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What is a sufficiently serious breach?

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The question(s)

- What is considered to be a “sufficiently serious” breach in the context of the remedy of damages being available only when there is a sufficiently serious breach of the Regulations?

Or should the question be:

- Should there only be a remedy of damages when there is a sufficiently serious breach?
  - *Fosen-Linjen*

The issues

- The starting point: *Francovich*
- The UK position
- The EFTA position
- What does it all mean?
- Impact on adequacy of damages?

The starting point

The *Francovich* conditions – damages only available where:

1) Rule of law infringed must be intended to confer rights on individuals

2) Breach must be sufficiently serious

3) There must be a direct causal link between the breach and the damage sustained

The Supreme Court position - *EnergySolutions v NDA* (2017)

- Did *Francovich* apply to the Directive and to the Regulations?
- Was there a conflict between *Combinate Spijker v Provincie Drenthe* (2010) and *Stadt Graz v Strabag AG* (2010)

Supreme Court:

- Francovich applies to the Directive

- Faced with a choice between deciding that:

  - The judgment in *Spijker* was an incoherent mixture of two differing schemes and jumped back and forwards

  - There was no uncertainty or confusion in the CJEU's case law

- The SC could be safe in relying on the clear language and ruling in *Spijker* as settling the position

- *Francovich* applies at domestic law level:
  - Legislator's intention in 2009 was not to gold plate
  - Court of Appeal in *Matra v Home Office* (1999) was wrong in treating *Francovich* conditions as irrelevant
  - Court of Appeal in NDA was clearly wrong in assumption that claim under the Regulations was no more than private law claim for breach of a domestically based statutory duty
  - Consistent with use of the *"Court <u>may</u> ….award damages"* in the Regulations

Word Perfect Translation Services Ltd v Minister for Public Expenditure and Reform (2018) Irish CA

- Clear from *Spijker* that member states are required by EU law to provide remedies by reference to the *Francovich* criteria
- Open to member states to provide a more elaborate/claimant-friendly remedy
- Reference in 2010 Regulations is to Francovich damages only because that is all the law requires

The EFTA position: *Fosen-Linjen v AtB* (2017)

- Commission argued:
  - A simple breach of a sufficiently clear rule of EU law should be sufficient
  - To "re-import" a condition from the general principles to the Remedies Directive is a matter of concern
  - As damages are frequently the only remedy available, they should not be made more difficult or less advantageous to obtain than other remedies under the Remedies Directive
  - Remedies Directive is clear that any infringement of public procurement law should be followed up and should not be left unattended because the breach is not sufficiently serious

The Court's analysis

- CA carrying out a commercial act in a tender process, not an act of public authority

- Preferable that a breach is corrected before contract takes effect, but there may be cases where it can only be remedied by damages

- Remedies Directive precludes national legislation which requires proof of fault or has a general exclusion or limitation to specific cases e.g. breaches of a certain gravity

Conclusion:

- The gravity of a breach of the EEA rules on public contracts is irrelevant for the award of damages

- Award of damages does not depend on whether the breach was due to culpability and conduct deviating markedly from a justifiable course of action, occurred on basis of material error or attributable to existence of a material, gross and obvious error

- A simple breach of public procurement law is in itself sufficient to trigger the liability of the CA to compensate the person harmed for the damage incurred, pursuant to Art. 2(1)(c) of the Remedies Directive, provided that the other conditions for the award of damages are met including, in particular, the existence of a causal link

What is meant by sufficiently serious?

Brasserie de Pecheur and *Factortame:*

- The decisive test – whether there has been manifest and grave disregard of the limits of discretion
- A number of factors have been identified which can be taken into account in applying that test (the *Factortame* factors / the multifactorial approach)

The *Factortame* factors :

1) The importance of the principle breached

2) The clarity and precision of the rule breached

3) The degree of excusability of an error of law

4) The existence of any relevant judgment on the point

5) The state of mind of the infringer and, in particular, whether he was acting intentionally or involuntarily (deliberate or inadvertent breach)

6) The behaviour of the infringer after it has become evident that an infringement has occurred

7) The persons affected by the breach, including whether there has been a complete failure to take account of specific situation of defined economic group

8) Position taken by one of the Community institutions in the matter

- Key principles:
  - List of factors is not exhaustive
  - Weight to be given to each factor will vary from case to case
  - No single factor decisive
  - Application of test is a matter of fact and circumstance
  - Objective test
  - Seriousness of breach always important factor
  - Moral culpability, egregious conduct, flagrant misconduct not required

Application of the test – NDA (2016)

- Procurement using competitive dialogue (PCR 2006) for 14 year decommissioning contract, with funding for first 7 years of c.£4.211 bn

- Procurement took 2 years (2012 – 2014) and Claimant's bid costs were c.£10m

- CFP won – by 1.06%

- Energy Solutions (one member of RSS consortium) challenged after the contract had been placed

- Draft training slides said:

  "*As a matter of policy, only the electronic notes in AWARD … will be retained; all other notes pertaining to evaluation must be destroyed … any hard copy notes will be shredded at the end of the evaluation."*

- Final version omitted shredding but said:

  "*Evaluators must only use the AWARD system to record notes. They must not record paper notes either on copies of the bid that are provided or in their own note books … In the event of challenge your notes will potentially be subject to disclosure."*

- No notes were kept of dialogue meetings and NDA staff had to rely on memory; with 84 boxes of material, the Judge described this as *"verging on incredible"*

- There were crucial informal and unrecorded conversations, resulting in change in scores, and unexplained decisions to open *"closed down"* parts of the evaluation

- Members of the evaluation team attempted to keep transparency *"to the absolute minimum"* in order to avoid exposing NDA to a claim

- Judge found that, *"… deflecting legal challenge to the outcome of the competition was foremost in the collective mind of the NDA at all stages of the competition"*

- Illogical – *"logic became an early casualty during the NDA evidence"*

- Witnesses highly defensive (including by restricting note taking), *"obstinate refusal to accept that any mistakes or errors had been made at all"*

Outcome:

- Winning bidder should have been disqualified:

  "a way was found to avoid disqualification of CFP……NDA sought to avoid the consequence of disqualification by "fudging" the evaluation….. I mean choosing an outcome, and manipulating the evaluation to reach that outcome"

- In any event, RSS should have scored higher than CFP as a result of manifest errors in both bidders' scores

- Was the breach sufficiently serious for damages?
  - Overall breach (failure to award to MEAT)
  - Underlying breaches
    - Disqualification breaches
    - Scoring breaches

- Overall breach

  - Factors 1 and 2 satisfied
    - Clear, precise requirement
    - No discretion (misleading to concentrate on discretion in evaluation)
    - These factors were sufficient to satisfy test

  - Factors 3, 4 and 8 didn't arise or didn't assist NDA

- Factors 5 and 6 – no bad faith, deliberate intention
- Factor 7 - other tenderers affected

- Underlying breaches

  - Analysis the same for disqualification breaches

  - Scoring breaches also sufficiently serious if their effect on scoring, individually or cumulatively, would alter the outcome

- *Word Perfect Translation Services* (2018), IECA
  - Reliance on *Ogieriakhi v Minister for Justice and Equality* (2017), IESC
  - Chasm between Francovich damages and contractual damages
  - Necessary to show grave or manifest or inexcusable breach

- Analysis in *Ogieriakhi*:

  - First consideration: precise identification of how breach arose
  - Obvious mistake?
  - Good faith/honest misapprehension not enough
  - Lack of good faith/improper motivation probably decisive against State

Impact on interlocutory applications (including adequacy of damages)

Cemex v Network Rail (2017), TCC

*"Whilst I acknowledge that … the decision in **Energy Solutions** came as something of a surprise to procurement practitioners, the ramifications for bread and butter procurement disputes of the type with which this court is familiar are not yet clear, mainly because they do not feature in the judgments in the Supreme Court at all.*

"There is nothing in those judgments to indicate that the court was making fundamental changes to the way in which the Regulations operate or the way in which the court polices procurement challenges. There is nothing in ***EnergySolutions*** *which bears on the proper approach to an early application for specific disclosure"*

Lancashire Care NHS Foundation Trust v Lancashire County Council (2018), TCC

- Parties agreed that:
  - Court could not conclude at an interlocutory stage whether or not the alleged breaches were "sufficiently serious"
  - Point to be taken into account in considering the adequacy of damages as an additional requirement the Claimant had to satisfy to recover damages at all
- It does form part of the consideration necessary for preliminary conclusion re effectiveness of remedy

Word Perfect Translation Services (2018), IECA

- If WP's ability to recover damages is highly restrained, this clearly impacts the manner in which the factors on an interlocutory injunction should be weighed and balanced

- Given the interpretation of the Regulations (as damages only available where *Francovich* conditions are met), it cannot be said that damages have been shown to be an adequate remedy

- But analysis in *Mears Ltd v Leeds City Council* (2011)?
  - Choice of remedy is balancing exercise
  - Setting aside at serious end of scale, at other end where impact is less serious or obvious, damages will adequately deal with the breach

Where does that leave us?

- Which breaches are not sufficiently serious?
  - No effect on outcome
  - Loss of a chance
  - Minor/trivial breaches
  - Excusable

- Is there a chasm between ordinary damages claims and sufficiently serious claims?

- Does it make no difference?

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Thank you for listening

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