

Sufficiently serious

NDA and beyond

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- What is meant by the sufficiently serious test?
 - *NDA*

Or should it be:

- Is there meant to be a sufficiently serious test?
 - *Fosen-Linjen*

The *Francovich* conditions

- 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

EnergySolutions v Nuclear Decommissioning Authority (2017) SC



- *Francovich* applies to the Directive
 - *Combinate Spijker v Provincie Drenthe (2010)* said so
 - *Stadt Graz v Strabag AG (2010)* was not inconsistent

- 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 mayaward damages” in the Regulations



- 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?



- The decisive test – manifest and grave disregard of the limits of discretion
- The *Factortame* factors / the multifactorial approach
- The application of the multifactorial approach in *NDA No. 3* (2016)

The *Factortame* factors or the multifactorial approach:

- 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 multifactorial approach (*NDA* (2016) TCC)
 - 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

➤ Automatic suspensions and early disclosure

- *Cemex v Network Rail (2017)*:

“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”

- *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*

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

- Has anything changed?

Thank you for listening

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