enforcement.

Based on the aforementioned considerations, the objective of this thesis is to find an answer to a question – what are the substantive requirements imposed by EU law on procurement damages remedy? The fact that the Remedies Directives themselves do not provide answer to this question, does not mean that EU law imposes no requirements on procurement damages remedy. It is common knowledge that EU directives are merely a form of secondary EU law, inferior to primary EU law. It is presumed that the meaning behind procurement damages becomes clearer once we take a step back and look at the Remedies Directives as a part of EU legal system. Furthermore, it is submitted that availability of loss of chance as a head of damage

[13] M. Fuentes. The Spanish Approach to the Remedy of Damages in the Field of European Public Procurement. European Public Procurement & Public and Private Partnership Law Review, 2016, 11 (1), pp 49-52 (49).
[14] *Supra note* 9, p 27 (H. Schebesta).
[15] K-M. Halonen. Shielding against damages for ineffectiveness: the limitations of liability available for contracting authorities – a Finnish approach. Public Procurement Law Review, 2015, 4, p 112.
[16] M. A. Raimundo. Damages in Public Procurement Law: A Right or a Privilege? Some Thoughts After the Fosen-Linjen Saga. European Procurement & Public Private Partnership Law Review, 2019, 14(4), p 258.
[17] Judgement of 19 November 1991, *Andrea Francovich & Danila Bonifaci & Others v Italian Republic*, Joined Cases C-6/90 & C-9/90, ECLI:EU:C:1991:428, § 35.

might be required by EU law in order to solve the issue of lack of practical availability of procurement damages claims.

The first chapter establishes the legal context in light of which the procurement damages remedy must be seen. It provides an overview of relevant primary law principles of EU law and addresses the general EU law requirements on claiming damages for EU law breaches. Second chapter aims to scrutinize the specific requirements established on procurement damages in the CJEU case law. Furthermore, it aims to identify the issues related claiming damages for procurement breaches (high standard of burden of proof, required gravity of breach and causation). This chapter gives indication of what is required for achieving minimal effectiveness of damages remedy under EU law. In third chapter, three Member State examples are provided for a practical understanding of limitations to procurement damages remedy and for illustrating a solution which would be acceptable under EU law. Firstly, English example is provided to illustrate a common law approach to procurement damages. Secondly, French example was chosen because the French system has been exemplified in legal literature as a positive example for procurement damages purposes. Finally, the example of Estonia was added due to my personal interest and also because there is not that much literature available about the Estonian perspective (apart from a few pages of comments in Estonian Public Procurement Act commentaries and some student works of limited extent). The methods used for the purposes of this work are systemic, analytic and comparative. It relies on journal articles, books and case law of the CJEU and selected Member State examples as main sources.

It is noted that T. Tähe[18] defended a master thesis on a similar topic in the University of Tartu in 2015. Nevertheless, besides the name of the topic, there are not many other substantive similarities between her thesis and my work. This work has the objective to focus on the EU perspective (EU law requirements), while T. Tähe attempted to approach the issue from the Estonian and German perspective. Moreover, the outcomes of the works differ to significant extent. The works of K. Saar[19] and E. Fels[20] contain subchapters on the topic, but only briefly and in general terms. Lastly, the master thesis of A. Praakle is noted as a thesis focused on the loss of profit and loss of chance doctrine[21]. While the general loss of profit and loss of chance doctrines are of importance to my thesis as well, it is worth mentioning that the work of A. Praakle afforded no consideration on public procurement law.

[18] T. Tähe. Kahju hüvitamine hankemenetluses toimunud rikkumiste korral. Magistritöö. Tartu Ülikool. Õigusteaduskond, 2015.
[19] K. Saar. Vaidlustamine riigihankemenetluses. Magistritöö. Tartu Ülikool. Õigusteaduskond, 2014, pp 59-63.
[20] E. Fels. Euroopa Liidu riigihankeõiguse normide rikkumise mõju hankelepingu kehtivusele. Magistritöö. Tartu Ülikool. Õigusteaduskond, 2015, pp 55-59.
[21] A. Praakle. Võimaluse kaotuse põhimõte ja selle kasutamise võimalused Eesti õiguses. Magistritöö. Tartu Ülikool. Õigusteaduskond, 2015.

To conclude the introduction, it is noted that while I agree that the ideal solution to issues related to procurement damages would be for the EU lawmaker and/or the CJEU to expressly establish substantive minimum conditions on procurement damages[22], I do not believe that such development can be reasonably expected any time soon. The issue with procurement damages was identified by the European Commission impact assessment report prior to the 2007 amendments as relatively acute[23]. Nevertheless, as can be seen, no amendments were made to procurement damages remedy, presumably because of policy considerations.

To this extent, enforcement of EU law illustrates similar tensions present in the making of international law. Like with any other international legal rule, the functionality of EU law comes down on the willingness of Member States to execute that law. This means that EU lawmaker has to be careful not to exceed its capacity over matters under discretion of Member States. Establishing substantive requirements on procurement damages claims is understandably a sensitive area. For instance, if the EU lawmaker was to expressly require that a Member State has to compensate much more in comparison with what the national law would offer to aggrieved tenderer, it could be considered an unacceptable interference with internal matters of a Member State. However, if EU was to leave the matter completely up to Member States, then there would be no purpose of having EU law in the first place – all Member States would do as they please with no consideration on EU law purposes. This means that the question of effective procurement damages remedy ultimately comes down to balancing the interests of Member States with those of the EU. A solution found in EU law should thus presumably express itself as a balance of interests between the contracting authorities (as "extensions" of Member States) and protection of individual interests of aggrieved tenderers.

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Keywords relevant to this thesis are as follows: EU public procurement law, Remedies Directives, damages remedy, Member State liability, loss of chance.

[22] For example, *supra note* 9, p 13 (H. Schebesta).
[23] Commission of the European Communities. 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 with regard to improving effectiveness of review procedures concerning the award of public contracts, Brussels, 4 May 2006, SEC (2006) 557, p 12. Available at https://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2006/sec_2006_0557_en.pdf (23.03.2021).

1. Scope of damages remedy under general EU law

1.1. General principles of procedural autonomy, effective judicial protection and effectiveness

A fundamental characteristic of EU is the decentralized enforcement of its law. While EU rules are binding on its Member States, it is for national laws to implement and national courts to apply EU law[24]. General principles of EU law serve as a minimum harmonization tool across Member States as well as a minimum standard of individual rights protection[25]. General principles in combination with EU treaties form the primary EU law with which the secondary EU law (e.g., directives) must comply with. It is common knowledge that primary EU law prevails over EU secondary law in the event of a conflict[26].

In the procurement field, general principles of EU law serve as an important reference point to determine the scope of damages remedy. That is even more so since there is no EU secondary law regulating the matter in substantive terms. The Remedies Directives only stipulate the requirement that damages remedy has to be available under national legal systems of Member States for parties injured by procurement breaches. Thus, the substantive EU requirements on procurement damages remedy must be derived from the general principles as elaborated in the case law of the CJEU.

In the context of procurement damages, the CJEU has referred to the general principles of procedural autonomy, effectiveness and equivalence and at times, effective judicial protection[27]. Principle of equivalence is settled in the CJEU case law as a requirement that "the detailed procedural rules governing actions for safeguarding individual's rights under the EU law must be no less favourable than those governing similar domestic actions"[28]. As principle of equivalence does not appear as a point of substantive discussion in the context of EU procurement damages, it will not be specifically addressed further. Other aforementioned principles will be briefly discussed as follows.

Simply put, procedural autonomy is discretion of Member States to decide on how to implement EU law. Upon joining the EU, Member States limit their sovereignty in order to

[24] P. Craig & G. de Búrca. EU Law. Text, Cases, and Materials. 5th edition, Oxford University Press, New York, 2011, p 172.
[25] D. Pachnou. The effectiveness of bidder remedies for enforcing the EC public procurement rules: a case study of the public works sector in the United Kingdom and Greece. Thesis submitted to the University of Nottingham for the degree of Doctor of Philosophy. March 2003, p 25.
[26] *Supra note* 5, p 194 (A. J. van Heeswijck).
[27] *Supra note* 9, p 71 (H. Schebesta).
[28] Judgement of 9 December 2010, *Combinatie Spijker Infrabouw-De Jonge Konstruktie & Others v Provincie Drenthe*, Case C-568/08, ECLI:EU:C:2010:751, § 91.

achieve effective enforcement of EU goals[29]. The principle is enshrined in Art. 5(2) of the TEU according to which Member States confer the EU power "to attain the objectives set out [in the Treaties]". Those objectives must have primacy over discretion (i.e., procedural autonomy) of Member States, otherwise EU law would have no actual effect.

The Remedies Directives, like all other EU directives, set only the minimum requirements of EU law. The objectives of EU lawmaker expressed in the directives must be achieved by Member States through transposing directives into their respective national legal systems[30]. As noted above, since the Remedies Directives are a form of secondary EU law, their interpretation and application must comply with primary EU law (e.g., the general principles of EU law). Directives leave Member States some margin of appreciation, but it is limited with the primary EU law to ensure at least minimum harmonization across Member States[31].

While the principle of procedural autonomy is comprehensible as a theoretical concept, it is difficult to draw the line between EU law and procedural autonomy of Member States[32]. It is settled in the case law of the CJEU that "in the absence of [Union] legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from [Union] law" (i.e., procedural autonomy)[33]. Procedural autonomy is limited by principles of effectiveness and equivalence[34]. In other words, under procedural autonomy, Member States still have the responsibility to ensure "that [EU rights] are efficiently protected in each case"[35]. The aforementioned CJEU guidance for delimitation of EU law and procedural autonomy is of general nature and too inconclusive to afford uniform understanding of its substantive nature in practical terms.

In *Spijker*, the CJEU held the same settled but vague understanding of procedural autonomy applicable in the narrow context of procurement damages remedy[36]. This did little to clarify the scope of procedural autonomy in general, let alone in the field of procurement remedies. Opinions still differ on the extent of Member State procedural autonomy in determining the substantive criteria of damages remedy in procurement context.

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[29] Z. Nicolo. Member State Liability vs National Procedural Autonomy: What Rules for Judicial Breach of EU Law. German Law Journal, 2010, 11 (4), p 428.
[30] *Supra note* 25, p 43 (D. Pachnou).
[31] *Supra note* 5, (p 194, A. J. van Heeswijck).
[32] *Supra note* 29, p 429 (Z. Nicolo).
[33]Judgement of 30 September 2003, *Gerhard Köbler v Republik Österreich*, Case C-224/01, ECLI:EU:C:2003:513, § 46.
[34] Judgement of 15 March 2017, *Lucio Cesare Aquino v Belgische Staat*, Case C-3/16, ECLI:EU:C:2017:209, § 48.
[35] Judgement of 19 October 2017, *Hansruedi Raimund v Michaela Aigner*, Case C-425/16, ECLI:EU:C:2017:776, § 40.
[36] *Supra note* 28, §§ 90 & 91 (*Spijker*, Case C-568/08).

Some believe that the CJEU has (almost) completely left the damages remedy under procedural autonomy of Member States. For instance, H. Schebesta writes that "the CJEU has fully subjected" damages remedy under procedural autonomy and has refrained "from legislative action on damages on grounds of the Member States' procedural autonomy" in public procurement context[37]. K. Krüger argues that by virtue of procedural autonomy, it is for the national law to decide over the heads, causation and quantification of procurement damages, provided that only the minimum conditions of effectiveness and equivalence have been complied with[38]. This line of reasoning suggests that the general EU law provides no other conditions on damages remedy apart from the principles of effectiveness and equivalence.

By contrast, S. Treumer has correctly noted that while it is probable that the CJEU affords Member States considerable discretion on grounds of procedural autonomy, they still do not have full control over the scope and substance of the procurement damages remedy[39]. As will be seen below, the general EU law in fact does impose additional requirements on damages besides the general principles of effectiveness and equivalence.

The mere existence of the Remedies Directives already indicates above average restrictions on procedural autonomy of Member States. It is common knowledge that EU lawmaker usually leaves the establishment of procedural rules and remedies for Member States to decide under their respective national laws[40]. If the EU lawmaker would have wanted to leave the procurement remedies system solely under the discretion of Member States, it would have simply refrained from implementing the Remedies Directives in the first place. Thus, the Remedies Directives can be considered as an expression of the EU lawmaker's will to restrict the procedural autonomy of Member States in the procurement damages field.

While the Remedies Directives limit discretion of Member States to above usual extent, procedural autonomy has nevertheless not been excluded completely. Therefore, differences in the mechanisms established for awarding damages for procurement breaches can be expected across the national laws of Member States. This is an inevitable result of procedural autonomy - the general principles of EU law even in combination with the Remedies Directives, are incapable of completely harmonizing procurement damages in substantive terms[41].

There is no need to further scrutinize the exact meaning behind procedural autonomy. The scope of procedural autonomy does not derive from procedural autonomy itself but from

[37] *Supra note* 9, p 42 (H. Schebesta).
[38] K. Krüger. Action for Damages Due to Bad Procurement – On the Intersection between EU/EEA Law and National Law, with a Special Reference to the Norwegian Experience. Public Procurement Law Review, 2006, 4, p 211.
[39] *Supra note* 12, p 165 (S.Treumer in Public Procurement Law Review, 2006).
[40] *Supra note* 25, p 4 (D. Pachnou).
[41] *Supra note* 6, p 187 (D. Fairgrieve & Licéhre in Damages as an Effective Remedy).

limitations imposed on procedural autonomy by EU law (such as the general principles or directives). For the purposes of this work, it is sufficient to conclude that firstly, Member States have retained procedural autonomy in procurement damages field to some extent. Secondly, that the procedural autonomy of Member States in this context lies somewhere between the general EU law principles and conditions stipulated in the Remedies Directives.

Coming to the principle of effectiveness, it is firstly noted that all legal remedies systems essentially carry a presumption of effectiveness within the general meaning of the word. Inherent function of all remedies is to offer actual alleviation to harm caused by infringement of law to at least some minimum extent. Theoretically existing, yet practically unenforceable remedies, can hardly be considered effective. In the context of damages, effective enforcement in general meaning of the word presumes that damages are awarded in the amount which corresponds to actual harm caused.

The functionality of the Remedies Directives and implementing national laws rely on the principle of effectiveness[42]. It is said to have been developed from Art. 4(3) of the TEU[43] which establishes obligation on Member States, firstly to ensure fulfilment of EU obligations and secondly to refrain from jeopardizing the EU's objectives. In the context of public procurement, the principle of effectiveness is often expressed within the traditional *Rewe*[44]*/Comet*[45] meaning which requires that national law must not "make it virtually impossible or excessively difficult [for injured persons] to obtain reparation [for EU law breaches]"[46].

However, some authors argue that in the context of public procurement remedies the aforementioned understanding of effectiveness ought to be rejected. For instance, D. Pachnou argues that effectiveness within the meaning of *Simmenthal*[47], should be applied instead[48]. In *Simmenthal,* the CJEU held that "any provision of a national legal system … which might impair the effectiveness of [Union] law …[and] which might prevent [Union] law from having full force and effect is incompatible with those requirements which are the very essence of [Union] law"[49]. Thus, according to the *Simmenthal* requirement, principle of effectiveness can be interpreted as Member States' responsibility to achieve the "full force and effect" of EU

[42] C. H. Bovis. Access to Justice and Remedies in Public Procurement. European Procurement & Public Private Partnership Law Review, 2012, 7(3), p 201.
[43] *Supra note* 25, p 24 (D. Pachnou).
[44] Judgement of 16 December 1976, *Rewe-Zentralfinanz eG & Rewe-Zentral AG v Landwirtschaftskammer für das Saarland,* Case 33-76, ECLI:EU:C:1976:188 § 5.
[45] Judgement of 16 December 1976, *Comet BV v Produktschap voor Siergewassen,* Case 45-76, ECLI:EU:C:1976:191 § 13.
[46] *Supra note* 17, § 43 (*Francovich*, Joined Cases C-6/90 & C-9/90).
[47] Judgement of 9 March 1978, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, Case 106/77, ECLI:EU:C:1978:49.
[48] *Supra note* 25, p 32 (D. Pachnou).
[49] *Supra note* 47, § 22 (*Simmenthal,* Case 106/77).

legal rules. Moreover, *Simmenthal* implies obligation of Member States to apply higher standards than those stipulated in national law if national rules do not enable the adequate achievement of a standard required by EU law[50].

The main reason for preferring the *Simmenthal* requirement over *Rewe/Comet* requirement is the fact that *Simmenthal* effectiveness is wider in scope, enabling more consideration to the achievement of EU purposes. As national remedies in procurement context are provided by the Remedies Directives, rules contained therein must be enforced by Member States (similarly to all other EU legal rules) to achieve their "full force and effect". Member States have to ensure compliance of their national laws with minimum standards of EU law as developed in the case law of CJEU. *Rewe/Comet* effectiveness on the other hand refers solely to the effectiveness of minimum EU conditions on national procedural rules used for the enforcement of EU law, which are usually completely up for Member States to create. Such effectiveness would afford only the slightest protection of EU law goals which is insufficient for procurement field purposes[51]. Thus, as Remedies Directives are rules of EU law, their "full force and effect" must be ensured for achieving compliance with the principle of effectiveness.

According to H. Schebesta, it is appropriate to interpret the principle of effectiveness within the *van Schijndel* meaning[52]. In *van Schijndel*, the CJEU first referred to the traditional effectiveness requirement of "[not make it] impossible or excessively difficult … to obtain reparation". Such effectiveness "must be analysed by reference to the role of [EU] provision in the procedure, its progress and its special features, viewed as a whole…". Furthermore, that analysis should consider "basic principles of the domestic judicial system, such as … the principle of legal certainty and the proper conduct of procedure… where appropriate"[53].

Strongly in favour for the argument to use *van Schijndel* effectiveness within the procurement context is the fact that in part, the CJEU followed similar reasoning in the infamous procurement damages case of *Strabag*. For determining compliance with the principle of effectiveness, the CJEU required that EU damages remedy is "interpreted in the light of the general context and the aim of the judicial remedy of damages" and then measured against national provision implementing EU rule[54].

It is noteworthy that in *van Schijndel*, the CJEU referred to effectiveness also as a balancing exercise. Consideration of the basic principles of national law is acceptable when determining

[50] *Supra note* 25, pp 31 & 32 (D. Pachnou).
[51] *Ibid*.
[52] *Supra note* 9, p 56 (H. Schebesta).
[53] Judgement of 14 December 1995, *Jeroen van Schijndel & Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten*, Joined Cases C-430/93 & C-431/93, ECLI:EU:C:1995:441, § 39.
[54] Judgement of 30 September 2010, *Stadt Graz v Strabag AG & Others*, Case C-314/09, ECLI:EU:C:2010:567, § 34.

compliance with the principle of effectiveness. Effectiveness is thus not only a standard against which the application of other applicable general principles of law (primary law) and EU rules on procurement (secondary law) must be measured against[55]. Notwithstanding that, the CJEU did not follow the balancing exercise part of the reasoning in *Strabag* thus did not elaborate on its (scope of) applicability in procurement field but neither did the CJEU exclude the possibility. Therefore, the balancing nature of effectiveness can be borne in mind for the purposes of procurement cases as well.

The principle of effectiveness needs to be understood as requirement on the Member States to achieve "full force and effect" of the EU legal rule (i.e., the *Simmenthal* effectiveness), which restricts the procedural autonomy of the Member States to a necessary extent for the achievement of the EU law. The achievement of "full force and effect" is wider in scope and would therefore essentially cover the *Rewe/Comet* effectiveness requirement of "not make it virtually impossible or excessively difficult to obtain reparation". Such "full force and effect" of EU law and effectiveness will only be achieved once damages remedies for procurement breaches become regularly claimable in practice. Otherwise, damages remedy in procurement cannot be held to even exist, let alone be considered effective.

There is no uniform understanding of whether the principle of effectiveness extends solely to the effectiveness of the remedies system as a whole or to each remedy individually. Some authors suggest that a remedies system which is consistent with principle of effectiveness must meet two cumulative criteria – it must be effective as a whole functioning system, and also each of the remedies must be effective individually[56]. The remedies must thus not be seen to be in a "fixed relationship" amongst themselves[57]. Others argue that remedies under the Remedies Directives are interrelated and must be seen in the context of the whole system. The 2007 reform changed the balance between the procurement remedies and gave rise to questions of hierarchy[58]. By this line of reasoning focus seems to be on the effectiveness of a system as a whole rather than on each remedy itself.

The idea that each procurement remedy must be effective on its own is consistent with the intent of the EU lawmaker. The required remedies for procurement breaches have been listed in the Remedies Directives, suggesting that all of them must be available to injured parties if not expressly stipulated otherwise. If Member States would only be expected to achieve effectiveness of a remedy system as a whole, they could justify the practical absence of one

[55] D. Soloveičik. The Principle of Effectiveness in Lithuanian Public Procurement Law: This Way or No Way. European Procurement & Private Partnership Law Review, 2016, 11(2), pp 60 & 61.
[56] *Supra note* 25, p 37 (D. Pachnou), also *supra note* 8, pp 1405 & 1406 § 7 (Brussels Commentary).
[57] *Supra note* 6, p 189 (D. Fairgrieve & F. Lichère, Damages as an Effective Remedy).
[58] *Supra note* 9, pp 51 & 52 (H. Schebesta).

remedy (e.g., damages) by arguing the system as a whole is sufficiently effective (i.e., efficiency of one remedy could compensate for the absence of another). Sure enough, there would be no need to claim damages if primary remedies (i.e., those directed at correcting infringement prior to the conclusion of the contract) could always be relied on. The lack of factual need to claim damages can suggest the efficiency of a remedies system as a whole. Nevertheless, this cannot serve as an excuse for the factual absence of a remedy listed in the Remedies Directives. If such need should arise, all remedies must be individually available to injured parties.

Liability for damages is at the heart of effectiveness of the enforcement of public procurement rules due to its dual purpose of deterrence and protection of individual rights[59]. By affording protection to individual rights, the injured parties are given incentive to draw attention to breaches of the contracting authority. The possibility of injured parties to litigate should deter the contracting authority from potential future unlawful conduct, as it knows that it might be held liable for damages in the event of a breach of procurement rules[60].

It is settled in the CJEU case law, that the Member States have "to ensure that neither the effectiveness of [the Remedies Directives] nor the rights conferred on individuals by EU law are undermined"[61]. Nevertheless, it seems that general consensus in legal literature is that procurement damages remedy does not fulfil the conditions of principle of effectiveness[62]. As S. L. Kaleda has correctly pointed out – damages remedy as it currently stands, cannot be considered effective in any sense of the word since its legal outcome is unpredictable. That holds true even despite the fact that the general principle of effectiveness imposes no clear substantive minimum standard which procurement damages remedy has to comply with[63].

Third principle sometimes referred to by the CJEU in context of procurement damages is the principle of effective judicial protection. It imposes minimum requirements to ensure right of fair trial to individuals and requires national procedural law to be interpreted in a manner which benefits "the achievement of the EU law"[64]. Additionally, the principle of effective judicial protection stipulates that effective remedy must be available to harmed individuals in all cases of EU law infringements by Member States[65]. In general, the principle has been said

[59] *Supra note* 16, p 258 (M. A. Raimundo).
[60] S. Arrowsmith. European Communities: the implications of the Court of Justice decision in Marshall for damages in the field of public procurement. Public Procurement Law Review, 1993, 6, CS169 & 170.
[61] Judgement of 7 August 2019, *Hochtief AG v Budapest Főváros Önkormányzata*, Case 300-17, ECLI:EU:C:2018:635, § 38.
[62] *Supra note* 4, p 61 (A. Reich & O. Shabat).
[63] S. L. Kaleda. Claims for damages in EU procurement and effective protection of individual rights. European Law Review, 2014, 39(2), p 208.
[64] *Supra note* 5, p 192 (A. J. van Heeswijck).
[65] *Supra note* 60, CS172 (S. Arrowsmith).

to be relatively well developed in the case law of the CJEU[66] related to the use of legal remedies against unlawful behaviour of the Member States[67]. It is currently established in Art. 47 of the Charter of Fundamental Rights of the EU[68] and in Art. 19(1) of the TEU.

It remains unclear whether the principle of effectiveness encompasses the principle of effective judicial protection or should they be considered separately. For example, in *Pontin*, the CJEU considered the principle of effective judicial protection as an expression of the general Member State obligation to comply with principles of effectiveness and equivalence in their national laws[69]. The CJEU reached the opposite conclusion in *Mono Car Styling,* stating that EU law requires that effective judicial protection is separately considered in addition to obligation of adhering to principles of effectiveness and equivalence[70].

Some authors argue that principle of effective judicial protection must always be clearly distinguished from the general principle of effectiveness[71]. For instance, S. L. Kaleda maintains that principle of effective judicial protection serves as a basis for individual protection of rights in the context of EU procurement rules. Judicial protection makes it possible for aggrieved tenderers to claim damages for procurement breaches in the first place[72]. By contrast, others do not even mention the principle of effective judicial protection when writing about damages remedy in procurement, suggesting that effective judicial protection is either irrelevant or covered within the scope of principle of effectiveness. For example, according to C. H. Bovis three main principles that are prevalent in the case law of CJEU related to the Remedies Directives are the principle of procedural autonomy and its interrelationship with principles of effectiveness and equivalence[73].

Even if one was to assume that principle of effectiveness must be clearly differentiated from principle of effective judicial protection, their interrelationship remains unresolved in the case law of the CJEU[74]. Importantly, the CJEU has not given the principle of effective judicial protection substantive value in its case law concerning the interpretation of damages and has merely on occasion mentioned the principle[75]. For example, in *Hospital Ingenieure*, the CJEU

[66] Judgement of 15 May 1986, *Johnston v Chief Constable of the Royal Ulster Constabulary*, Case 222/84, ECLI:EU:C:1986:206, § 17 & § 19.
[67] R. Caranta. Damages in EU Public Procurement Law: Fosen-Linjen Can Hardly Be the Last Chapter. European Procurement & Public Private Partnership Law Review, 2019, 14(4), p 215.
[68] Judgement of 6 November 2012, *European Commission v Otis*, Case C-199/11, ECLI:EU:C:2012:684, § 46.
[69] Judgement of 29 October 2009, *Virginie Pontin v T-Comalux SA*, Case C-63/08, ECLI:EU:C:2009:666, §§ 43 & 44.
[70] Judgement of 16 July 2009, *Mono Car Styling SA, in liquidation v Dervis Odemis & Others*, Case C-12/08, ECLI:EU:C:2009:466, § 49.
[71] *Supra note* 9, p 38 (H. Schebesta).
[72] *Supra note* 63, p 193 (S. L. Kaleda).
[73] *Supra note* 42, p 195 (C. H. Bovis).
[74] *Supra note* 9, pp 39 & 40 (H. Schebesta).
[75] *Supra note* 9, p 71 (H. Schebesta).

stated that "judicial review exercised in the context of the review procedures covered by 89/665/EEC must be examined in the light of the purpose of the latter, taking care that its effectiveness is not undermined"[76]. Although the CJEU used the term "judicial review", it did not actually elaborate on the principle of effective judicial protection. Instead, the importance to ensure the effectiveness of the rules stipulated in the directive was highlighted.

Requirements traditionally enshrined in the effective judicial protection doctrine are nevertheless important and cannot be left aside. For instance, in *Hochtief*, the CJEU highlighted the significance of the Member State obligation to ensure the availability of effective remedy pursuant Art. 47 of the Charter in the context of procurement law[77]. As procurement is a field highly harmonized in substantive terms by the EU law[78], the need of effective remedies is even more so pressing for the protection of EU procurement system as a whole. The willingness of individuals to bring actions against Member States in breach with the EU law ensures the fulfilment of EU legal obligations[79]. Individuals cannot be reasonably expected to pursue litigation against State if there is no chance of reparation of harm (i.e., effective remedy, such as a foreseeable chance of obtaining award of damages).

However, for the purposes of this work, conclusive delimitation between effectiveness and effective judicial protection carries little practical significance. As long as the minimum conditions of Art. 19(1) of TEU and Art. 47 of the Charter are fulfilled, it is not decisive whether effective judicial protection is considered as a condition under general effectiveness principle or as a separate self-standing principle next to effectiveness.

All in all, the principle of effectiveness serves to afford protection to the purpose and functionality of the EU law. In the context of Remedies Directives, the EU lawmaker has required that injured parties must be able to claim damages for procurement breaches. As damages remedy is not much further elaborated in the Remedies Directives, it remains for the general principles (such as effectiveness) to provide minimum standard of compliance with the EU law. Based on the above, it can be concluded that at minimum, effectiveness requires that injured parties should be able to obtain reparation for harm caused to them by procurement breaches (regardless of whether "full force and effect" or "not excessively difficult" standard is upheld). Procedural autonomy is limited so far as to enable minimum standard of effective enforcement.

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[76] Judgement of 18 June 2002, *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Stadt Wien*, Case C-92/00, ECLI:EU:C:2002:379, §§ 58 & 59.
[77] *Supra note* 61, § 39 (*Hochtief*, Case 300-17)
[78] Directives 2014/23/EU, 2014/24/EU & 2014/25/EU.
[79] Judgement of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Case 26-62, ECLI:EU:C:1963:1, p 13.

1.2. EU law conditions on liability for damages

Since the landmark *Francovich*[80] case, it has been well established in the CJEU case law, that Member States are liable for harm caused to individuals by EU law infringements[81]. In *Francovich*, the CJEU established substantive minimum criteria of State liability to ensure their uniform application across Member States[82]. The CJEU has maintained that "the principle of State liability … is inherent in the system of [EU]"[83]. This can be attributed to the fact that the effective functioning of the decentralized enforcement of EU law relies in part on the disposition of harmed individuals to act in response to the breach[84].

Individuals harmed by Member State breaches of EU law are entitled to claim damages when a) Member State breached a rule of [EU] law which conferred rights on individuals, b) breach is sufficiently serious and c) there is a causal link between the breach and the damage. When those minimum conditions are fulfilled, the right to recover reparation for harm derives directly from EU law[85]. Moreover, these conditions must be interpreted in a way which enables to achieve the positive effect of EU law[86].

The *Francovich* State liability conditions are extensively used in the CJEU practice and have been widely discussed in legal literature[87]. For the purposes of this thesis, only a short overview of those minimum general liability conditions is provided.

First condition of State liability requires that Member State has to be in breach with EU legal rule which confers rights on individuals. While the wording of the first condition in *Francovich* expressly requires a breach of a "Member State", this requirement has been interpreted to be relatively broad. The CJEU has held that the principle stands in the event of the EU law breach "whichever is the authority of the Member State whose act or omission was responsible for the breach". This is because for the purposes of liability for a breach, State is considered as a one whole entity, all authorities of which are bound by the EU legal rules "which directly govern the situation of individuals"[88].

The "individual right" part of the criterion is superficially settled in case law as a requirement that EU legal rule "protects an individual interest, without … requiring enforceability of an individual right in the strict sense"[89]. Thus, the substantive meaning behind

[80] *Supra note* 17, (*Francovich*, Joined Cases C-6/90 & C-9/90).
[81] C. Ginter. Riigi vastutus õigusmõistmisel tekitatud kahju eest. Juridica, 2004, 8, lk 521.
[82] *Supra note* 8, p 1408 § 17 (Brussels Commentary).
[83] *Supra note* 17, § 35 (*Francovich*, Joined cases C-6/90 & C-9/90).
[84] *Supra note* 79, p 13 (*van Gend en Loos*, Case 26/62).
[85] *Supra note* 17, §§ 35 & 40 & 41 (*Francovich*, Joined cases C-6/90 & C-9/90).
[86] *Supra note* 29, p 425 (Z. Nicolo).
[87] *Supra note* 8, p 1407 § 16 (Brussels Commentary).
[88] *Supra note* 33, §§ 31 & 32 (*Köbler*, Case C-224/01).
[89] *Supra note* 9, p 43 (H. Schebesta).

the "confer rights on individuals" part of the first condition remains unclear. T. Lock points out that this is mainly the result of the CJEU reluctance to clearly establish the definition of a "right" for the purposes of the State liability doctrine[90].

For example, in *Dillenkofer* the CJEU hinted that individuals are entitled to claim damages "where the result prescribed by the directive entails the grant of rights to individuals, the content of those rights is identifiable on the basis of the provisions of the directive…."[91]. Thus, there is no State liability if the content of a right does not derive from the directive and is left under procedural autonomy of Member States to refine[92]. However, this definition does not afford much guidance on how to establish whether or not a right can be derived from a directive. In other words, there is no conclusive uniform elaboration on what amounts to minimum standard of an "identifiable right"[93]. In the end, it will be for the national courts to interpret the relevant EU instrument to establish whether or not it is intended to confer rights on individuals[94]. With reasonable certainty, it can only be concluded that the first condition is definitely fulfilled only in those cases where a directive expressly establishes rights on individuals.

This is exactly the case in procurement field since the inherent purpose of the Remedies Directives is to *inter alia* confer rights on individuals. For instance, Art. 1(3) of Directive 89/665/EEC refers directly to the rights of individuals by obliging Member States to "ensure that review procedures are available … 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". In Art. 2 of Directive 89/665/EEC specific remedies are listed which must be available for those persons under national law. Therefore, as the fulfilment of the first condition has not posed a challenge in the field of procurement, no further general consideration is given to this condition.

Secondly, to hold a Member State liable, the breach of the EU legal rule has to be "sufficiently serious". It must be noted that the "sufficiently serious breach" under State liability is an autonomous standard under the EU law which has to be uniformly applied across EU.

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[90] T. Lock. Is private enforcement of EU law through State Liability a Myth: An Assessment 20 Years after Francovich. Common Market Law Review, 2012, 49(5), p 1693.

[91] Judgement of 8 October 1996, *Erich Dillenkofer, Christian Edmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula & Trosten Knor v Bundesrepublik Deutschland,* Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 & C-190/94, ECLI:EU:C:1996:375, § 22.

[92] A. Taro. Euroopa Ühenduse õiguse rikkumisega tekitatud kahju. Ühenduse liikmesriigi vastutus. Juridica, 2003, 3, p 175.

[93] *Supra note* 90 (p 1693, T. Lock).

[94] A. Biondi & M. Farley. The right to damages in European Law, Alphen aan den Riin, Kluwer Law International, 2009, p 32.

Therefore, Member States are not at liberty to equate "sufficiently serious breach" with any national law requirement of fault if that concept of fault constitutes a stricter standard[95].

In order to decide if a breach is "sufficiently serious", the national court has to consider all relevant circumstances of the case. Particularly important is to contemplate "clarity and precision of the rule infringed", intention of the wrongdoer, scope of discretion and possible justifications to the infringement[96]. This means that the scope of a Member State's discretion is at the heart of the "seriousness" of a breach. The wider the margin of appreciation, the harder it is for the injured individual to establish that there had been a "sufficiently serious" breach[97]. The breach is definitely "sufficiently serious" in any case where has been a manifest breach of the CJEU case law[98] i.e., it is clear from the CJEU case law that "the conduct in question constituted an infringement"[99]. Any infringement may amount to "sufficiently serious" also when "the Member State .... had only considerably reduced, or even, no discretion" to exercise its legislative powers[100].

According to T. Lock, national courts are usually willing to establish the existence of a "sufficiently serious" breach in the event of aforementioned "clear-cut" infringement cases (i.e., EU law non-transposition cases and cases where breach was not eliminated even after it had been established by the CJEU). Nevertheless, national courts appear reluctant to hold that there has been a "sufficiently serious" breach when they have to contemplate whether the Member State remained within the limits of its discretion (i.e., cases of alleged "incorrect transposition of Directives"). That is why some authors believe that the Member State discretion makes the "seriousness" of a breach hardest of the three conditions for the injured party to prove[101].

Thirdly, there must be a direct causal link between the breach of the EU rule and the damage sustained. The necessary conditions for establishing such causal link are for national laws and courts to determine, provided that EU general principles of equivalence and effectiveness are complied with[102]. Nevertheless, it must be borne in mind that the concept of "direct causal link" in context of State liability is an autonomous one across EU and remains

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[95] Judgement of 5 March 1996, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and the Queen v Secretary of State for Transport, ex parte: Factortame Ltd & other*s, Joined Cases C-46/93 & C-48/93, ECLI:EU:C:1996:79, § 79.
[96] *Supra note* 33, §§ 54 & 55 (*Köbler*, Case C-224/01)
[97] *Supra note* 90 (p 1693, T. Lock).
[98] *Supra note* 33, § 56 (*Köbler*, Case C-224/01).
[99] *Supra note* 95, § 87 (*Brasserie du Pêcheur*, Joined Cases C-46/93 & C-48/93).
[100] Judgement of 4 July 2000, *Salomone Haim v Kassenzahnärztliche Vereiningung Nordhein*, Case C-424/97, ECLI:EU:C:2000:357, § 38.
[101] *Supra note* 90, pp 1693 & 1694 & 1701 (T. Lock).
[102] Judgement of 20 September 2001, *Courage Ltd v Bernard Crehan v Courage Ltd & Others*, Case C-453/99, ECLI:EU:C:2001:465, § 29.

under governance of EU law[103]. Therefore, Member States cannot impose higher demands in their national laws compared to those stipulated by EU law.

It has been well established in the CJEU case law that the three aforementioned State liability conditions "are necessary and sufficient to found a right in individuals to obtain redress". Member States are not at liberty to impose stricter standards for State liability[104]. Liability for damages in case of EU public procurement law breaches must thus be considered as one particularization under the general State liability doctrine. Hence, the same three minimum general conditions apply to claiming damages for procurement breaches[105].

This argument is strengthened by the fact that the CJEU made an express reference to State liability doctrine in procurement damages landmark case of *Spijker*. The CJEU held that Art. 2(1)(c) of Directive 89/665/EEC[106] "gives concrete expression to the principle of State liability" and cited the three general State liability conditions. The CJEU further noted that its case law is yet to develop a more detailed regulation for the purposes of procurement damages[107]. This means that apart from the State liability doctrine and general principles of the EU law, there are no additional EU law requirements to establish liability for damages in the field of procurement.

This is supported by the fact that EU secondary law in the form of the Remedies Directives provides no express substantive prerequisites for claiming damages for procurement breaches. Had it been the intent of the EU lawmaker to stray from the already existing State liability doctrine, it would have simply established procurement liability conditions in the Remedies Directives. Lack thereof suggests the reluctance of the EU lawmaker to create a new or additional liability standards and the intent to subject procurement damages under general State liability[108]. Consequently, State liability in combination with general principles is applicable as a general rules of EU law due to the absence of *lex specialis*.

The idea of using State liability doctrine as the main requirement under EU law to determine liability for procurement damages, has been criticized in the legal literature. It is mainly argued that the State liability doctrine restricts effective enforcement of the procurement damages remedy in practice[109]. Some authors believe that liability for damages under the general EU law (i.e., State liability) ought to be separated from liability under the Remedies Directives. By this line of reasoning, it is possible to apply different standards (than State

[103] *Supra note* 92, p p 177 (A.Taro).
[104] *Supra note* 95, § 66 (*Brasserie du Pêcheur*, Joined Cases C-46/93 & C-48/93).
[105] A. Sanchez-Graells. The EFTA Court's Fosen-Linjen Saga on Procurement Damages: A There and Back Again Walk. European Procurement & Public Private Partnership Review, 2019, 14(4), p 259.
[106] „Member States shall ensure that the measures taken concerning the review procedures specified in Art. 1 include provision for powers to award damages to persons harmed by an infringement" (text of Art. 2(1)(c)).
[107] *Supra note* 28, §§ 87 & 88 (*Spijker*, Case C-568/08).
[108] *Supra note* 8, p 1409 § 18 (Brussels Commentary).
[109] *Supra note* 9, p 65 (H. Schebesta).

liability) to establish liability for procurement damages[110]. As will be seen, the use of different standards for procurement purposes by this line of reasoning is justified by effectiveness considerations.

According to D. Pachnou, the fact that EU law (i.e., the Remedies Directives) expressly requires the availability of procurement damages remedy indicates that in comparison with general State liability doctrine, "stronger obligation" of Member States to achieve effectiveness of damages remedy is required[111]. This means that while the State liability conditions remain applicable, they ought to be customized in order to ensure the achievement of full force and effect of procurement damages remedy.

H. Schebesta has strongly advocated for strict differentiation between State liability and effectiveness damages as different types of liability (separation thesis). The purpose of State liability is to ensure implementation of EU law by Member States. If national law contains even a theoretical possibility to claim damages for procurement breaches, it can be held that the Member State has fulfilled its transposition duty and thus cannot be liable for breach under the State liability doctrine[112]. By contrast, effectiveness is the "enforcement of EU specific obligations" and must consider the "particular context of the area of law". Substantive procurement law is highly harmonized on the EU level. The Remedies Directives are designed to protect and achieve full force and effect of EU procurement law system as a whole[113].

H. Schebesta suggests applying effectiveness damages and State liability not "as a hybrid or minimum floor but sequentially". For achievement of effective damages remedy, its substantive conditions cannot be left under procedural autonomy of Member States as suggested in *Spijker*. Resorting to State liability results "in conjuring a loophole through which the Member State might escape liability by retreating safely into national law". Unlike effectiveness, State liability is incapable of establishing any substantive damages conditions and is related only to the compensation aspect of damages. The CJEU would be unable to consider the "specialities of the procurement sector"[114]. H. Schebesta thus considers *Spijker* to be "disappointing" primarily due to unwillingness of the CJEU to "engage with the question [of damages] in substantive terms"[115].

As established above, the unclear interrelationship between effectiveness and general State liability forms a vicious circle. On one hand, the general State liability doctrine can be said to

[110] *Supra note* 105, p 248 (A. Sanchez-Graells).
[111] *Supra note* 25, p 88 (Pachnou).
[112] *Supra note* 9, p 70 (H. Schebesta).
[113] *Supra note* 9, pp 65 & 66 (H. Schebesta).
[114] *Supra note* 9, pp 68 & 70 & 71 (H. Schebesta).
[115] *Supra note* 9, p 60 (H. Schebesta).

have crystallized in the EU law (i.e., "inherent to the system of the Treaty"[116]). Furthermore, the CJEU has expressly held State liability applicable in the field of EU public procurement law damages. There is also no substantive EU *lex specialis* on the matter since the Remedies Directives do not expressly stipulate an alternative standard of liability. Hence, it can be concluded that State liability is relevant for the purposes of determining liability for procurement damages and cannot be excluded completely.

On the other hand, the applicability of the general principle of effectiveness is also not disputed. However, it is correctly concluded in the legal literature, that despite the principle, in practice no effective damages remedy for procurement breaches exists[117]. This holds true regardless of whether effectiveness is defined by "not make it virtually impossible or excessively difficult"[118] requirement or "obligation to achieve full force and effect"[119] requirement. Consequently, procurement damages remedy does not fulfil the requirements of effectiveness.

This raises a question of hierarchy between State liability and effectiveness. If we accept, that achievement of both concurrently is impossible, which one prevails over the other? Can the conditions of State liability be altered for sake of effectiveness? And if so, to what extent?

From the perspective of procedural autonomy, the use of effectiveness to restrict the discretion of Member State even further is obviously unfavourable. It could be argued that such use of effectiveness would exceed powers conferred upon EU by the Member States. From the perspective of the effective enforcement of EU law however, the use of effectiveness to restrict procedural autonomy seems unavoidable. After all, the requirement of availability of damages remedy in the Remedies Directives suggests the will of the EU lawmaker to afford higher protection to such remedy than it would have been afforded under the general EU law.

It is submitted that the use of effectiveness to customize State liability for procurement purposes might be justified to minimal necessary extent. Effective enforcement of the EU objectives via EU law is the inherent purpose of the Union. If this fundamental purpose could be set aside by virtue of procedural autonomy every time practical obstacles arise, EU law would become a mere formality, void of substance.

It has been suggested in legal literature that to gain effectiveness of procurement damages remedy, the general State liability conditions ought to be relaxed in public procurement field. The CJEU gender discrimination case law in employment field should serve as an example and be applied by analogy. It would aim to afford aggrieved tenderers considerable probability to

[116] *Supra note* 17, § 35 (*Francovich,* Joined cases C-6/90 & C-9/90).
[117] *Supra note* 63, p 208 (S. L. Kaleda).
[118] *Supra note* 17, § 35 (*Francovich,* Joined cases C-6/90 & C-9/90).
[119] *Supra note* 47, § 22 (*Simmenthal,* Case 106/77).

succeed in claiming damages for procurement breaches (i.e., serves to contribute legal certainty and the existence of effective remedy).

The main implications of the use of the CJEU discrimination law would be firstly that solely a proof of breach gives rise to liability for damages[120]. Secondly, that burden of proof could be shifted if circumstances of the case so require[121]. Therefore, effectiveness would be achieved by making it easier for an injured party to show that preconditions for awarding damages are fulfilled in their particular case.

The use of gender discrimination law in this context is appropriate because it shares multiple inherent similarities with public procurement law. Firstly, both are grounded on principles of equal treatment, non-discrimination and equality of opportunity. Secondly, both include competition between two or more candidates who may be evaluated on subjective criteria, determination of which is under wide discretion of either the employer or the contracting authority respectively. Thirdly, the subjectivity and broad discretion puts the injured party in a weak position to prove the (required gravity of) infringement and causation. Fourthly, while the remedies in both fields are established in a broad manner, they both carry the dual inherent purpose of reparation for harm caused and deterrence of potential future breaches[122]. Hence, gender discrimination law and public procurement law are sufficiently similar to justify the use of similar standards to establish liability for damages.

The CJEU gender discrimination law uses State liability doctrine as a starting point. The conditions are however adjusted to enable the enforcement of intended effect of gender discrimination law[123]. Customization is needed in the event of alleged gender discrimination, because similarly to procurement breaches, it would otherwise be relatively difficult if not impossible for the injured party to prove that State liability conditions are met. As the right of gender equality is of "fundamental importance"[124], it must be afforded effective protection in practice. The relaxation of general EU law standards is thus justified, since there is no other reasonably efficient method to achieve effective protection of such a fundamental right.

In context of employment, decision to employ someone is usually based on a combination of different factors. To decide which candidate is the best, employer should be at liberty to consider objective as well as subjective criteria characterizing the candidates. For instance,

[120] *Supra note* 6, p 156 (S. Treumer in Damages as an Effective Remedy).
[121] Judgement of 31 May 1995, *Specialarbejderforbundet i Danmark v Dansk Industri*, Case C-400/93, ECLI:EU:C:1995:155, § 24.
[122] *Supra note* 12, p 165 (S. Treumer, Public Procurement Law Review 2006).
[123] H. Leffler. Damages liability for breach of EC procurement law: governing principles and practical solutions. Public Procurement Law Review, 2003, 4, p 155.
[124]Judgement of 26 February 1986, *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, Case 152/84, ECLI:EU:C:1986:84, § 36.

previous work experience and educational background are relevant objective criteria. Nevertheless, an employer cannot be condemned for evaluating candidates on relevant subjective criteria as well (e.g., motivation, attitude, teamwork skills etc). This means that an employer has a relatively broad discretion in determining necessary criteria and their overall importance when deciding which candidate to employ. It makes it easy for the employer in breach to hide discrimination behind this wide discretion.

The same holds true in procurement procedures, especially when the contract is awarded based on the "most economically advantageous tender"[125]. The purpose of the aforementioned criteria is to award the contract to tenderer who offers the best value for money. In principle, it is possible to determine best value for money either based on price only or considering price in combination with other criteria related to the object of procurement procedure[126]. According to the settled case law of the CJEU, the "most economically advantageous tender is to be identified from the point of view of the contracting authority". This means that the contracting authority is afforded significant discretion in determining the necessary award criteria in order to decide on which of the tenders was the "most economically advantageous". Requirements included in substantive procurement directives on determining the "most economically advantageous tender" are non-exhaustive. However, conditions for such determination must be related to the subject-matter of the contract in question[127]. The latter does not mean that award criteria can only relate to aspects of "purely economic nature". In *Concordia Bus Finland*, the CJEU subsequently held that "it cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority"[128]. Therefore, the contracting authority has wide discretion in establishing award criteria which might include objective and subjective criteria and the weights of such criteria, as long as they are related to the subject-matter of the contract.

From the candidate/tenderer perspective, the aforementioned subjectivity and broad margin of appreciation makes it challenging to prove that there has been an infringement (i.e., discrimination or breach of procurement rules) in the first place. This can mainly be attributed to the fact that the candidates usually have very little information about other candidates and/or their offers. Consequently, there are very little to no factual evidence available for the candidate

[125] *Supra note* 1, Art. 67 § 2 (2014/24/EU) & *Supra note* 1, Art. 82 § 2 (2014/25/EU).
[126] M.-A. Simovart & M. Parind (eds). Riigihangete seadus kommenteeritud väljaanne. Kirjastus Juura, Tallinn, 2019, p 476 § 12,
[127] Judgement of 26 March 2015, *Ambisig – Ambiente e Sistemas de Informação Geográfica SA v Nersant – Associação Empresarial da Região de Santarém & Núcle Incial – Formação e Consultoria Lda.* Case C-601/13, ECLI:EU:C:2015:204, §§ 28-30.
[128] Judgement of 17 September 2002, *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki & HKL-Bussiliikenne.* Case C-513/99, ECLI:EU:C:2002:495, § 55.

on which their allegations could be based on. Logically, in most cases, lack of factual evidence inevitably results in the inability of an injured party to prove infringement has taken place at all.

Furthermore, it is reminded from previous, that proof of breach itself is not enough to give rise to liability for damages under general EU law– there must be a "sufficiently serious" breach. As established above, the wider discretion afforded to the Member State (or any other entity whose behaviour can be attributed to the Member State), the harder it is to prove the required gravity of infringement under the State liability doctrine. This is because State liability seems to use the criterion of "sufficiently serious" to characterize the intent behind the breach. The fact that breach must be of sufficient gravity, suggests that room for error is afforded under State liability. If a Member State as an employer or contracting authority has acted in good faith within the limits of its discretion, it is difficult to convincingly argue that the breach had been "sufficiently" serious. Thus, in order to condemn the Member State for a breach, it must have been at least negligent towards its obligation. It is hard to imagine how one can conclusively prove such negligence in such context where all decisions made inherently contain subjective considerations.

Even if the candidate was somehow able to establish that there had been a sufficiently serious breach, they would still have a hard time proving causation under general State liability conditions. As noted above, general State liability requires direct causal link between breach and damage. This raises the same question of what is the meaning behind this damage? Is the fact of infringement enough to constitute to damage or must the candidate be able to establish that discrimination lost them the employment? Or in similar terms, is it necessary to prove that absent the breach an injured party had been awarded the procurement contract?

To accept that infringement itself is sufficient to rise liability for damages, would certainly increase the likelihood that an injured party is able to fulfil the required burden of proof. It would also mean that the applicability of the third condition of State liability is rejected. However, such possibility cannot be derived from the general EU law (i.e., the State liability doctrine). Thus, its use would need express justification from either the EU lawmaker or the CJEU.

On the other hand, to require that the candidate must be able to prove that absent infringement, they would have been employed, is to set the standard of proof unachievably high for most cases. It is difficult to imagine how could the candidate be able to convincingly argue that they would have been employed, considering that only very little information is available to them. To rebut such claim, employer would only need to make it believable that absent infringement, a third candidate would have been employed. Therefore, upholding requirement

of State liability would deprive all persons experiencing gender discrimination in employment process from actual legal protection. Similar consideration holds true for procurement cases.

In order to resolve such issues for gender equality purposes, the CJEU held in *Dekker* that "any breach of the prohibition if discrimination must, in itself, be sufficient to make the employer liable, without there being any possibility of invoking the grounds of exemption provided by national law"[129]. Furthermore, in *Royal Copenhagen*, the CJEU established that while burden of proof will usually be on the party bringing the proceedings, it "may be shifted when that is necessary to avoid depriving workers who appear to be victims of discrimination of any effective means of enforcing the principle of equal pay"[130].

The aforementioned means that the CJEU relaxed the standard of State liability. This was to afford persons injured by alleged discrimination to have an actual opportunity to meet the necessary standard of proof - such alleviation of standard was necessary to enable liability for damages to arise. As similar difficulties of providing sufficient proof of gravity of breach and causation characterize public procurement procedures, reducing the burden of proof of the injured party in a similar fashion might thus be justified to achieve effective protection of the EU substantive public procurement law.

Under EU gender discrimination, full compensation is in order. The CJEU held in *von Colson* that "sanction for unlawful discrimination … [must] guarantee real and effective judicial protection. … it must also have a real deterrent effect on the employer…[thus] compensation must … be adequate in relation to the damage sustained. [Subsequently]… national provisions limiting the right to compensation … to a purely nominal amount, such as, for example, the reimbursement of expenses incurred… would not satisfy the requirements of an effective transposition of the directive"[131]. When applied in the context of procurement, full compensation should entail compensation for loss of profit or chance, in addition to bid costs.

While the gender discrimination case law does not provide all the necessary answers (e.g., there is no express statement that loss of chance was claimable and no substantive terms on conditions), this serves as an important starting point[132]. Express requirement of full compensation would indicate that participation costs for procurement breaches are definitely not enough – lost chance or profit also has economic value which must be compensated for. Furthermore, reduction of burden of proof for injured party seems the main practical way to increase the effectiveness of damages remedy by making it obtainable for injured parties.

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[129] Judgement of 8 November 1990, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, Case C-177/88, ECLI:EU:C:1990:383, § 25.
[130] *Supra note* 121, § 24 (*Royal Copenhagen*, Case C-400/93).
[131] Judgement of 10 April 1984, *Sabine von Colson & Elisabeth Kamann v Land Nordrhein-Westfalen*. Case 14/83, ECLI:EU:C:1984:153, §§ 23 & 24.
[132] *Supra note* 60, CS 171&172 (S. Arrowsmith).

2. Scope and essence of procurement damages remedy

2.1. CJEU case law on procurement damages and issue of sufficiently serious breach

As already established above, the Remedies Directives themselves do not give any substantive indication on what the damages remedy for procurement breaches should entail. Pursuant to the general EU law, the EU State liability conditions can be held applicable also in the field of procurement. In order to find more procurement field-specific answers, relevant case law in the context of procurement damages remedy must be considered.

There are only two judgements of the CJEU (i.e., *Strabag* and *Spijker*) which contemplate on the substantive conditions of the procurement damages remedy. Both were delivered in 2010, less than two months apart from each other. To this day, *Strabag* and *Spijker* have remained the main authority in interpreting EU requirements on procurement damages. However, as will be seen, the substantive contribution of aforementioned judgements has not been that extensive. Moreover, conciliating the CJEU in *Strabag* and *Spijker* have posed a challenge in practice as those decisions are somewhat contradictory. All in all, the uncertainties surrounding damages claims persists even after the delivery of *Strabag* and *Spijker*.

In *Strabag*, the CJEU confirmed that national law cannot make the award of damages for procurement breaches conditional on proof of fault even if such fault of the contracting authority was presumed by national law[133]. The practical effect of this judgement is the possible mitigation of the injured party's burden of proof in comparison with the general State liability doctrine. With *Strabag*, any requirement of fault is unconditionally excluded from establishing liability for procurement damages. By contrast, the "sufficiently serious breach" requirement under general State liability does not expressly exclude the possibility to rely on fault criterion in national law. The CJEU held in *Brasserie* that "certain objective and subjective factors with the concept of fault under a national legal system may … be relevant [to establish sufficiently serious breach]". The CJEU concluded that the requirement of fault cannot be upheld under national law if this would impose stricter standard in comparison with the requirement of "sufficiently serious breach"[134]. It would make sense to conclude that the proof of fault element under State liability can otherwise be required under national law. Thus, *Strabag* imposes higher demands on procurement field than general State liability doctrine since *Brasserie* allows the Member State to rely on justification for its breach, possibility of which is expressly excluded under *Strabag*[135].

[133] *Supra note* 54, § 45 (*Strabag*, Case C-314/09).
[134] *Supra note* 95, §§ 78 & 79 (*Brasserie*, Joined cases C-46/93 & C-48/93).
[135] R. Caranta. Remedies in EU Public Contract Law: The Proceduralisation of EU Public Procurement Legislation. Review of European Administrative Law, 2015, 8(1), p 97.

The scope of practical implication of *Strabag* judgement is arguable. On one hand, it can be said that *Strabag* has notable substantive meaning and effect. For instance, A. van Heeswijck goes as far as to argue that *Strabag* concludes that the procurement damages remedy is completely left under procedural autonomy of Member States[136]. This might be too optimistic interpretation as the absence of fault requirement does not in itself equate with rejection of the applicability of the general EU State liability conditions. If national law requirement of fault does not impose stricter standard than sufficiently serious breach, requirement of proof of fault would be consistent with State liability. This might especially be the case where national law presumes the existence of fault.

Nevertheless, even if *Strabag* was interpreted in a more conservative way than proposed by A. van Heeswijck, any express interpretation of the CJEU still amounts to more than just guesswork based on the general EU law (e.g., general State liability doctrine) which tends to be relatively wide in scope. In principle, *Strabag* thus excludes the possibility of a contracting authority to argue that the requirement of fault under national law can be upheld as this is in compliance with the "sufficiently serious" breach requirement. The CJEU held in *Strabag,* that prohibition of fault requirement holds even if national law presumes fault of contracting authority and does not allow contracting authority to justify the breach[137]. As such possibility is not expressly excluded under State liability in general, *Strabag* is certainly a progress for the procurement field purposes.

On the other hand, as R. Caranta has pointed out, this is not a significant development in terms of clarifying the substantive requirements behind procurement damages remedy. The same or, at least similar conclusion can be reached as one possible interpretation of the *Brasserie* judgement[138]. Furthermore, *Strabag* provides very little practically usable information and still leaves majority of the obstacles related to procurement damages unaddressed. For instance, while requirement of proof of fault was rejected, the CJEU did not elaborate on the conditions of necessary minimum standard of the breach (i.e., State liability and possible adjustments to it). By this line of reasoning, the *Strabag* decision is thus too limited in scope to contribute to practical effectiveness of procurement damages remedy.

In *Spijker*, the CJEU held that the general State liability doctrine conditions were applicable to procurement damages[139]. The CJEU provided no procurement context specific clarifications nor any consideration on the practical difficulties of injured parties to provide sufficient proof to claim damages for procurement breaches. Consequently, *Spijker* was also not the much

[136] *Supra note* 5, pp 197 & 198 (A. van Heeswijck).
[137] *Supra note* 54, § 45 (*Strabag*, Case C-314/09).
[138] *Supra note* 67, p 218 (R. Caranta in EPPPL).
[139] *Supra note* 28, § 92 (*Spijker*, Case C-568/08)

hoped for development of procurement damages remedy in substantive terms either. As already established above, in the absence of a field-specific regulation (*lex specialis*), the doctrine of State liability would in any event apply by virtue of the general EU law. Thus, similarly to *Strabag*, the main value of *Spijker* rests in an express CJEU confirmation rather than in any substantive development on the conditions of damages remedy.

The *Spijker* judgement is criticized by some for its possible counter-effective impact on the effectiveness of procurement damages. It holds true that the State liability doctrine might not be best suited for ensuring effectiveness of procurement damages remedy. Procurement damages are characterized by difficulties of injured party to establish the emergence, reach, sufficient gravity of breach and causation of such damages. Oftentimes the main damage is the loss of awarded contract – extent of harm caused can be measured in purely hypothetical terms. It is also difficult to provide sufficient evidence of infringement, gravity of breach and causation, as the aggrieved tenderer has usually very limited access to factual evidence. Furthermore, contracting authorities have wide discretion to establish award criteria making fulfilment of State liability conditions even more burdensome on aggrieved tenderers. National courts might also be discouraged to award damages for procurement breaches since, in the end, the compensation would come from the purse of the taxpayer and thus would be to detriment of general interest. This means that persons injured by procurement breaches are in a disproportionately weaker position to argue their case than the contracting authority.

Significant imbalance between aggrieved tenderer and contracting authority suggests the need to provide additional consideration for the interests of aggrieved tender to ensure protection of their rights. On this point, H. Schebesta pointedly compares aggrieved tenderers with consumers, who must be afforded special protection due to their vulnerability[140]. However, application of State liability doctrine affords procurement damages no such consideration, failing to consider any specificities of public procurement field. Strict adherence to the State liability doctrine thus leads to the current unsurprising result of procurement damages remedy with little to no practical effect.

Nonetheless, effectiveness considerations themselves are not sufficient grounds to reject the applicability of the State liability doctrine completely. As State liability has crystallized in the general EU law and consequently it cannot be reasonably expected that the CJEU would be willing to depart from it completely any time soon. Still, customization of State liability conditions to consider characteristics of procurement law, would not be completely out of line. As already mentioned, the CJEU has been willing to alleviate State liability to conditions for

[140] *Supra note* 9, p 59 (H. Schebesta).

the benefit of an injured person in the field of gender discrimination and employment law. Thus, it is not out of line to argue that relaxation of primary law conditions is possible under EU law for effectiveness considerations of secondary law (i.e., the Remedies Directives). Similar adjustments would be welcome in the field of public procurement as well since similarly to gender discrimination, the injured person normally has hard time providing sufficient proof of causation and quantification. While *Spijker* did not elaborate on the possibility to improve the position of an injured party in procurement procedure, the CJEU did also not exclude such possibility, leaving it open for future consideration.

Although, the brief messages behind *Strabag* and *Spijker* taken separately are clear enough, their correlation has caused confusion. Some authors suggest that by virtue of *Strabag*, the interrelationship between the Remedies Directives and State liability remain unclear. At the heart of the debate is the question – do the Remedies Directives as *lex specialis* enable the lower threshold of a breach to establish liability as opposed to the general State liability?[141] S. Treumer for instance, concludes that while *Strabag* and *Spijker* lead to completely opposite results, it is left for the Member States to establish the threshold of the gravity of the breach required and "the dominant trend" in national laws appears to be that "any violation is sufficient"[142]. Such interpretation is consistent with the Remedies Directives and the CJEU case law (i.e., *Strabag* and *Spijker*), as long as the no proof requirement is upheld. The Member States are at liberty to impose easier standards in national laws which transpose EU law requirements for benefit of individuals, e.g., require only proof of breach instead of a sufficiently serious breach. Although such interpretation is tempting, it does not really address the interrelationship between *Strabag* and *Spijker* and their possible implications on minimum gravity of breach required under EU law.

The discussions related to the required gravity of the breach under EU procurement law once again arose in legal literature with the EFTA Court saga of *Fosen-Linjen*. Although the EFTA Court applies the EEA law, its judgements can be taken into consideration for the EU procurement law purposes as well – the EEA legal authority on procurement is essentially the same as the EU one[143].

The main attraction of the two *Fosen-Linjen* judgements can be attributed to the fact that those judgements are contradictory within the most immediate sense of the word. Those judgements were the result of attempts of the EFTA Court to interpret the interrelationship between *Strabag* and *Spijker*[144]. In *Fosen-Linjen I,* the EFTA Court asserted that a "simple"

[141] *Supra note* 105, p 251 (A. Sanchez-Graells).
[142] *Supra note* 6, pp 160 & 161 (S.Treumer in Damages as an Effective Remedy).
[143] *Supra note* 16, p 255 (M. A. Raimundo).
[144] *Supra note* 105, (p 248, A. Sanchez-Graells).

breach is sufficient for establishing liability for damages – there was no need to prove gravity of the breach[145]. In *Fosen-Linjen II,* the EFTA Court reversed its initial position and upheld the requirement of "sufficiently serious breach"[146]. The conclusion of the *Fosen-Linjen II* seems to be compliant with the CJEU practice so far. Nonetheless, the views are divided in legal literature as to the outcome of the *Fosen-Linjen* saga.

Some authors maintain that the *Fosen-Linjen I* conclusion that any breach is sufficient should be upheld. According to R. Caranta, the requirement of "sufficiently serious" breach is too indeterminate, affording too much procedural autonomy "to the determent of effective judicial protection"[147]. M. A. Raimundo argues that *Fosen-Linjen I* amounts to a "more adequate understanding of the law". This is because liability for damages is inherent to any system of liability of public bodies. Therefore, the need to protect the fundamental right of an individual to receive compensation for harmed caused by public authority should prevail over upholding the general State liability requirement of sufficiently serious breach. According to M. A. Raimundo, this is supported by the fact that in case law, the CJEU has departed from the requirement of "sufficiently serious" breach and has accepted "simple breach" on grounds of procedural autonomy of Member States[148]. Finally, T. Kotsonis has criticised the approach of *Fosen-Linjen II* by pointing out that strict adherence to State liability doctrine excludes all real considerations of effectiveness which in turn leads to problematic result[149], thus suggesting adherence to *Fosen-Linjen I.*

By contrast, others argue that the *Fosen-Linjen II* was the correct judgement out of the two. A. Sanchez-Graells considers *Fosen-Linjen I* as an "excessively broad interpretation of the Remedies Directives" and a "clear judicial excess" on part of the EFTA Court. This is because *Fosen-Linjen I* interprets the Remedies Directives to be instruments of maximum harmonization, while they are in fact instruments of minimum harmonization (i.e., directives set not all, but only the minimum requirements Member States have to comply with, thus do not require the transposing national laws to be identical). Furthermore, the Remedies Directives as an expression of secondary EU law cannot sever the link between themselves and the general principle of State liability. However, the latter is exactly what the conclusion of *Fosen-Linjen I* did by rejecting the applicability of the second condition of State liability. Such conclusion is incorrect and thus ought to be rejected[150].

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[145] Judgement of 31 October 2017, *Fosen-Linjen AS v AtB AS*, Case E-16/16, p 18 § 82.
[146] Judgement of 1 August 2019, *Fosen-Linjen AS v AtB AS,* Case E-7/18, pp 22 & 23 §§ 120 & 121.
[147] *Supra note* 67, p 214 (R. Caranta in EPPPL).
[148] *Supra note* 16, p 256 & 259 (M. A. Raimundo).
[149] T. Kotsonis. Case E-7/18 – Fosen Linjen AS v AtB AS (Fosen Linjen II): the parable of Fosen Linjen (reprise). Public Procurement Law Review, 2020, 1, NA6 & NA7.
[150] *Supra note* 105, p 252-254 (A. Sanchez-Graells).

There are advantages in reading the no-fault condition established in *Strabag* to mean that any infringement (as opposed to "sufficiently serious" breach) amounts to liability for procurement damages[151]. Such interpretation would certainly benefit the injured parties (at minimum would reduce the burden of proof) and could be justified for effectiveness purposes. As matters stand now, injured parties have been essentially deprived of their right to an effective remedy for procurement breaches in any case where pre-contractual remedies cannot be used (e.g., when contract has already been concluded). Such result is contradictory to the inherent purpose of any remedies system and cannot thus be tacitly accepted. Consequently, the view which holds simple breach sufficient is understandable, as it prioritizes the general aim of the procurement damages remedy.

Despite the aforementioned considerations, *Strabag* judgement itself cannot be read into a conclusion of the CJEU that simple breach is sufficient for procurement purposes. It must be kept in mind that *Strabag* merely rejected possibility of national law to require proof of fault as a precondition of liability for procurement damages. Prohibition to require proof of fault does not exclude the possibility to uphold the State liability requirement of a sufficiently serious breach.

It is submitted that the scope of a "sufficiently serious" is much broader than the scope of fault. That is, sufficiently serious breach must be differentiated from fault despite the fact that there might be some overlap between them. It is probably safe to assume that if the actions of a Member State are culpable, the breach would be in any event "sufficiently serious". Nonetheless, breaches which do not entail fault may be sufficiently serious as well. As noted above, the CJEU held already in *Brasserie*, that any fault requirement that imposes a stricter standard than "sufficiently serious" breach, must be rejected under general State liability. Regardless of whether or not *Strabag* refers to the applicability of State liability doctrine, no-fault condition cannot be automatically equated with the rejection of "sufficiently serious" breach criterion.

Clash between effectiveness and requirement of sufficiently serious breach has thus not been conclusively resolved in the procurement field. On the contrary, the sufficiently serious breach requirement appears to have set the standard of proof unachievably high for persons injured by procurement breaches rendering the remedy lacking effectiveness. Two possible ways are submitted here in order to aid the effectiveness of procurement damages while preserving the link between the Remedies Directives and the general EU law (i.e., State liability).

[151] *Supra note* 6, pp 160 & 161 (S.Treumer in Damages as an Effective Remedy).

Firstly, multiple authors argue[152] that breach of EU substantive procurement rules amounts to "sufficiently serious" breach within the meaning of general State liability doctrine. According to S. L. Kaleda, breaches of procurement law suggest breaches of underlying principles of EU law (e.g., equal treatment and transparency). Establishing fulfilment of the "sufficiently serious breach" should thus be easy enough, especially in cases where Member States have limited procedural autonomy in determining the substantive terms of procurement law[153]. R. Caranta similarly argues that in most cases procurement breaches, are "characterized by very little discretion if any"[154]. It should be reminded that it is the discretion of Member States which tends to make the proof of a "sufficiently serious" breach difficult to achieve in practice. The inherent purpose of the "sufficiently serious" criterion is to make EU rules sufficiently clear so that Member States would know of unlawfulness of their activities at the time such activities take place[155]. Thus, with discretion, Member States are afforded a margin for error by virtue of which they can justify them being unaware of their breach. In the absence of such discretion however, the existence of sufficiently serious breach should be assumed – Member States had to know. By this line of reasoning, the burden of proof for injured parties would be significantly reduced – in practical terms, only proof of infringement would be required to fulfil the standard of sufficiently serious breach under State liability doctrine.

Secondly, as elaborated above, the situation could be resolved by adapting the State liability conditions to consider the characteristics of procurement law in a similar manner as the CJEU has done in the field of gender discrimination. This means that in order to afford protection to rights of individuals and effective judicial protection, proof of infringement should be sufficient and if circumstances so require, the burden of proof must be reversed for the benefit of injured party. Thus, there is no inevitable need to rely on *Strabag* in order to achieve the applicability of the (terms of the) requirement of "simple breach" as opposed to "sufficiently serious breach" in procurement context. Similar conclusion can be reached by either assuming sufficiently serious breach for the purposes of procurement field or allowing adjustments to general State liability standards for effectiveness considerations.

The argument that by virtue of *Strabag*, the interrelationship between the Remedies Directives and State liability is unclear, is unconvincing and ought to be rejected. As established above, *Strabag* cannot be interpreted as an exclusion of a "sufficiently serious" breach

[152] In addition to those mentioned in the following paragraph, H. Leffler in *supra note* 123, p 159 & H. Schebesta in *supra note* 9, p 62.
[153] *Supra note* 63, p 197 (S. L. Kaleda).
[154] *Supra note* 67, p 220 (R. Caranta in EPPPL, 2019).
[155] *Supra note* 16, p 260 (M. A. Raimundo).

requirement. This in turn means, that it also cannot be interpreted as an argument for the exclusion of applicability of the State liability doctrine.

It is again highlighted that the CJEU never expressly excluded the applicability of State liability in *Strabag*. Interpreting *Strabag* as such would lead to a result which does not really make sense in legal terms. How would it be possible for the CJEU to tacitly (i.e., without express statement) exclude the applicability of primary law (i.e., general State liability) by virtue of secondary law (i.e., the Remedies Directives)? It is not even certain, if and to what extent such exclusion would be possible by express statement by the CJEU.

All in all, so far, the case law has not made a significant contribution to the substantive meaning behind the EU procurement damages remedy. What is for certain is that firstly, damages remedy cannot be conditional upon proof of fault and secondly, that the conditions of general State liability doctrine have been held applicable by the CJEU. Furthermore, while the fulfilment of the "sufficiently serious" breach requirement might be an obstacle for aggrieved tenderers to claim damages for procurement breaches, it must be held applicable by virtue of case law of the CJEU as well. Nevertheless, it would be acceptable under EU law to assume the seriousness of all procurement law breaches (as breaches of substantive EU law procurement directives).

2.2. Participation costs and loss of profit as damages: issues of causation

The Remedies Directives do not stipulate which heads of damages must be available for aggrieved tenders in the event of procurement breaches. The two most obvious ones are participation costs and loss of profit. Litigation costs and question of interest are also relevant. Finally, it has also been suggested that an aggrieved tenderer could suffer reputational harm. However, the latter cannot be considered a priority since the mere fact that another economic operator has won a contract award procedure does not in itself cause reputational harm to others who participated in the procedure[156]. For the purposes of this work, participation costs and loss of profit are closer scrutinized because they form the substantive claim of damages for procurement breaches.

Participation costs amount to direct monetary damage of an injured party – these are costs injured party has actually incurred. Otherwise, there would be no legal grounds to claim them as damages. Although, such costs are presumably much lower than the value of the contract, participation costs can still amount to significant sum thus providing economic operators incentive to claim them as damages. Considering that the Remedies Directives require the

[156] *Supra note* 63, p 198 (S. L. Kaleda).

availability of damages claims, it is not possible for national courts to avoid awarding damages for procurement breaches completely. As participation costs are objectively measurable (i.e., quantifiable), it is easy to see why the national courts would be willing to award them as damages (as opposed to loss of profit, extent of which is hard to quantify).

Alternative perspective is to argue that participation costs should not be claimable as damages. As pointed out by S. L. Kaleda, participation costs can be seen as "normal economic risks inherent in [injured party's] commercial activities". Participation itself does not ensure an award of contract and thus cannot create a legitimate expectation for reimbursement of such costs[157]. H. Leffler argues that bid costs cannot be claimed as damages due to lack of causation. The purpose of awarding damages is to put an injured party into a position it would have been had the breach not occurred. Even in the absence of a procurement breach, the injured party would have borne participation costs. Thus, there is no causation between the breach and bearing of participation costs[158].

It is nevertheless submitted that injured parties should be entitled to claim participation costs as damages. Firstly, 92/13/EEC Art. 2(7) expressly foresees such possibility at least in the field of water, energy, transport and telecommunications (i.e., utilities) sector. Secondly, it can be presumed that in normal circumstances, tenderers are willing to bear such costs in exchange for participation in a fair and transparent procurement procedure where all participants are afforded an equality of opportunity. In the event of a contracting authority's breach however, the procedure will no longer be fair nor transparent nor equal. Thus, participation costs would not serve their legitimately expected purpose and should be compensated to injured party.

By this line of reasoning, it can be argued that any infringement should serve as legitimate grounds to claim participation costs as damages. However, as established above, the State liability doctrine affords contracting authorities some room for error, excluding the possibility to establish liability for any infringement under general EU law. Especially problematic would be to argue that contracting authority acting in good faith should compensate all bid costs in the event of even a minor infringement which might not have even affected the general outcome of the award procedure. This holds true for any heads of damage under the Remedies Directives. Therefore, it is presumed that no considerations of general principles of EU law such as equal treatment, non-discrimination or transparency are likely to overturn the margin of error left under "sufficiently serious breach". It can be expected that unless expressly otherwise provided, claiming bid costs as damages for procurement breaches might require proof of certain gravity of a breach under general State liability doctrine.

[157] *Supra note* 63 p 198 (S. L. Kaleda).
[158] *Supra note* 123, p 160 (H. Leffler).

Assuming that participation costs can be claimed as damages under the Remedies Directives, the minimum requirements to be fulfilled must be identified. In utilities sector, such conditions are stipulated in Art. 2(7) of Directive 92/13/EEC. However, the issue here is the absence of a similar paragraph in Directive 89/66/EEC which governs the public works sector. That is despite the fact that Directive 89/665/EEC and 92/13/EEC are otherwise pretty much the same in content. This difference has caused confusion.

In utilities sector, Art. 2(7) of 92/13EEC establishes that three conditions have to be met to claim participation costs as damages. Firstly, proof of infringement of the public procurement law (i.e., the EU law itself or national law implementing the EU law). Secondly, proof that injured party would have had a "real chance" of winning the contract. Thirdly, infringement must have had an adverse effect on the chance to win. Most importantly, it can thus be concluded that any infringement is sufficient to claim participation costs as damages. However, an injured party has to be able to prove a "real chance" of winning, as well as causation between the breach and adverse effects on the injured party to fulfil the standard of causation.

The question remains – can the same principles be applied on public works contracts despite the fact that paragraph similar to Art. 2(7) of 92/13/EEC is absent from 89/665/EEC? Some authors argue that the extent of damages claims should be the same under both Directives. Therefore, Art. 2(7) of 92/13/EEC should be expressly included in 89/665/EEC as well[159]. While such inclusion would certainly be justified and would clarify the situation in public works sector, the absence of such paragraph from 89/665/EEC must be considered as will of the EU lawmaker to differentiate between 92/13/EEC and 89/665/EEC. As similar as the Remedies Directives might otherwise be, there are no grounds to justify application of 92/13/EEC rules on 89/665/EEC situations. This line of reasoning leads to the conclusion that in the absence of special provisions in 89/665/EEC, the general State liability conditions are applicable also to claiming bid costs as damages.

Despite the aforementioned, there still seems to be some understanding in legal literature that even under 89/665/EEC bid costs should not be subjected to the onerous burden of proof under State liability. In his opinion to the *Spijker* case, Advocate General C. Villalón reached a similar conclusion. He wrote that interpretation of 2007 remedies reform leads to conclusion that the EU lawmaker did not intend to add a paragraph such as Art. 2(7) of 92/13/EEC to 89/665/EEC. Nevertheless, it is possible to use Art. 2(7) of 92/13/EEC in the context of 89/665/EEC for "interpretative purposes…concerning causality and proof as regards to the objective damage comprising the cost of participating in the tendering procedure". The

[159] *Supra note* 8, p 1141 § 20 (Brussels Commentary).

Advocate General then went on to highlight greater extent of procedural autonomy afforded to Member States under 89/665/EEC concerning damages as participation costs[160]. The procedural autonomy part might suggest that conditions for establishing liability for bid costs under 89/665/EEC might stand somewhere between State liability and Art. 2(7) of 92/13/EEC requirements.

While D. McGowan correctly criticizes this AG opinion as contradictory and opaque[161], the opinion serves as (at least some) grounds for two important conclusions. Firstly, that while 89/665/EEC affords Member States more extensive procedural autonomy, this discretion does not extend to exclusion of participation costs as a head of damage recoverable under 89/665/EEC. Secondly, that under 89/665/EEC the causation and proof rules should be somewhat similar to those of 92/13/EEC (i.e., not equate to State liability conditions).

Overall, there seems to be no convincing arguments against the general consensus in legal literature that availability of participation costs is a minimum standard of efficiency required under the Remedies Directives[162]. While in utilities sector, claiming such damages is relatively straightforward by virtue of Art. 2(7) of 92/13/EEC, the same cannot be said about public works sector. In the absence of specific rule in 89/665/EEC, it is suggested that the contents of 92/13/EEC should still be taken as a point of reference when claiming bid costs as damages. Nevertheless, the injured party does not have a legitimate expectation under 89/665/EEC that bid costs will be awarded when conditions stipulated in Art. 2(7) of 92/13/EEC are fulfilled. This is because due to the absence of a similar provision from 89/665/EEC, general State liability rules should be held applicable by virtue of the general EU law. Thus, the national law seems to be at liberty to require fulfilment of higher standards than those imposed in Art. 2(7) of 92/13/EEC.

In any case, compensation for bid costs should not be considered as the only available head of damage under the Remedies Directives. While it is not expressly clear from the Remedies Directives, there seems to be a general consensus that loss of profit is claimable for procurement breaches. However, as there is no objective or uniform method to measure the extent of loss of profit, awarding damages based on loss of profit has proved much more problematic in practice when compared with awarding participation costs as damages[163].

The requirement of the availability of loss of profit as a head of damage is a general rule under EU law. Already in *Brasserie,* the CJEU implied that loss of profit must be available for

[160] *Supra note* 28 (*Spijker*, Case C-568/08), Opinion of AG C. Villanòn, §§ 95 & 97.
[161] D. McGowan. Remedies revolution avoided: a note on Combinatie Spijker Ingrabouw-De Jonge Konstruktie v Provincie Drenthe (C-568/08). Public Procurement Law Review, 2011, 3, NA69.
[162] *Supra note* 63, p 198 (S. L. Kaleda).
[163] *Supra note* 6, p 179 (R. Caranta in Damages as an Effective Remedy)

EU law breaches, especially when "a total exclusion of profit would be such as to make reparation of damage practically impossible"[164]. According to the often-cited *Manifredi* case "it follows from the principle of effectiveness and the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss but also for loss of profit plus interest"[165]. Consequently, it can be asserted that loss of profit is claimable under the Remedy Directives as well by virtue of a general rule of EU law.

Practical issues related to loss of profit arise out of a high standard of causation often required under national legal orders. It is reminded, that under the State liability doctrine, it is for the Member States to establish necessary conditions for determining causal link, provided that EU general principles of equivalence and effectiveness are complied with[166]. Consequently, limited guidance is available from the CJEU case law in terms of uniform EU requirements on causation.

Difficulties arise because in order to claim compensation for loss of profit, the all or nothing approach is commonly adhered by. This means that the injured party must be able to prove that absent the infringement of procurement law, it would have been awarded the contract. If the injured party is successful, full compensation is in order. Otherwise, injured party is left with nothing, even no compensation for bid costs due to lack of causation (i.e., the breach had no effect on the position of the injured party, had there been no breach, bid costs would have been wasted anyways)[167]. In most cases, fulfilment of such standard is unachievable – procurement procedures usually involve more than two tenderers who are evaluated on subjective criteria, establishment of which is under wide discretion of contracting authority[168]. Therefore, proof of infringement does not automatically mean that aggrieved tenderer claiming damages would have but for breach won the contract. Furthermore, because of the lack of information available to the aggrieved tenderer about other unsuccessful tenderers, it will be relatively impossible to establish that out of all tenderers, theirs should have been successful.

There is a general consensus in legal literature that commonly required proof of successful contract but for breach (i.e., *conditio sine qua non*), sets the standard to unachievable heights for most cases. According to H. Leffler for example, providing proof that tenderer's bid should have been the winning bid under the award criteria of "the most economically advantageous

[164] *Supra note* 95, § 87 (*Brasserie*, Joined cases C-46/93 & C-48/93).
[165] Judgement of 13 July 2006, *Vincenzo Manifredi v Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v Fondiaria Sai SpA (C-296/04) & Nicolò Tricarico (C-297/04) & Pasqualino Murgolo (C-298/04) v Assitalia SpA*, Joined cases C-295/04 to C-298/04, ECLI:EU:C:2006:461, § 95.
[166] *Supra note* 102, § 95 (*Courage*, Joined cases C-295/04 to C-298/04).
[167] *Supra note* 60, CS169 (S. Arrowsmith).
[168] *Supra note* 4, p 71 (A. Reich & O. Shabat).

tender" is troublesome[169]. R. Caranta argues that the issue of causation combined with high standard of burden of proof is the main reason behind the lack of effectiveness of the current procurement damages system. As the matters currently stand, the relatively small likelihood to establish causation exists only for those aggrieved tenderers who have managed to reach procurement procedure to its final stages. This means that in the event of direct contract or unadvertised contract, which are considered the most severe possible infringements, establishing sufficient causation to claim damages is relatively unlikely[170]. Thus, despite the general consensus that loss of profit needs to be available for procurement breaches under the EU law, there seems to be no such factual availability under national laws. Even if the aggrieved tenderers were able to overcome the obstacle of proving the existence of sufficiently serious breach, the high standard on establishment of causation will more often than not be to their detriment.

It is noted that the issue of causation has persisted during the entire existence of the EU procurement law. J. M. Fernández-Martín wrote already in 1997, that "it is unlikely that complainants can overcome the obstacle of providing a better right to the contract, especially with regard to those contracts awarded pursuant to the most economically advantageous offer…. As for the tenderers, it is a well-known fact that the supply of such evidence is an almost insurmountable obstacle in public procurement cases, unless the award is made on the basis of the lowest offer criterion. National experiences and case law on the matter largely supports this conclusion"[171]. Therefore, it is even more so concerning that the EU lawmaker has not acted in response to such practical issue which has been identified for a long time.

As a solution to procurement damages lack of practical effectiveness, it has been suggested in legal literature that burden of proof should be either significantly reduced or reversed. According to A. Reich and O. Shabat, it should be for the contracting authority to prove that there has been no infringement. If burden of proof was to put on the contracting authority, it would ensure that the national court would be presented all relevant evidence thus increasing the probability that the outcome of court proceedings would be just[172]. H. Leffler also argues that the contracting authority should carry much higher burden of proof due to "inherent inequality of arms between procuring entity and tenderer". Thus, the burden of proof must be for contracting authority to carry due to their better position to obtain relevant information (similarly to gender discrimination cases as established above). This has to be done because the

[169] *Supra note* 123, p 166 (H. Leffler).
[170] *Supra note* 6, pp 175 & 176 & 178 (R. Caranta in Damages as an Effective Remedy).
[171] J.M. Fernández-Martín. Damages for Breach of Community Law. Public Procurement Law Review, 1997, 5, pp 149 & 150.
[172] *Supra note* 4, p 51 (A. Reich & O. Shabat).

current absence of functional procurement damages remedy violates the general principle of effectiveness as well as the Remedies Directives[173].

However, consideration must be given to the fact that procurement rules do not exist for the sole purpose of affording protection to the aggrieved tenderers. They also serve to protect the general interests[174] by ensuring that the substantive procurement system is functional as a whole[175]. Interests of individual and general interests inherently contradict each other. Nevertheless, both interests must be considered by national lawmaker when deciding the required standard under which damages can be claimed for procurement breaches. The balancing of such interests might lead to a result which restricts the aggrieved tenderers right to full compensation to at least some extent.

This might hint the underlying reason as to why successful claims of damages are rare in practice. When deciding whether to award damages, the national court will inevitably have to balance the opposing interests of general public versus individual rights. Deciding in favour of one would mean a decision in detriment of the other. It is also not hard to see reasons why national courts could be inclined to prefer overall general interests over the interests of individuals. After all, once the bar of successfully claiming damages is reduced, more such claims can be expected (i.e., result would be at least increased litigation costs for the contracting authority). Such development is unacceptable from the perception of general public interest as it would have to be financed ultimately through the purse of the taxpayer [176].

On one hand, it can thus be argued that damages remedy serves general interest by deterring contracting authority from potential breaches in the future. Damages claims thereby have a punitive purpose which, however, is not related to the scope of actual damage caused to an aggrieved tenderer[177]. While such punitive function may be commendable and protect the general public from systemic infringements by contracting authority, this is not the only relevant consideration. It must be kept in mind that procurements are, at least for the most part, financed through taxpayer's money and thus prudent and efficient use of those funds should be presumed. Consequently, every time a contracting authority would be required to compensate an aggrieved tenderer for procurement breaches, would take funds from general public. Such result can be considered disproportionately harmful from general interests' perspective.

All in all, effectiveness of damages remedy is reduced in importance, if the procurement remedies system was intended to put more emphasis on the protection of the EU law and thus

[173] *Supra note* 123, pp 171 & 172 (H. Leffler).
[174] *Supra note* 25, pp 34 & 35 (D. Pachnou).
[175] *Supra note* 126, p 1038 § 5 (M.-A. Simovart & M. Parind).
[176] *Supra note* 4, p 72 (A. Reich & O. Shabat).
[177] *Supra note* 63, 193 & 194 (S. L. Kaleda).

general interests. The main protection would be extended to benefit functioning of EU law in general. Consequently, focus would be on remedying the infringements as opposed to merely compensating for them[178]. The CJEU held already in *Alcatel* that the purpose of the Remedies Directives is to "establish effective and rapid procedures to review unlawful decisions of the contracting authority at a stage where infringements may still be rectified"[179]. This in itself shows the primary weight of general interests – the Remedies Directives are to enable tenderers fair procedure and equality of opportunity to be awarded a contract.

On the other hand, an individual's right to compensation for harm caused by the breach of EU law is crystallized in EU law[180]. It cannot be restricted with relying on general interests. If Member States could excuse breaches of EU law with public interests, EU law would likely lose significant amount of its practical effect. Furthermore, T. Lock argues that any damages claim which stands on the general State liability doctrine should be considered as an instrument for individual rights protection (not an instrument for EU law enforcement)[181]. This is because individual rights themselves have value which is protected under EU law. Such value would be diminished if individual rights were considered as a EU law enforcement mechanism.

While there might have been some discussions in 1990s on whether or not procurement rules actually confer rights on individuals[182], it is by now agreed that it is so. According to S. L. Kaleda, public procurement rules serve the primary purpose of conferring rights on tenderers[183]. H. Schebesta points out that the CJEU has held the Remedies Directives obligations of quick and efficient review and right of set-aside directly effective. This gives strong indication that the damages provision of the Remedies Directives would be directly effective as well (i.e., confers rights on individuals within the meaning of State liability)[184].

Therefore, effectiveness of procurement damages remedy cannot really be restricted by virtue of general interest considerations. General interests might solely serve as an argument not to make claiming damages easier than required under EU law. Furthermore, it is noted that under EU law damages remedy must be effective, which requires generous damages awards and easier standards on procedural rules in order to claim compensation for harm[185]. Therefore, the unachievable standard of causation under State liability cannot be upheld for general interest

[178] *Supra note* 25, pp 34 & 35 (D. Pachnou).
[179] Judgement of 28 October 1999. *Alcatel Austria AG & Others, Siemens AG Österreich & Sag-Schrack Anlagentechnik AG v Bundesministerium für Wissenschaft und Verkehr.* Case C-81/98, ECLI:EU:C:1999:534, § 38.
[180] *Supra note* 95, §§ 71 & 72 (*Brasserie,* Joined Cases C-46/93 & C-48/93).
[181] *Supra note* 90, pp 1701 & 1702 (T. Lock).
[182] For instance, *supra note* 59, CS171 (S. Arrowsmith) or *Supra note* 22, pp 34 & 35 (D. Pachnou).
[183] *Supra note* 63, p 197 (S. L. Kaleda).
[184] *Supra note* 9, p 61 (H. Schebesta).
[185] *Supra note* 25, pp 34 & 35 (D. Pachnou).

consideration. Any balancing act of opposing interests cannot result in lack of effective damages remedy for injured individuals.

Similar conclusion can be reached by virtue of potential third perspective. H. Leffler writes that the principle of effectiveness protects the EU law rule as public interest rather than the individual interest of an aggrieved tenderer. However, protection of individual rights of an injured party tends to overlap with the protection of public interest and thus "easily accessible, generous damages, providing both prevention and reparation" concurrently serve the interests of the injured party as an individual and the general interest in effective application of EU law[186]. This approach is most compliant with the idea of achieving protection of dual interests via the procurement remedies system. If the protection of both interests can mostly rely on the same remedy (i.e., generous damages awards), there would be no need to balance opposing interests. Nevertheless, the idea behind using generous damages as deterrence will inevitably have at least short-term adverse effects on public interest. Furthermore, as it is not possible to predict how long would it take to achieve long-term effectiveness by virtue of deterrence, the general interest cannot be completely left aside for the benefit of protection of individual interests.

In conclusion it is noted that claiming compensation for participation costs appears to be relatively straightforward in practice, provided that aggrieved tenderer has actually incurred such costs and can provide reasonable proof thereof. This result is expected as participation costs should be usually quite easily quantifiable (i.e., compensated in such extent aggrieved tenderer is capable of proving). Nevertheless, participation costs themselves do not represent a major part of the harm caused by infringement. As the inherent purpose to participate in the award procedure is to obtain the award of the contract, the loss of the award as a result of breach is the harm which should be compensated for.

However, obtaining compensation based on loss of profit is usually objectively impossible. This is because loss of profit is characterized by all or nothing approach according to which aggrieved tenderer is entitled to full compensation only if it can prove that absent the breach, it would have been awarded the contract. In procurement context however, fulfilling such burden of proof is usually impossible. Consequently, for effectiveness considerations, Member States might be required under EU law to offer some relief to aggrieved tenderers in terms of causation. One possibility could be the reversal of burden of proof in terms of causation to afford sufficient protection of individual rights. Another would be to take a step away from the traditional all or nothing approach which characterizes loss of profit as a head of damage.

[186] *Supra note* 123, pp 151-174 (H. Leffler).

2.3. Loss of chance as a possible solution

As established above, the main issue with claiming loss of profit for procurement breaches, is the unachievable standard of causation. According to the traditional all-or-nothing approach, in order to claim compensation for harm, the injured party must be able to establish that absent the breach, it would have been awarded the contract. In most cases of procurement breaches this is usually impossible.

The aggrieved tenderers have a limited access to other unsuccessful tenders which they might presumably need to establish that their tender was better. Furthermore, contracting authorities are afforded significant discretion in determining the award criteria for choosing the "most economically advantageous tender". Such criteria might include subjective elements in addition to objective, and in combination with discretion of contracting authority assessing tenders (e.g., giving points for aesthetics or previous experience), it will not usually be possible to establish definitively who should have been the rightful winner. This is even more so since often there are more than two participants in a tender. Contracting authority would be thus able to just argue that a third tenderer should have been a winner or that there were no compliant tenders at all to avoid award of damages.

Loss of chance is appropriate to relax the standard of required causation and thus make it possible in practice for aggrieved tenderers to claim damages. According to the loss of chance doctrine, an injured party can claim damages from person whose "conduct decreased or eliminated the chance of a favourable outcome". This includes the loss of chance (a result of a breach) to benefit from fulfilment of a contract[187]. Loss of chance represents an idea that contracts that were never performed due to a breach still have economic value. Parties injured by such non-performance are entitled to compensation under the full compensation doctrine. The idea of loss of chance has at least some international recognition. For instance, it is stipulated in Art. 7.4.3 § 2 of the UNIDROIT Principles 2016 (soft law)[188].

Loss of chance is an alleviation of the traditional all-or-nothing approach taken under the loss of profit doctrine. The idea is to afford protection in situations where objective

[187] A. Ferot. The Theory of Loss of Chance: Between Reticence and Acceptance. FIU Law Review, 8 (2), 203, pp 591 & 592.
[188] UNIDROIT Principles of International Commercial Contracts, 2016, pp 271-275. Available at https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016, accessed 23.03.2021.

establishment for harm caused in the event of a breach cannot be objectively quantified.[189]. Result in which a person in breach would be able to escape liability solely because of the uncertainties surrounding the monetary scope of harm caused is unacceptable[190]. Loss of chance resolves such situation by reducing the burden of proof of the injured person (instead of certain win, they would have to show a chance to win). Such relaxation would be balanced by reduction in the sum of damages awarded – injured party would be entitled to only claim the value of the chance, not the expected profit of the whole contractual relationship[191].

It is often said in legal literature, that the doctrine of loss of chance was firstly established in the English court case *Chaplin v Hicks* of 1911[192]. In *Chaplin v Hicks*, the plaintiff entered into a newspaper contest in which a theatre manager was looking to offer twelve fixed term contracts for actresses. Fifty finalists (out of 6 000 participants) of the competition were chosen by votes of the newspaper readers who voted on pictures published of the participants. The plaintiff was one of the finalists, however she did not receive her invitation to final audition on time and consequently, was not offered an acting contract[193]. While she was unable to prove that absent the breach, she would have been one of the winners, she was still awarded damages. Quantification was based on mathematical likelihood of winning the contract – out of 50 finalists competing for 12 contracts, the plaintiff had approximately 1 in 4 chance of winning the contract[194].

The objective inability to prove that the plaintiff would have won a contract in *Chaplin v Hicks* was because the final determination of winners was completely under discretion of the theatre manager. According to the facts of the case, the newspaper contained no evaluation criteria based on which the winners would be chosen. There appears to be no score sheet or ranking order either[195]. This means that there was no evidence plaintiff could have presented to establish that she would have won. The decision of the theatre manager was the standard and thus theatre manager could have easily rebutted any argument presented against him. Such subjectivity and extensive discretion are understandable in the field of acting. After all it is not possible to measure artistic performance on solid uniform objective standards. Nevertheless, it

[189] J. L. Pryor. Lost Profit or Lost Chance: Reconsidering the Measure of Recovery for Lost Profit in Breach of Contract Actions, Regent University Law Review, 19, 2006, p 561.
[190] R. Frasca. Loss of Chance Rules and the Valuation of Loss of Chance Damages. Journal of Legal Economics, 15(2), 2009, p 91.
[191] *Supra note* 189, p 572 (J. L. Pryor).
[192] Y. W. D. Lee. Proving Causation in a Claim for Loss of Chance in Contract. Singapore Academy of Law Journal, 17(1), 2005, pp 426 & 427.
[193] The Court of Appeal. Judgement of 15 May 1911, *Chaplin v Hicks*, 1911, 2 KB, pp 786-788.
[194] *Supra note* 189, p 571 (J. L. Pryor).
[195] *Supra note* 193 (*Chaplin v Hicks*).

also suggests that unless loss of chance is available as a head of damage, injured parties are deprived of legal protection.

Similar considerations are relevant in the field of procurement as well. Likewise, contracting authorities are afforded considerable discretion when deciding on award criteria and the weights each award criteria carries. While procurement rules require evaluation to be objectively clear, this is often not the case in practice. The more unclear or ambiguous such criteria are, the more difficult it would be for the injured party to establish any certainty of winning[196]. As already established, such difficulties are inconsistent with EU general principle of effectiveness. The Remedies Directives foresee a right to claim damages for procurement breaches which means that the damages remedy must be factually available for aggrieved tenderers. Loss of chance is thus the only viable solution to ensure protection of individual rights as this enables to relaxation of standard to proof to achievable level.

The prerequisites for claiming loss of chance are familiar enough – the injured party has to establish that there has been a lost chance, infringement and causal link between the lost chance and the infringement[197]. The proof of "lost chance" standard is considerably lower than required proof under loss of profit of the fact that the injured party should have won. Nevertheless, problems tend to arise when determining what does this "lost chance" at minimum have to entail and how to quantify its extent.

The main issue with loss of chance doctrine is that it is completely hypothetical while loss of profit has some certainty behind it. Such certainty can be illustrated by the fact that there is presumably only one winner under loss of profit who can claim damages. However, under loss of chance, there is a risk that multiple participants argue that they had a chance to win and thus a right to claim damages for breach. This might be the reason why the willingness of national courts to apply loss of chance doctrine as something quite uncertain varies across Member States. Due to such uncertain nature, national courts tend to have wide discretion in determining the extent of a chance. Furthermore, to alleviate unforeseeable adverse effects on the contracting authority, the injured party must usually prove a "serious" (i.e., 50% or more) chance of winning to be award of damages[198].

There are a few options available for courts to measure the value of the lost chance. Firstly, court can establish the proportional likelihood that the injured party would have won (e.g., 50/50), take the average of expected profit calculations provided by the aggrieved tenderer (e.g., 100), calculate the value according to likelihood of winning (e.g., 50% likelihood, value 50 out

[196] *Supra note* 123, pp 171 & 172 (H. Leffler).
[197] *Supra note* 187, p 595 (A. Ferot).
[198] *Supra note* 6, p 177 (R. Caranta in Damages as Effective Remedy).

of 100) and reduce commercial risk (e.g., 25) of the tenderer from the average (50-25=25)[199]. The final sum will be the sum of damages to be awarded to the injured party. For instance, as will be seen, this method was used in the *Harmon* case[200] – one of the few English cases in which procurement damages were awarded based on loss of chance[201].

This method is in the interests of the aggrieved tenderer because the value of loss is considered subjectively, from aggrieved tenderer's point of view. Instead of giving the chance objective value, which is independent from the aggrieved tenderer, this method gives the chance value based on the aggrieved tenderer's assessment (i.e., starting point is average of expected profit provided by the aggrieved tenderer). Such approach is justified since general EU law requires compensation to be adequate, corresponding to the actual harm suffered.

Another way for the court would be to value the loss of chance based on criteria independent from the injured party. Court could determine the objective value based on the average market value of a similar contract during the breach of the contract[202]. This method might lead to a more just outcome from the perspective of the contracting authority because it excludes the possibility for the aggrieved tenderer to show the court artificially raised expected profit margins. Nevertheless, the aforementioned method ought to be rejected because it does not consider actual harm caused to aggrieved tenderer. Despite the fact that all tenderers compete for the same contract in an award procedure, one cannot assume that expected profit margins of all tenderers are the same. Even if profit margins were the same, the position of the aggrieved tenderer must be still considered to ensure protection of individual rights. Without connection to aggrieved tenderer, damages claim becomes a mere monetary sanction. This result is inconsistent with EU law – as established above, the Remedies Directives *inter alia* have the inherent purpose to confer rights on individuals.

It is submitted that in order to fulfil the primary EU law effectiveness requirement, loss of chance should be an available head of damage for procurement breaches. Upholding solely the loss of profit requirement under EU law would deprive aggrieved tenderers of their right to effective damages remedy for procurement breaches. Contract lost due infringement must be held to have economic value which must be compensated if the aggrieved tenderer can at minimum, establish that it had a "serious" chance to win.

[199] *Supra note* 189, p 577 (J. L. Pryor).
[200] The High Court of Justice, Queen's Bench Division, Technology & Construction Court. Judgement of 28 October 1999, *Harmon CFEM Facades (UK) Ltd v the Corporate Officer of the House of Commons,* 1996 ORB No 1151.
[201] A. Semple. A Practical Guide to Public Procurement. Oxford University Press, United Kingdom, 2015, p 226.
[202] *Supra note* 189, p 577 (J. L. Pryor).

3. State practice

The aim of this chapter is to provide a few Member State examples to illustrate how has procurement damages remedy been brought to life by national lawmakers. After all, compliance with EU law can be measured on national levels only. Actual enforcement provides insight into shortcomings of the EU lawmaker as well. If the same EU rule has not achieved its desired purpose or if its effectiveness fluctuates considerably across Member States, it is indicative of the fact that the EU lawmaker has failed to express its will sufficiently clearly to ensure a functioning regulation. Analysis of Member States' practice can help identify obstacles preventing the efficient enforcement of EU law.

For those purposes, England (the UK), France and Estonia have been picked out. While England is at the time of writing this thesis no longer a member of EU, its practice during its membership is relevant and appropriate for illustrating a common law approach to EU procurement damages claims. France was chosen because it is often considered as a positive example of a national legal system which regularly awards damages for procurement breaches of contracting authorities[203]. Finally, Estonia was chosen because of my personal interest and the fact that there is not much literature available on the subject matter from Estonian perspective. For those reasons, Estonian example is given more depth in terms of analysis.

So far, it has been established that procurement damages remedy is relatively problematic in substantive terms since the EU lawmaker and the CJEU have been reluctant to elaborate on the matter. The Remedies Directives stipulate the mere requirement that damages remedy must be available for persons injured by procurement breaches of the contracting authority[204]. This suggests that the matter has been left under procedural autonomy of Member States[205]. Because of procedural autonomy, a unitary approach to awarding procurement damages cannot be expected. However, procedural autonomy is restricted by the general principles of effectiveness and equivalence[206]. Those principles are thus yardstick to measure compliance with EU law. It is noted that a general consensus in legal literature is that procurement damages remedy in practice is not effective within any possible meaning of the word[207]. This is because, for most cases, required standards of proof are set too high for aggrieved tenderers to fulfil, making successful damages claims rare in practice.

What is also known about EU conditions for claiming damages for procurement breaches, is that by virtue of general EU law, minimum standards for establishing the liability for damages

[203] *Supra note* 9, p 3 (H. Schebesta).
[204] Art. 2(1)(c) of Directive 89/665/EEC & Art. 2(1)(d) of 92/13/EEC.
[205] *Supra note* 33, § 46 (*Köbler*, C-224/01).
[206] *Supra note* 34, § 48 (*Aquino*, C-3/16).
[207] *Supra note* 8, p 1413 § 24 (Brussels Commentary).

are those of general EU State liability. The latter was confirmed by the CJEU in *Spijker*[208]. Nevertheless, strict adherence to State liability doctrine has been criticized mainly because of the requirement of sufficiently serious breach which an aggrieved tenderer is unlikely able to prove[209]. Upholding the requirement of sufficiently serious breach thus has adverse effects on the practical effectiveness of damages remedy.

Resulting Member State behaviour is interesting to observe. On one hand, Member States have the liberty to uphold State liability requirement since the CJEU has expressly allowed it. That is despite effectiveness considerations – the CJEU has not required that State liability conditions must be altered for procurement field purposes (which the CJEU has done for example in its gender discrimination law to achieve practical effect). After all, achieving the effectiveness of EU law cannot be left completely on Member States. EU lawmaker has the inherent responsibility to ensure that its will is clearly expressed and uniformly understood. If it fails to do so, it cannot reasonably expect of Member States the achievement of its will.

On the other hand, adhering by standards which result in lack of EU law effectiveness is in itself problematic from perspective of primary EU law principle of effectiveness. The application of the general principle of effectiveness is undisputed. Furthermore, it is no secret that procurement damages remedy has very limited effect in practical terms. Such situation arises questions of interrelationship between State liability and principle of effectiveness which is not easy to answer. This is because principle of effectiveness and State liability doctrine should complement each other not contradict each other. The inherent idea behind State liability is to achieve effectiveness of EU law. The CJEU established already in *Brasserie* that the three State liability conditions "satisfy the requirements of the full effectiveness of the rules of [EU] law and of the effective protection of rights which those rules confer"[210]. As established, in current situation however, adherence to State liability is to detriment of effectiveness.

Lastly, the CJEU has stated in *Strabag* that award of procurement damages cannot be conditional upon proof of fault of contracting authority even if such fault is presumed under national law and if the contracting authority cannot excuse its mistake[211]. This requirement in itself is relatively straightforward. In practical terms, it should not be very hard to differentiate between national law which is consistent with the no fault requirement from national law which is not.

[208] *Supra note* 28, § 87 (*Spijker*, Case C-568/08).
[209] *Supra note* 6, pp 175 & 176 & 178 (R. Caranta in Damages as an Effective Remedy).
[210] *Supra note* 95, § 52 (*Brasserie du Pêcheur*, Joined Cases C-46/93 & C-48/93).
[211] *Supra note* 54, § 45 (*Strabag*, Case C-314/09).

3.1. England

In the UK, the lawmaker did not elaborate on the substantive details of procurement damages remedy when transposing the Remedies Directives into its national law (i.e., Public Contracts Regulations 2006). Statutory regulation for procurement damages was limited to the wording of the Remedies Directives and thus the conditions for the award of procurement damages were left for the case law to develop[212]. Such regulation is indicative of the UK lawmaker's intention to transpose only the minimum requirements of the Remedies Directives into its national law. In 2017, the UK Supreme Court confirmed that in *EnergySolutions,* stating that "the [UK] legislator's intention … [was not] to gold plate"[213].

In the UK, public procurement law breaches are considered as breaches of statutory duty which amount to tort liability[214]. The tort liability approach to procurement damages might have been since the English law has "no special and general rules for administrative wrongs" nor does it "recognize a general right to redress for maladministration"[215].The nature of the procurement damages claims as a statutory duty which must be "fitted into one of the existing torts" was clearly established in Public Contracts Regulations 2006[216].

Before that, there were multiple possible actions for damages to claim compensation for procurement breaches. In the landmark 1999 *Harmon* judgement, the Court granted procurement damages under the heads of a breach of statutory duty (the English law, EU Directives and Treaty of Rome), implied contract and misfeasance in public office[217], suggesting that all of them are possible actions for procurement damages under English law. Nevertheless, in subsequent case law the possibility to rely on implied contract as a cause of action was rejected because "the Regulations create their own regime" leaving "no room for the implication of any contract". Moreover, misfeasance in public office also never gained any popularity since it contained a requirement of proof of "bad faith" which the aggrieved tenderers were usually not able to fulfil[218].

In common law system, the breach of statutory duty amounts to a private cause of action which is developed by case law. Public body (e.g., contracting authority) is liable for damage caused due to its infringement of statutory duty. The injured party must prove that a) the purpose

[212] *Supra note* 9, p 97 (H. Schebesta).
[213] UK Supreme Court. Judgement of 11 April 2017, *Nuclear Decommissioning Authority (Appellant) v EnergySolutions EU Ltd (now called ATK Energy EU Ltd) (Respondent),* [2017] UKSC 34, § 34.
[214] *Supra note* 6, p 61 (F. Banks & M. Bowsher QC in Damages as Effective Remedy).
[215] R. Vornicu. Procurement Damages in the UK and France – Why So Different? European Procurement & Public Private Partnership Law Review (EPPPL), 2019, 14(4), p 223-225.
[216] *Ibid*.
[217] *Supra note* 200, §§ 1, 1411-1420 (*Harmon,* 1996 ORB No 1151).
[218] *Supra note* 9, p 98, 100 & 101 (H. Schebesta).

of obligation breached was to afford protection to the injured party, b) infringement and c) causal link[219]. According to P. Leyland and G. Anthony, tort liability in the UK is "another form of strict liability and public authorities (or other subjects to a statutory duty) will be held liable for damages even if they are not at fault at all"[220]. In those terms, the UK law was in compliance with the CJEU finding in *Strabag* that the Remedies Directives preclude national law which makes the award of procurement damages claim conditional upon proof of fault of the contracting authority[221].

Until 2017, it was understood that under English law, the contracting authority was responsible for procurement damages in the event of any breach (i.e., no gravity of breach requirement). This was because strict liability for a breach of statutory duty under the English law imposed no requirement of "sufficiently serious" breach (i.e., Regulation 47C of the Public Contracts Regulations 2006)[222]. The injured party only had to prove the infringement and a direct causal link to claim damages while contracting authority was afforded no chance to justify the infringement[223]. According to the UK Court of Appeal in *EnergySolutions* 2015, "the second *Francovich* condition is a more restrictive condition for liability in damages than prevails in English law and is therefore displaced by the national rules in the absence of EU rules in this area as to the determination and estimation of appropriate damages". The Court of Appeal went on to hold that the UK did not intend to "gold plate" the Remedies Directives and thus intended to apply English law principles "to the determination and assessment of damages awarded" for procurement breaches[224].

In 2017, this position was reversed when the UK Supreme Court held in *EnergySolutions* that the procurement damages claims are subject to *Francovich* and *Brasserie* conditions, i.e., the general EU State liability doctrine. Consequently, damages claims under English law were also subjected under EU State liability requirement of a "sufficiently serious breach". According to Supreme Court, this was precisely because of the UK's legislator's intention not to "gold plate" the Remedies Directives. Gold plating means that national law offers relief from conditions applicable under the EU law (i.e., relaxes the standard in the benefit of the effect of the EU law). It follows that if the national law was interpreted to require only "any infringement" in comparison with the higher standard of "sufficiently serious breach"

[219] *Supra note* 215, p 224 (R. Vornicu).
[220] P. Leyland & G. Anthony. Textbook on Administrative Law. 7th edition, 2012, Oxford University Press, United Kingdom, p 64.
[221] *Supra note* 54, § 45 (*Strabag*, Case C-314/09).
[222] *Supra note* 63, p 196 (S. L. Kaleda).
[223] *Supra note* 215, p 226 (R. Vornicu).
[224] UK Court of Appeal. Judgement of 15 December 2015, *EnerySolutions EU Ltd v Nuclear Decommissioning Authority*, [2015] EWCA Civ 1262, § 67.

established under the EU law, it would be an instance of gold plating. As established, this was not the intent of the UK legislator and thus the minimum standards of the EU law (i.e., EU State liability) conditions had to be upheld under English law as well[225].

A decent argument can be made that the approach taken by the UK Supreme Court in *EnergySolutions* 2017 was problematic from the perspective of general EU principle of equivalence. It is reminded, that the principle of equivalence requires that "the procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions"[226]. In other words, if national law makes it easier for an individual to achieve positive effect of the EU law (as compared to the minimum conditions established in the EU law itself), then those more beneficial conditions must be upheld. In *EnergySolutions* 2017, the UK Supreme Court nevertheless essentially stated that while similar domestic actions require proof of infringement only, higher standard of proof is required from procurement damages claims since they are "claims based on EU law[227]". This is because the EU law imposes a stricter minimum standard in comparison with minimum standard required under national law. Such conclusion is inconsistent with the principle of equivalence.

R. Vornicu argues that the UK Supreme Court's position in *EnergySolutions* 2017 might be consistent with the principle of equivalence. The conditions for measuring compliance with principle of equivalence are "not straightforward", suggesting that breach of equivalence is not obvious. Furthermore, as the UK law did not contain any similar regulation prior to the transposition of the Remedies Directives, no comparison can be made for the purposes of equivalence. That is even more so as there also "was no general rule for compensation for damages caused by public bodies"[228]. Thus, it can be argued that the position of aggrieved tenderers to claim damages for procurement breaches is in fact not less favourable. That is even more so because the UK lawmaker wanted to afford aggrieved tenderer the minimum required standard of rights under the Remedies Directives.

The aforementioned view ought to be rejected. While the Member State is afforded discretion to opt for enforcing EU law to minimum necessary extent, this discretion is limited by principle of equivalence. This means that the specific intent of a Member States' lawmaker towards transposition of EU law does not definitively determine its limitations in national law. If national law affords better position for benefit of individuals this will extend to EU legal rule by virtue of equivalence. National lawmaker made their choice when implementing standards

[225] *Supra note* 213, §§ 34-37 (*EnergySolutions,* [2017] UKSC 34).
[226] *Supra note* 28, § 91 (*Spijker,* Case C-568/08).
[227] *Supra note* 213, § 37 (*EnergySolutions,* [2017] UKSC 34).
[228] *Supra note* 215, p 226 (R. Vornicu).

for "similar domestic rules". Thus, there should be no room to argue for the detriment of individuals and more favourable rules must be applied instead (i.e., requirement of any breach should have been sufficient as opposed to "sufficiently serious breach").

When it comes to heads of damages which were available for aggrieved tenderers under the English law, loss of profit and loss of chance were available, at least in principle[229]. Under English tort law, the aim of damages is to place the injured party into a position in which it would have been had the breach not taken place. This test requires comparison between the situation at hand and a hypothetical situation which would have been absent the breach. There is some disagreement under the English law as to what this hypothetical situation is which needs to be restored.[230].

One perspective would be to put the aggrieved tenderer into a position in which "the tender procedure had never occurred". This could be justified by the fact that under private law, it is not possible to obligate the contracting authority to award a contract. Under this view, only bid costs are recoverable[231]. According to the mainstream opinion, the comparator could be a situation in which the contracting authority would have conducted award procedure which is compliant to procurement law. This gives rise to claim loss of profit or at least loss of chance as damages if the aggrieved tenderer can establish that absent the breach it would have been awarded the contract or at minimum, that it had a serious chance to win[232]. By this line of reasoning, the aggrieved tenderer would normally not be able to obtain compensation for participation costs[233]. This is because in the event of a lawful award procedure, the aggrieved tenderer would have born bid costs[234].

The central legal authority for claiming damages (i.e., loss of profit and loss of chance) for procurement infringements is the *Harmon* judgement of 1999[235]. In *Harmon*, HHJ Humphrey Lloyd GQ held loss of chance claimable for procurement breaches if the aggrieved tenderer is able to prove that it had lost a "real or substantial chance as opposed to speculative one." Harmon's chance of success but for the breach was evaluated to be at 70:30. However, "it remains important to distinguish between the evaluation of the loss of chance of "success" i.e., being awarded the contract" and the probability that the whole of the likely profit might be recovered". HHJ considered 50% reduction justified due to "risks and hazards inherent in

[229]*Supra note* 6, p 61 (F. Banks & M. Bowsher QC in Damages as Effective Remedy).
[230]*Supra note* 9, pp 110 (H. Schebesta).
[231]*Supra note* 9, pp 109 & 110 (H. Schebesta).
[232]S. Arrowsmith. The Law of Public and Utilities Sector Procurement. 2nd edition, Sweet & Maxwell, London, 2005 p 1381.
[233]*Supra note* 6, p 140 (C. Donnelly in Damages as an Effective Remedy).
[234]*Supra note* 201, p 227 (A. Semple).
[235]*Supra note* 9, p 98 (H. Schebesta).

construction work". Consequently, 35% of the contract value was held to be the scope of damage awarded to Harmon[236] Furthermore, participation costs were held recoverable[237].

The *Harmon* judgement as a legal authority embodies probably the most efficient imaginable way (i.e., loss of chance) for aggrieved tenderers to claim damages for procurement breaches. The requirement of "serious chance" on causation is in itself reasonable and restricts the liability of the contracting authority to foreseeable limits. The main issue with *Harmon* is the fact that it remained an isolated precedent of recovery for loss of chance. It is noted that in *Harmon*, several breaches of contracting authority were established, some of them quite serious. This might have provided the Court necessary incentive to award damages[238]. Subsequently, damages for procurement breaches were rarely awarded in the UK[239] and thus, only a few cases of damages claims were brought each year[240].

All in all, the example of the UK in terms of efficient procurement damages claims is not encouraging. That is despite the fact that at least up until 2017, the theoretical framework to claim damages for procurement breaches in the UK was more favourable than general requirements of State liability – only proof of an infringement (as opposed to "sufficiently serious" infringement) was required to claim damages. Furthermore, *Harmon* judgement served as an authority for claiming damages based on "serious" chance to win, suggesting that the standard of causation required could was not unjustifiably high. In theory, English system was just what one could expect under EU law effectiveness considerations.

Considering that the theoretical framework for effective damages claims was there, it is much more difficult to identify the reasons why in fact award of procurement damages claims was rare in practice. However, it is presumed that such outcome was not the result of activities or lack thereof of the EU lawmaker. This is because the EU lawmaker should not be able to definitively establish how one or the other national law quantifies damages claims and establishes causation – it should be left under procedural autonomy of Member States. It is possible that the doctrine of loss of chance is not in itself developed in the English system, making national courts reluctant to award damages based on it. As the loss of chance is inherently uncertain and completely hypothetical, there is no reasonable way the EU lawmaker would be able to establish the specific necessary uniform conditions to award loss of chance. This illustrates a deeper issue with the overall idea of awarding damages for procurement breaches.

[236] *Supra note* 200, §§ 319 & 320 (*Harmon*, 1996 ORB No 1151).
[237] *Supra note* 200, § 328 (*Harmon*, 1996 ORB No 1151).
[238] *Supra note* 9, p 115 (H. Schebesta).
[239] *Supra note* 201, (p 227, A. Semple).
[240] *Supra note* 6, p 192 (D. Fairgrieve & F. Lichère in Damages as an Effective Remedy).

3.2.France

While the French system is hailed as a positive example in the context of procurement damages, the transposition of the Remedies Directives into the French legal system had in fact only a very limited effect. No special paragraphs were introduced by transposition of the damages remedy requirement because damages remedy for procurement breaches is recognized under French law since before the first Remedies Directive came to force[241]. Consequently, French administrative courts do not refer to EU law in their judgement. Nevertheless, R. Vornicu argues, that the system behind awarding damages for procurement breaches in France is unquestionably consistent with EU law requirements[242].

The French legal system has not established any specific liability for procurement field but relies on general French administrative law. According to N. Gabayet, it must be considered as "public tort law" or "public bodies' extracontractual liability". Public authority is liable for damages if injured party can prove that public authority has committed "fault" (i.e., any illegality), loss and causal link between illegality and loss. This holds true for any administrative decision thus also the decisions of contracting authorities in the context of public procurement procedure[243].

In terms of procurement damages, French administrative courts have developed standard of causation which serves as grounds for functional system of awarding damages. It balances protection of individual rights (i.e., aggrieved tenderers) by enabling real chance to claim procurement damages but concurrently offers contracting authorities protection from excessive litigation[244]. Aggrieved tenderers have been able to claim participation costs as damages in France since 1930s and loss of profit since 1970s[245]. *Monti* case was the turning point in which the Counseil d'État held that "the quashed decision to evict the bidder from the [award procedure] … has deprived [it] of a serious chance to win the bid. [It] has therefore a right to compensation, calculated on the loss of profit actually observed and not on bid costs"[246].

When deciding on the award of procurement damages, the Counseil d'État usually relies on the following test: "whereas the bidder is entitled to a) damages for tender costs if they can show that they would have had a chance of winning the contract, had the illegality not been committed and b) is entitled to positive damages (i.e., anticipated loss of profits) if they can show that they would have had a serious chance of winning the contract, had the illegality not

[241] *Supra note* 9, p 138 (H. Schebesta).
[242] *Supra note* 215, p 224 (R. Vornicu).
[243] *Supra note* 6, p 7 (N. Gabayet in Damages as an Effective Remedy).
[244] *Supra note* 9, p 151 (H. Schebesta).
[245] *Supra note* 215, p 227 (R. Vornicu).
[246] Counseil d'État, 13 May 1970, 74601, *Sieur Monti c/ Commune de Ranspach*, Lebon, § 322.

been committed"[247]. The scope of damages award is thus related with the likelihood of an aggrieved tenderer for winning the contract, but for breach. There are three possible solutions. Firstly, if an aggrieved tender can only prove that but for breach, it "would have not been devoid of a chance to win the contract", participation costs are awarded as damages. Secondly, if an aggrieved tenderer fails to provide proof of "would not have been devoid of chance of winning the contract", compensation will not be awarded. Finally, if there is proof of "serious chance" to win but for breach, compensation is awarded for "loss of potential profit"[248].

The standard of proof required for claiming bid costs as damages is set very low in France. An aggrieved tenderer must only be able to prove that "there was more than 0% chance of being awarded the contract"[249]. In those cases, French courts generally hold that aggrieved tenderer has no right to claim loss of potential profit, but do not usually elaborate much further on the matter. For instance, in *Golf de Cognac*[250], it was held that 5 out of 12 chance was insufficient to amount to a "serious chance" and consequently, only participation costs were awarded as damages[251].

Bid costs in France usually means compensation for expenses an aggrieved tender has made to pay its employees to prepare the bid. An aggrieved tenderer therefore must provide evidence of how many people and for how long and for what salary worked on preparing the bid. Nevertheless, due to a low standard of proof required, award of bid costs in France can be interpreted to serve punitive function for unlawful conduct during award procedure as well. According to N. Gabayet, it is a "fair solution" for tenderers whose rights were breached by unlawful conduct of the contracting authority[252].

In order to claim "full compensation for the loss of profits" or loss of chance, an aggrieved tenderer must be able to prove that it had a "serious chance" to win the contract had the breach not taken place[253]. In order to establish a "serious chance", French administrative courts regularly rely on their inquisitorial power to gather necessary evidence and information such as about "the skills and the guarantees of the bidder, the circumstances in which [it] has been evicted from the award of the contract, the number of bidders and the differences of prices between the offers". The court then analyses bids in a similar manner as a contracting authority would when determining the winner of an award procedure.

[247] Counseil d'État, 10 February 2017, 393720, *Société Bancel*: JurisData nº 2017-0t3416, Lebon, T. 2017.
[248] *Supra note* 6, p 9 (N. Gabayet in Damages as an Effective Remedy).
[249] *Ibid.*
[250] Counseil d'État, 23 March 1994, 101079 116391, *Golf de Cognac*, 1/4 SSR, Lebon.
[251] *Supra note* 9, p 144 (H. Schebesta).
[252] *Supra note* 6, pp 9-11 (N. Gabayet in Damages as an Effective Remedy).
[253] Counseil d'État, 27 January 2006, 291545, *Ville d'Amiens,* CP-ACCPMarch 2006, § 62.

The inquisitorial nature of French administrative procedure has been hailed as one of the main reasons why the French system for awarding procurement damages is functional at least in comparison with majority of Member States. In addition to statements and evidence provided by parties to the dispute, courts of France are able to gather information themselves through court-appointed experts and from contributions of the *rapporteur public*. Presumably, French courts have a broader and more objective perspective on the matter in comparison with courts who solely rely on the evidence brought by disputing parties. This might be the underlying reason why French courts were comfortable to develop doctrines which enable to award damages based on hypothetical losses[254].

This approach, while proven to be effective, is not without flaws. As N. Gabayet correctly argues it "runs close to the judges second-guessing [contracting authority's] decision"[255]. It is reminded that according to settled case law of the CJEU, contracting authorities have significant discretion to establish award criteria[256]. This means that discretion to evaluate tenders according to award criteria is left for contracting authorities and not for national review organs. The purpose of review procedures is to establish whether decisions taken by the contracting authorities are in compliance with substantive procurement law[257]. In other words, review is directed at the outcome (decision), meaning that the court should not be able to exercise discretion left for contracting authorities to make such a decision. This holds true for awarding points based on award criteria, what is exactly what French courts seem to do in order to award damages for procurement breaches.

Another problematic aspect seems to be the importance French courts tend to bestow upon the price of a tender when determining its probability of winning. According to N. Gabayet, lowest price of an offer in French case law results in "a sort of presumption of a serious chance in its favour"[258]. This might be justified with some reservations in cases where a contracting authority has established low price as the main criteria to determine the winner[259]. Low price in itself does not even prove that the tender was in compliance with award criteria, let alone that it should have won. Furthermore, in procedures where winner is determined by "the most economically advantageous" criteria, using price argument to assess the likelihood of chance might be completely inappropriate. For instance, if focus was directed on making an environmentally friendly purchase, a higher price can usually be expected from tenders which

[254] *Supra note* 6, p 194 (D. Fairgrieve & F. Lichère in Damages as an Effective Remedy).
[255] *Supra note* 6, p 11 (N. Gabayet in Damages as an Effective Remedy).
[256] *Supra note* 127, §§ 28-30, (*Ambisig*, Case C-601/13).
[257] Art. 1(1) of 89/665/EEC & 92/13/EEC, "decions taken by contracting authorities may be reviewed efficiently".
[258] *Supra note* 6, p 11 (N. Gabayet in Damages as an Effective Remedy).
[259] *Supra note* 208, p 228 (R. Vornicu).

offer a "greener" product or service. Therefore, establishing the chance to win should take into consideration all relevant circumstances, not only the lowest price.

If a "serious chance" to win has been established, the French courts usually rely on principles established in the *Guadeloupe* judgement[260] and award compensation "for its lost profit, as well as for the tender costs as long as the latter have not been covered as per agreement through a different and specific indemnity"[261]. This is completely opposite from the UK approach. As established above, in the UK, participation costs were reduced from award for loss of profit because in the event of lawful procedure, an aggrieved tenderer would have born bid costs anyway. According to R. Caranta, the fact that bid costs are awarded in France together with compensation for loss of profit results in unjust enrichment of aggrieved tenderers[262]. Nevertheless, it seems to fit with the punitive function which the French legislator has bestowed upon awarding compensation for bid costs in any event an aggrieved tenderer manages to prove that possibility to win was not completely excluded.

Under the French system, award of damages can only be obtained if an award procedure has taken place, i.e., the contract has been advertised. Understandably enough, there are no damages in the form of participation costs if aggrieved tenderer never participated in the procedure. According to N. Gabayet, it would also be "impossible for potential bidder to prove" a chance of winning without making an offer[263]. In those cases, aggrieved tenderer can rely on the remedy of "*référé précontractuel'* and "request a stay of the awarding procedure and the annulment of all unlawful decisions made so far". The possibility to claim damages was not included under that remedy. Nevertheless, Counseil d'État held in *Tropic Travaux* judgement[264] that administrative courts can either annul the award procedure or award damages caused to aggrieved tenderer by unlawful conduct of the contracting authority[265]. Thus, the French case law has developed a way for aggrieved tender to obtain compensation for damages even if the procurement breach resulted in the inability of aggrieved tenderer to participate. However, in such cases, it would probably more beneficial for aggrieved tenderer to achieve the annulment of the procedure as opposed to damages claims. Award of damages in cannot be very high because aggrieved tenderer is in no position to convincingly argue any chance of winning the contract.

[260]Counseil d'État, 18 June 2013, 249603, *Groupement d'entreprises solidaires ETPO Guadeloupe*, Lebnon, AJDA, 1676.
[261] *Supra note* 215, p 227 (R. Vornicu).
[262] *Supra note* 6, p 180 (R. Caranta in Damages as an Effective Remedy).
[263] *Supra note* 6, p 11 (N. Gabayet in Damages as an Effective Remedy).
[264] Counseil d'État, Assemblée, 16 July 2007, 291545, *Société Tropic travaux signalisation Guadeloupe*, RFDA, 2007, p 696.
[265] *Supra note* 6, p 11 (N. Gabayet in Damages as an Effective Remedy).

All in all, damages for procurement breaches are awarded regularly in France which can be illustrated by an above average number of more than 4000 claims brought annually. This might be possible because the modern administrative case law in France has shown development towards the "more pro-victim approach". It is illustrated by the fact the requirements on causation which are favourable from the perspective of aggrieved tenderers (i.e., requirement of any infringement is sufficient). Furthermore, the inquisitorial nature of French courts has held to be of significant contribution to regular development and use of loss of chance doctrine[266].

It is noted however, that the theoretical conditions for claiming damages for loss of profit or chance are very similar to those required under English law at least prior to 2017 i.e., any infringement and a "serious chance" to win. However, as established, the practical outcome of this theoretical framework is totally different with France hailed as a positive example and England criticized for the fact that *Harmon* remained an isolated incident in case law. The main difference between those two systems is the fact that firstly, French administrative courts rely on their inquisitorial power to obtain information relevant to deciding on the case. Secondly, that French courts had a history of awarding procurement damages independent from EU law (i.e., naturally developed in their own legal system) while procurement damages in the UK were introduced by the Remedies Directives. This suggests that effectiveness of damages remedy comes down to cultural aspects of the legal system – the cultural understanding of whether or awarding damages on relatively hypothetical grounds is justified.

Nonetheless, damages are not the preferred remedy for aggrieved tenderers in France as well – the expected number would otherwise be considerably higher[267]. This however does not pose a problem. It is reminded that the EU lawmaker intended to give preference to pre-contractual remedies[268]. If the Remedies Directives achieve their inherent purpose, claims containing post-contractual remedies (i.e., damages or ineffectiveness) should in any event be of significantly lower number. Moreover, the "pro-victim approach" cannot absolve protection of the interests of contracting authority completely. Especially compensation for loss of chance stands on very uncertain and hypothetical grounds. In order to protect the general interests, at least some standard has to exist (i.e., "serious chance") and an aggrieved tenderer should not be entitled to hope for such compensation in the event of any infringement. Otherwise, the risk of excessive litigation would arise which would be to the detriment of the interests of contracting authorities in terms of resources spent on litigation as well as on damages awards.

[266] *Supra note* 6, p 192 & 195 (D. Fairgrieve & F. Lichère in Damages as an Effective Remedy).
[267] *Supra note* 6, p 195 (D. Fairgrieve & F. Lichère in Damages as an Effective Remedy).
[268] Recital 3 of 2007/66/EC – the reform of the Remedies Directives was necessary to „ensure compliance with Community law, especially at a time when infringements can still be corrected".

3.3. Estonia

Under Estonian law, all procurement-specific regulation is gathered into Public Procurement Act (hereinafter PPA). In the context of claiming damages for procurement breaches, the relevance of PPA is limited because PPA regulations do not provide a cause of action for such claims. Moreover, as Estonian lawmaker has not transposed all requirements as stipulated by the CJEU, substantive conditions of national law for claiming damages for procurement breaches are somewhat problematic[269]. Subsequently, specific requirements for claiming damages for procurement breaches under Estonian law remain uncertain.

While not expressly stated in PPA, it has been established in the case law of the Public Procurement Review Committee (hereinafter the Review Committee) that State Liability Act (hereinafter SLA) must be applied to determine the scope of damage and conditions for awarding damage[270]. Case law of administrative courts leads to the same conclusion[271]. This means that similarly to France, procurement breaches in Estonia rely on general administrative law as opposed to the English tort liability.

The underlying idea behind Estonian state liability law is to restrict the possibility to require compensation for damages to foreseeable limits for the public authority and when possible, enable public authority to rely on other measures to remedy a breach[272]. It is expressed in SLA § 7(1) which establishes the general right to claim damages for unlawful acts of public authorities. According to SLA § 7(1) "a person whose rights are violated by the unlawful activities of a public authority in a public law relationship may claim compensation for damage caused to the person if damage could not be prevented and cannot be eliminated by the protection or restoration of rights…".

The lawmaker followed this idea in procurement field and established in PPA § 185(6) that an economic operator can request compensation for damages only after contract has been awarded and economic operator had no previous opportunity to contest the decisions of the contracting authority. Therefore, under Estonian law, aggrieved tenderer has to be mindful not to postpone bringing an action for damages in order to ensure that its action would not be dismissed. For instance, in 2018, the Review Committee rejected a damage claim because aggrieved tenderer did not contest award of contract during 30-day period after it was concluded and brought a damage claim almost a year later instead[273].

[269] *Supra note* 161, p 28 § 4 & p 1153 § 5 (M.-A. Simovart & M. Parind).
[270] Public Procurement Review Committee, Decision of 18 May 2017, 12.2-9/1848/181783 § 5.22.
[271] *Supra note* 161, p 1153 § 6 (M.-A. Simovart & M. Parind).
[272] T. Lember. Õigustloova aktiga tekitatud kahju hüvitamise nõue. Kehtiva regulatsiooni probleemid. Juridica, 2010, 6, p 399.
[273] Public Procurement Review Committee, Decision of 22 June 2018, 12.2-9/11/157680 §§ 4, 14-17.

Under Estonian law and by virtue of SLA § 7(3) aggrieved tenderers can claim compensation for direct patrimonial damage (e.g., bid costs) and loss of profit. When it comes to compensation for bid costs, the idea is to create a financial situation in which the injured party would be if its rights were not violated (SLA § 8(1)). According to PPA § 217 aggrieved tenderer must be able to prove that firstly, contracting authority breached "provisions regulating organisation of public procurement" and secondly, that absent the breach, the aggrieved tenderer "would likely have been awarded" the contract.

The Review Committee has only awarded compensation for bid costs once in 2013 (out of 14 total damages claims brought before it). Review Committee reduced the amount requested by aggrieved tenderer by 74,4% and awarded remaining 26,6% as damages. Firstly, Review Committee was willing to award compensation only for such bid costs which were proven and reasonable. For instance, as the aggrieved tenderer was unable to explain some costs claimed as damages during the hearing and as there were no substantial proof thereof, compensation for such costs was rejected by the Review Committee. Furthermore, Review Committee noted that some damages calculations consisted unreasonably long periods of employee time for simple activities (e.g., one hour to write down a date and sign a document). Secondly, according to Review Committee, costs related to review procedure itself (e.g., costs of contractual representative) could not be considered as bid costs and thus could not be compensated for[274].

It is noted that subsequent changes of 2019 in PPA have made it easier for aggrieved tenderer to claim costs of contractual representative as damages. According to PPA § 198(1) currently in force, aggrieved tenderer is entitled to compensation for entire state fee paid for review proceedings and costs of the contractual representative to a reasonable and necessary extent if claim of damages is awarded in full. If damages are granted only partially, pursuant to PPA § 192(2), aggrieved tender is entitled state fee and "costs of the contractual representative in proportion to the granting of the request for compensation of damages", considering "reasonableness and necessity" of such costs. Considering the recent amendments in law, the requirements for claiming bid costs as damages as stipulated by Review Committee in 2013 are justified. Requirement of proof of bid costs is understandable, as is expectation that aggrieved tenderer makes some effort to keep their expenses at reasonable extent. All in all, if the aforementioned case can be considered as indicative of Estonian practice for awarding damages for bid costs, it can be held consistent with minimum requirements established by EU law.

When it comes to compensation for loss of profit, it is firstly noted that SLA does not regulate the meaning behind loss of profit but merely stipulates it as an available head of

[274] Public Procurement Review Committee, Decision of 27 February 2013, 12.2-9/14024, §§ 12.2-12.4.

damage for public authority breaches. Additionally, pursuant to SLA § 13(2) liability of a public authority for loss of profit is excluded when public authority manages to prove that it is not "at fault in causing the damage". However, in context of procurement damages, SLA § 13(2) must be disapplied[275] because it is directly opposite from the CJEU finding in *Strabag* that the Remedies Directives preclude national legislation which makes compensation for procurement damages conditional upon any proof of fault[276]. This also means that contracting authority cannot exclude its liability by proving that it was not at fault. Consequently, the SLA does not offer much elaboration on what are the substantive requirements of claiming loss of profit for procurement breaches.

Loss of profit as a head of damage is regulated under Estonian Law of Obligations Act (hereinafter LOA). According to LOA § 128(4) an injured party is entitled to claim loss of profit ("gain which a person would have been likely to receive") and also "loss of an opportunity to receive gain" (i.e., loss of chance). According to settled case law of Estonian Supreme Court, the injured party does not have to be able to prove the exact scope of loss of profit. Even if it is difficult for court to measure harm caused in financial terms, loss of profit must still be awarded provided its preconditions have been met. This is because as a general rule, it is not possible to certainly assess what would have the outcome (i.e., scope of profit) been, had the breach not occurred. In order to claim damages for loss of profit, the injured party thus has to prove its intention and possibility to receive profit[277].

While the aforementioned approach on causation would be favourable for aggrieved tenderers, fulfilment of a more strict standard is required in cases concerning public authorities. Estonian Supreme Court has held that standard of proof required in civil matters for claiming loss of profit is inconsistent with the essence of compensating damages under Estonian state liability. Consequently, in addition to proof of intention and possibility to receive profit, injured party is required to prove certain causal link between the breach and loss sustained[278]. As procurement damages in Estonia are awarded under SLA, one might conclude that aforementioned higher standard of causation is also applicable in procurement context.

It settled in case law of the Review Committee, that in order to claim compensation for loss of profit or loss of chance, three cumulative conditions have to be met. Firstly, existence of a breach (i.e., unlawful decision, document or conduct). Secondly, only the breach established was the reason why contract was not awarded to aggrieved tenderer (award of contract has to

[275] *Supra note* 125, p 1156 § 16 (M.-A. Simovart & M. Parind).
[276] *Supra note* 54, § 45 (*Strabag*, Case C-314/09).
[277] Estonian Supreme Court. Civil Chamber. Judgement of 6 January 2013, 3-2-1-173-12, § 20.
[278] Estonian Supreme Court. Civil Chamber. Judgement of 30 March 2016, 3-2-1-157-15, § 13.

be "likely or certain"[279]). Thirdly, there must be a direct causal link[280]. Out of the 14 damages claims brough before the Review Committee by the time of writing this thesis, majority of them (i.e., 8) were rejected because failure of aggrieved tender to establish that there had been unlawful decision, document or conduct of the contracting authority. In four cases, damages were not awarded because the second requirement (i.e., only the breach established is the reason why contract was not awarded to aggrieved tenderer) was found unfulfilled. Only in the remaining two cases, aggrieved tenderer was awarded compensation for damages (once for bid costs and once for loss of profit)[281].

The Review Committee has only once awarded partial compensation for loss of profit in 2018. In this decision, the Review Committee first established that conditions to claim procurement damages were fulfilled (breach, which amounted to only legal obstacle to awarding contract to aggrieved tenderer and causal link). Review Committee considered it to be "likely" that absent the breach, aggrieved tenderer would have been awarded the contract[282]. To quantify the scope of damages claim, the Review Committee cited case law of Estonian Supreme Court Civil Chamber according to which in order to award loss of profit, chance of obtaining the profit absent the breach must be assessed[283]. The Review Committee then went on to note that aggrieved tenderer did not provide any proof which would allow assessment on which part of tender could have been the profit of aggrieved tenderer. According to damages request, the total cost of a tender was 17 640 euros - 8200 euros of which would have been payment to subcontractors had the aggrieved tenderer awarded the contract. That suggests that the alleged loss of profit was in the extent of 9440 euros. Review Committee referred to previous annual report of the aggrieved tenderer according to which the annual profit of it had been 23 482 euros. It then concluded that "reasonable profit could not have been more than 10% of the total costs of the tender" and awarded the aforementioned 10% as loss of profit[284] (i.e., 1764 euros).

Yet again, the reasoning established in the aforementioned case seems to be consistent with all minimum EU law requirements on procurement damages remedy. While no conclusive analysis can be made on the basis of one case, some conclusions are still offered. The 2018 was a small step forward for Estonian practice in awarding compensation for loss of profit caused by procurement breaching. What is more interesting, is that similarly to English and French law, Estonian law also appears to afford more favourable requirements (in comparison with EU

[279] Public Procurement Review Committee, Decision of 18 September 2014, 12.2-9/7737, §§ 7.4 & 16.
[280] *Supra note* 270, § 6.13 (18 May 2017, 12.2-9/1848/181783).
[281] Own statistics.
[282] Public Procurement Review Committee, Decision of 22 February 2018, 12.2-9/6394/157680, §§ 15 & 17.
[283] Estonian Supreme Court. Civil Chamber. Judgement of 21 May 2002, 3-2-1-56-02, § 21.
[284] *Supra note* 282, § 22 (22 February 2018, 12.2-9/6394/157680).

general law minimum requirements) from the viewpoint of aggrieved tenderer to request compensation for damages. Likewise, only the establishment of a fact of a breach was a necessary precondition for awarding damages. While under EU State liability proof of "sufficiently serious" breach would have been required, the Review Committee did not evaluate the gravity of a breach in any way.

Secondly, aggrieved tenderer was able to claim compensation for loss of chance. It only had to prove that absent the breach, award of contract would have been "likely" which in substantive terms appears to be similar with the requirement of "serious chance" under French and English laws. By contrast, under EU State liability it can quite convincingly be claimed that loss of profit must be recoverable. However, loss of profit would traditionally require proof of certainty (i.e., absent the breach, aggrieved tenderer would have won the contract).

While an argument can be made, that effectiveness considerations of EU law impose an obligation on Member States to make loss of chance available as a head of damage for the purposes of procurement breaches, it has no express legal authority. It stands only on one possible interpretation of principle of effectiveness. Consequently, any Member State which allows aggrieved tenderers to claim damages for loss of chance must be held to be in compliance with principle of effectiveness. Obviously enough, a national law (be that legal act or case law) which expressly stipulates the possibility for aggrieved tenderers to claim loss of chance offers higher protection of individual rights than guesswork based on general principles of EU law.

Thirdly, the requirements on causation appeared to be acceptably loose in the aforementioned Review Committee case of 2018. Furthermore, compensation was awarded despite the fact that aggrieved tenderer had made no considerable effort to quantify the extent of harm caused. The method of determining the scope of compensation was not entirely clear and seemed to base on numerical values available to the Review Committee and on some sort of standard of "reasonableness". The underlying idea seems to be somewhat similar to the English *Harmon* case. The Court in *Harmon* established the scope of award by establishing Harmon had 70% chance to earn profits, however, risks inherent to construction halved the chance resulting in 35% award. In 2018 case, Review Committee did not establish chance to win as a percentage, however in a similar fashion, it used exclusion method to reach final award. It is noted that as the value of the loss of chance is in any event relatively hypothetical, review bodies cannot be expected to give a specific formula to quantify the damage – it should be established considering the circumstances of each case.

Despite the fact that the 2018 case of Review Committee was in itself commendable from perspective of EU procurement law, as of now, it remains one isolated example (not so differently from the English *Harmon*). This might be since, similarly to English law, Estonian

law is yet to develop its own understanding of awarding damages for loss of chance or loss of profit in general terms. Compensation for loss of profits or loss of chance for procurement breaches has not been looked upon favourably by (a few) Estonian commentators who have addressed the issue.

It has been suggested in Estonian legal literature that aggrieved tenderers should be able to recover only direct patrimonial damage (i.e., bid costs) but not compensation for loss of profit or loss of chance. The main underlying argument is that PPA § 217 combined with one Estonian Supreme Court case, excludes the possibility to claim any other heads of damages for procurement breaches besides bid costs under Estonian law[285]. Firstly, it is because the possibility to claim bid costs is the only available head of damage established under PPA (*lex specialis*). This in itself suggests that the lawmaker did not intend to make any other heads of damages available for aggrieved tenderers for procurement breaches. In theory, there was no need for Estonian lawmaker to establish a legal rule for claiming compensation for bid costs. Hypothetically, general SLA conditions for claiming damages would have sufficed to claim such costs as damages. Thus, PPA § 217 might be expression of lawmaker's will to limit available heads of damages to bid costs[286].

Secondly, in 2009 Administrative Law Chamber of Estonian Supreme Court rejected the possibility to claim loss of profit as damages for unlawful conduct of public authority[287]. The case concerned administration of city assets. A local government organization held a public auction to rent out city property but breached the conditions of the public auction. Supreme Court held that despite the breach, injured party is only entitled to direct financial damage (i.e., costs actually incurred by the injured party). This is because rules for administrating city assets gives individuals only a subjective right to demand that local government organization adheres to procedural rules established. However, such rules do not give individuals the power to require that administration of city assets would be given to them. Therefore, the purpose of the obligation was not to prevent loss of profit which might have occurred because of the breach of rules of city asset administration. Consequently, by virtue of LOA § 127(2), the injured party was not awarded compensation for loss of profit[288].

While the aforementioned case of 2009 was not specifically about procurement, it has been argued in Estonian legal literature that similar reasoning is appropriate for procurement purposes as well. By this line of reasoning, in the event of procurement breach, aggrieved

[285]K. Saar. Kas Eesti riigihangete reeglid põhjustavad konkurentsimoonutusi? Hankemenetluse otsuste vaidlustamise probleemid. Juridica, 2014, 6, pp 428 & 429.
[286] P. Varul & Others (eds). Võlaõigusseadus I kommenteeritud väljaanne. Juura kirjastus, Tallinn, 2016, p 681 & *ibid.*
[287] Estonian Supreme Court. Administrative Law Chamber. Judgement of 22 October 2009, 3-3-1-66-09.
[288] *Supra note* 286, §§ 19-21 (3-3-1-66-09).

tenderer cannot require the award of contract to itself as a remedy. This means that the purpose of procurement damages remedy is not to prevent loss of profit of aggrieved tenderer but to ensure that contracting authority conduct would comply with procedural rules of procurement. This is even more so because the inherent focus of procurement procedures is on the interests of contracting authority – procurement procedures are conducted to enable contracting authority to purchase necessary product or service. In the light of this background, the aggrieved tenderer cannot have legitimate expectation to claim compensation for loss of profit or loss of chance because. Thus, the interests of contracting authority prevail over individual interests of the tenderers and aggrieved tenderers would have to settle for reasonable participation costs, extent of which they are able to prove[289].

The aforementioned approach is understandable from perspective of Estonian administrative law. As already mentioned above, Estonian state liability is built on around the idea that compensation for damages is a remedy of last instance. Injured party is only entitled to compensation for damages under Estonian state liability if there is no other possibility to remedy the harm and if public authority is at fault. Nevertheless, it must be borne in mind that public procurement rules are not completely up for Estonian legislator to make. It is inherent in general EU law that compensation for damages includes loss of profit. There is little controversy in legal literature concerning public procurement from EU perspective that loss of profit must be compensated for. Consequently, any view which restricts the possibility to compensate loss of profit for procurement damages under the Remedies Directives ought to be rejected.

All in all, it can be concluded that while the Estonian lawmaker has not expressly stated all substantive requirements of claiming damages for procurement breaches, effective framework might theoretically exist. Similarly, to France and England, there is no requirement to prove gravity of breach and loss of chance is available as a head of damage. While Estonian law relies on SLA to compensate for procurement damages which contains a regulation contrary to *Strabag* judgement (i.e., no requirement to compensate loss of profit if absence of fault is proven), it has not raised any practical issues. Similarly, to England, the absence of regular practice of awarding damages for procurement breaches is probably related to cultural legal background reasons. Furthermore, similarly to England, Estonian review procedures do not involve extensive use of inquisitorial powers of review body, which has been considered as one of the main reasons behind the effectiveness of the French system.

[289] *Supra note* 285, pp 423 & 428 & 429 (K. Saar).

Conclusions

This work was motivated by lack of effective procurement damages remedy for procurement breaches by contracting authority under EU law. That is despite the fact that EU lawmaker has highly harmonized substantive procurement law on EU level. Furthermore, EU lawmaker has required the availability of damages remedy for procurement breaches to afford protection of functionality of substantive EU procurement system as a whole and individual rights protection of aggrieved tenderers. Nevertheless, there is a general consensus in legal literature that EU damages remedy for procurement breaches can hardly be considered effective.

The problematic aspect with EU damages remedy is the fact that the Remedies Directives do not establish any substantive conditions of the damages remedy – merely a requirement, that damages remedy must be available - is established. Such lack of regulation has caused confusion and legal uncertainty. It can be interpreted as a will of EU lawmaker to leave substantive conditions completely under procedural autonomy of Member States. To some extent, it is true – EU lawmaker cannot establish the exact way how all national courts award damages for breaches. However, the fact that Remedies Directives themselves do not address the issue, does not mean that EU law imposes no additional requirements on the procurement damages remedy (besides the requirement of availability).

The objective of this work was to establish the minimum conditions required under EU law to achieve the minimum achievement of the will of EU lawmaker, i.e., minimum standard of required effectiveness of procurement damages remedy. Due to absence of specific EU legislation, the starting point in determining the minimum requirements of the EU law was the primary EU law. It was assumed from the start that award of damages, like any remedy, must achieve some minimum standard of effectiveness so it could be considered compliant. If damages remedy had no practical effect behind it, it would amount to mere words of legislator which clearly cannot carry inherent purpose of law.

Firstly, it was established that according to settled case law of the CJEU, if EU lawmaker has not regulated specific issue under governance of EU, it is for the Member States to ensure that the effect of the EU law would be achieved (i.e., procedural autonomy). This discretion is restricted by principles of equivalence (i.e., if similar domestic actions are given better procedural position than those required under EU law, actions based on EU law must be afforded the better procedural position as well) and effectiveness (i.e., domestic law cannot make it excessively difficult or impossible to achieve protection of rights conferred upon individuals by EU law or requirement for Member States to achieve full force and effect of EU law). At times, the CJEU has also referred to principle of judicial protection which governs the

rights of individuals to effective remedy and fair trial. It is not certain if principle of effective judicial protection is an expression of principle of effectiveness or should it be strictly differentiated from principle of effectiveness. However, as long as substantive conditions of principle of effective judicial protection are ensured, it has no practical significance for the purposes of this work whether it is part of principle of effectiveness or a separate concept.

The possibility for individuals to claim damages for EU law breaches from Member States is inherent to the system of the EU. General State liability doctrine founds a direct right based on EU law to claim damages, provided that *Francovich* State liability conditions are fulfilled. Injured party is entitled to compensation for damages if a) Member States breached a rule which intended to confer rights on the individuals, b) breach was sufficiently serious and c) there is a direct causal link between breach and harm caused to the individual. As EU procurement law has not established any other standard of liability for EU procurement law breaches, State liability is applicable by virtue of general EU to procurement field as well.

The fulfilment of first condition of State liability (i.e., EU rule confers rights on individuals) is not that problematic under procurement law. While all contracting authorities are not Member States, it has been established in case law of CJEU that the notion of a State must be interpreted broadly for purposes of State liability. Establishing that contracting authority can fulfil the criteria of a "State" under State liability is not very controversial. Furthermore, the inherent purpose of the Remedies Directives is to confer rights on aggrieved tenderers to *inter alia* obtain relief for procurement breaches. Therefore, the first condition of State liability does not usually pose a challenge for practical terms.

The requirement of proof of "sufficiently serious" breach under the second condition of State liability is however slightly problematic. This is because Member States are afforded room for error and discretion under "sufficiently serious" breach requirement. Consequently, national courts seem to be reluctant to hold "sufficiently serious" breach if the breach of a Member State is not obvious (i.e., in a matter in which Member States had no discretion or very limited discretion). Procurement procedures are characterized by relatively wide discretion of contracting authorities which makes the fulfilment of the requirement of "sufficiently serious" breach potentially burdensome for aggrieved tenderers.

Thirdly, direct causal link between loss and breach must be established. The conditions for causation have been generally left for Member States to establish. This might assumably be be problematic in the context of procurement damages as well. Considering that the purpose of participation in award procedure is to win the contract, the most obvious potential harm resulting from breach would be the loss of contract. However, proving certainty that but for

breach the aggrieved tenderer would have been awarded the contract appears to be objectively unachievable for most cases even in abstract terms.

Application of general State liability requirements might potentially result the lack of practical effectiveness of procurement damages remedy. If the required standard of proof is objectively set too high for most cases, aggrieved tenderers will not be able to claim compensation for damages and are thus deprived of their right to claim compensation for harm. Consequently, the question of interrelationship between general principle of effectiveness and State liability arises. This is not an easy one to answer because the inherent purpose of State liability is to complement the effectiveness of EU law. However, in field such as procurement, question arises if it is possible to adjust State liability for effectiveness considerations?

The CJEU has affirmed such possibility in the field of gender equality and employment law. Similarly to procurement law, protection of fundamental EU rights of non-discrimination and equal chance of opportunity is at the heart of gender equality law. Furthermore, contracting authorities and employers are afforded considerable discretion and subjectivity on whom to choose amongst multiple candidates. It is relatively easy to hide discrimination behind such wide margin of appreciation. The injured parties in both gender discrimination and procurement breach cases are on disproportionately weaker positions. They usually have very little access to factual information or evidence about other candidates or conduct of employer or contracting authority. This is in addition to the fact that proving breach of discretion is in itself an onerous task.

In the field of gender discrimination, the CJEU has consequently held that in order to afford protection of individual rights, any breach is sufficient to found a right to damages. Furthermore, if circumstances so necessitate, the burden of proof will be reversed for the benefit of the employee. As for heads of damages, full compensation is in order, that is direct costs, loss of profit, interest. Furthermore, compensation must be adequate and correspond to harm caused – Member State is not at liberty to impose limits on damages award which deprive party injured by gender discrimination from entitlement to full compensation. Due to inherent similarities in purposes of procurement and gender equality law and similar difficulties in providing proof of breach and causation, similar approach is justified for purposes of procurement breaches to afford protection of rights of aggrieved tenderers.

The CJEU has not elaborated on the possibility to relax State liability standard for procurement law purposes (in a similar manner as gender equality law). When it comes to case law of the CJEU concerning procurement damages, there are only two judgement from 2010 – *Strabag* and *Spijker*. According to *Strabag*, the Remedies Directives preclude national legislation which makes the award of damages conditional upon proof of fault even if fault of

contracting authority is presumed under national law. According to *Spijker*, general State liability conditions are applied to establish liability for procurement damages. Some authors consider those judgements to be contradictory and confusing. The main problem with *Strabag* and *Spijker* is the fact that they do not contained any much hoped for developments in terms of substantive conditions on procurement damages. What can thus be established this far is that State liability conditions are applicable for establishing liability for procurement damages, however there can be no requirement of proof of fault.

When it comes to available heads of damages under EU law, the substantive damages claim can be comprised of direct monetary damage (i.e., bid costs) and loss of profit. Compensation for bid costs is relatively straightforward since they are objectively quantifiable. Directive 92/13/EEC for utilities sector establishes a specific condition to claim participation costs for damages – aggrieved tenderer has to show it had a chance to win and that chance was adversely affected by breach of contracting authority. While there is no similar paragraph in public works directive 89/665/EEC, it is generally understood that participation costs can still be claimed as damages. However, while conditions 92/13/EEC are obviously directly applicable to 89/665/EEC, it is submitted that it is possible to rely on them for guidance. Consequently, conditions for claiming participation costs under 89/665/EEC should remain somewhere between general State liability and 92/13/EEC.

It is generally agreed that loss of profit as a head of damages is available for persons injured by breaches of EU law. In procurement purposes, loss of profit embodies compensation for actual harm caused to aggrieved contract – the loss of contract. However, claiming compensation for loss of profit in procurement fields is presumably problematic because of traditional all-or-nothing approach of award damages based on loss of profit. Aggrieved tenderer would usually be required to prove that in addition to the breach, it would have been awarded the contract had procedure been conducted lawfully. If aggrieved tenderer manages to provide required proof, it will be entitled to full compensation. If not, no damages are awarded, not even bid costs because in the event of lawful procedure, aggrieved tenderer had to bear bid costs anyways.

It is easy to see objective difficulties for aggrieved tenderer to prove certainty that their tender was the best amongst other tenders they usually know very little about. Furthermore, it is hard to imagine how to convincingly argue that contracting authority has exceeded its discretion if breach is not obvious. Thus, mere availability of loss of profit is inconsistent with principle of effectiveness since it will not offer aggrieved tenderers actual possibility to obtain compensation for harm caused by loss of contract.

In order to ensure minimum effective protection of aggrieved tenderer's rights, they must be able to claim loss of chance. Under loss of chance doctrine, the injured party must prove that they had a serious chance to win the contract absent the breach. Compensation is consequently awarded based on the likelihood injured party had to win the contract. This option would balance the dual interests of procurement damages remedy. Firstly, it would serve as deterrence because contracting authorities would be aware that compensation for damages might actually be awarded for procurement breaches. The purse of the taxpayer would be protected from excessive litigation by the "serious chance" requirement, in addition to fact that only part of expected profit is compensable under loss of chance. Secondly, individual rights would be protected since it is considerably more likely that aggrieved tenderer will be able to establish "serious chance" as opposed to "certain chance".

Thus, it is presumed that in order for procurement damages to be effective, aggrieved tenderer must be able to claim it for any breach and bid costs and loss of chance should be compensable. To illustrate the latter this work gave a general comparison between the systems of England, France and Estonia. England was chosen due to its common law legal system. France because it is generally exemplified in legal literature as a positive example of a system with regular award of damages claims. Finally, Estonia was chosen because of my personal interest and scarcity of literature from Estonian perspective.

Surprisingly, all legal systems were relatively similar from theoretical point of view. In all jurisdictions, national law settled for establishment of breach and did not require proof of "sufficiently serious breach" (although England changed that perspective in 2017, possibly resulting in breach of principle of equivalence). Participation costs were compensated for only in France and Estonia, but not in England due to understanding that participation costs are inherent commercial risks of tenderer. As tenderers must bear bid costs in the event of lawful award procedures as well, they do not have legitimate expectation for their compensation.

Theoretical possibility to award compensation for loss of chance if there had been a "serious chance" to win a contract was available in all jurisdictions. In France, awards for loss of chance are regular which is illustrated by a relatively high number (approximately 4000) annually brought damages claims. By contrast, award of loss of chance in Britain (i.e., *Harmon*) and Estonia were isolated cases. Average number of annually brought damages claims thus remained unsurprisingly low in both jurisdictions.

The secret behind success of the French system is considered the inquisitorial power of French administrative courts which is regularly used in procurement damages cases as well. There is nothing similar to match under Estonian or England law. Courts mainly rely on evidence and information brought by disputing parties.

What the analysis of selected Member States indicates is that the issue of procurement damages is probably much deeper than the lack of uniform set of rules on EU level (as initially presumed). Instead of EU regulation, the reason behind lack of practical effectiveness of procurement damages remedy might be attributed to cultural differences in legal background. The French system developed the compensation for loss of chance for procurement breaches independently from EU system (loss of profit for procurement breaches is awarded since 1970s, first Remedies Directives was introduced in 1989). In England, procurement damages remedy was introduced with transposition of Remedies Directives. In Estonia, while the general state liability law foresees the possibility to claim loss of profit for harm caused by public authority, it must be remembered that underlying idea of Estonian state liability law is to award damages only as a remedy of last resort. That is why courts might not be so forthcoming in award loss of profit – similarly to England, the doctrine is yet to develop under Estonian law.

Effectiveness of EU procurement damages remedy might still increase in practical value if the EU lawmaker would be inclined to assert some specific substantive requirements on such damages claim. However, as is seen, due to different legal backgrounds and procedural autonomy of Member States, even result in terms of effectiveness of procurement damages remedy can probably not be expected any time soon. Any development in this field would be welcome as procurement damages remedy remains at the heart of effectiveness of procurement remedies system, concurrently affording individual rights protection.

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