

A large, three-dimensional sculpture of the company name 'CLYDE & CO' in a metallic, brushed metal finish. The letters are arranged in a row on a light-colored wooden surface. The background is a wall with vertical grey slats. The lighting creates strong highlights and shadows, emphasizing the three-dimensional nature of the letters.

CLYDE & CO

White Paper

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The question

- What is considered to be a "serious breach," in the context of damages as a remedy being available only when there is a "serious breach" of the procurement regulations?

Coverage

- Damages as a remedy in procurement cases
- Concept of sufficiently “*serious breach*”
- Should there even be a test? (*Fosen Lindjen*)

- What does this all mean in practice?

Damages as a remedy

- Directives 89/665/EEC & 2007/66/EC and Public Contracts (Scotland) Regulations 2015 clear
- “*may award damages to an economic operator which has suffered loss or damage as a consequence of the breach*” (reg. 90(1)(b) PC(Scot)R 2015
- Ability of court to “*award damages to any person **harmed** by an infringement*” Article 2(1) Dir 89/665/EEC and Article 2 recital 7 Dir 2007/66/EC

The *Francovich* principles

- The principle of “state liability” in EU law
- *Case C-6/90 Andrea Francovich v Repubblica Italia* [1995] – workers suffered damage when employer became insolvent and entitled to compensation under an EU Directive which Italy had not enacted
- Three principles
 - Directive must grant rights to individuals
 - Breach was “sufficiently serious”
 - Direct causal link between the breach and the damage

Do the *Francovich* principles apply to procurement claims?

- Yes
- Case C-568/08 - *Combinate Spijker Infrabouw and ors. v Provincie Drenthe* – Dutch canal bridges procurement
- In “*concrete expression to the principle of state liability for loss or damage caused to individuals as a result of breaches of EU law for which the state can be held responsible*”

What is a “sufficient serious breach”?

- *ATK Energy (formerly Energy Solutions EU Ltd) v Nuclear Decommissioning Authority (2016)* - £8bn decommissioning of 12 Magnox nuclear reactors
- Supreme Court said claimant has a positive obligation to demonstrate a “*sufficiently serious*” breach in order to obtain damages
- Reversed common practice to plead damages in claim form in any procurement dispute

What is a “sufficient serious breach”?

- The “*decisive*” test
 - Breach must “*manifestly and gravely*” disregard the “*limits on the public body’s discretion*”
- Court will adopt a “multifactorial” approach to determine:
 - The importance and clarity of the rule which has been breached
 - The discretion that the authority had to apply to the rule
 - Whether the breach was intentional or excusable(the *Factortame* approach)

What is a “sufficient serious breach”?

- The seriousness of the breach is important
- Case by case assessment on the facts
- No one single decisive factor
- No need for moral culpability or misconduct/misfeasance

- Failure to award to MEAT bidder
- Failure to apply published evaluation criteria / pass – fail hurdles if the outcome would be different

BUT

- Does the EU agree that a breach must be “sufficiently serious”?
- Case E-16/16 *Fosen-Linjen AS v AtB AS (2017)* (ferry services procurement in Norway) – EFTA Court
- Court said
- *“the gravity of the breach of EEA rules on public contracts is irrelevant for the award of damages”*
- *“a simple breach of public procurement law is, in itself, sufficient to trigger the liability of the contracting authority to compensate the person concerned”*
- The Remedies Directive precludes national legislation which requires proof of fault or limitation on types of breaches
- Do need a causal link between breach and loss

The answer

- Multifactorial, case by case, review
- A requirement of sufficiently serious breach may limit unhappy bidders rights to damages
- Minor breaches which would not have affected the outcome still mean damages not guaranteed
- EFTA has different view and further case law needed to resolve
- No major change in UK procurement law until at least end of 2020?

Questions

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50+

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