

Compensation for Procurement Damage: A Nordic Exposé

Kai Krüger¹

1	Scope and Ambition of the Article	156
2	The Remedies Regimes – Nordic Variants	159
3	Liabilities’ Layout Alternatives	163
4	Cases on “Negative Interest” in the Nordic Jurisdictions – Viewed Comparatively in the Light of the EU and EEA Remedies Regime – from the Norwegian Observatory	166
5	Loss of Contract (“Positive Interest”)	172
6	Calculation of Losses – Positive Interest	182
7	The 2010 EUCJ Strabag and Spijkers Rulings – Implications	184
8	Equivalence and Effectiveness Principles on Stand; Side-view on Public Administrative Law Scenarios for Non-procurement Awards and Protection of Quasi-contractual Expectations in Private Relations to Public Authorities	188
9	Sideviews to Fraudulent and Corruptive Procurement	190
10	Summing up	191

1 An earlier article on Norwegian case law on damages was published together with other articles on Member States liability issues in (2006) 15 Public Procurement Law Review PPLR pp 211-232. The present article will elaborate and discuss subsequent developments in EUCJ and in recent Nordic case law. Thanks for valuable inputs to this article from Duncan Fairgrieve, Halvard H Fredriksen and Roald Hopsnes.

1 Scope and Ambition of the Article

This article will discuss issues on the question of damages for procurement violations under national law, somewhat vaguely provided for in the three EU remedies' directives. The Public Procurement Remedies' Dir. 89/665 article 2 No 11 (c) simply state that the remedy of damages shall be available to harmed interests such as defined in the provision on "legal standing" (Dir. 89/665 article 1 No. 3 "any person having or having had an interest in obtaining...a contract..."). The utilities' version is a little more sophisticated since there is a specific qualification on costs' recovery in case of a "loss of chance" in Dir. 92/13 article 2 No. 7.²

As pointed out in writing,³ one must bear in mind that the EU remedies' regime pursue as its declared purpose to enforce effectively the proper conducting of procedures in public and utilities' contracting. The Dir. 89/664 Preamble (un-numbered – 6th paragraph) introductory recital indicates the following guideline:

“Whereas it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement;” - which may even be contrasted to the eight recital on Commission's involvement in cases where Member States have infringed procurement rules, stating that “Wherever, the Commission, when it considers that a clear and manifest infringement has been committed during a contract award procedure, should be able to bring it to the attention of the competent authorities...so that appropriate steps are taken for the rapid correction of any alleged infringement;”

The two directives on remedies were not included in the 2004 EU law reform package (Dir. 2004/17 and Dir. 2004/18). The later 2007 law reform on remedies in public and utilities' procurement (Dir. 2007/66) introduced a standstill period and sanctions on certain grave procurement violations and in particular “direct purchasing” without a call for competition. However, the previous rules on damages were left without amendments. The new regime on “ineffective” contracts for certain qualified procurement violations does not change the law on damages, but might extend the arena for damages in the situation where a contracting authority through terminating the contract possibly incurs liability towards a presumed innocent selected contractor.⁴ The Commission launched a draft update of procurement regime late 2011

2 Cf. Dir 2009/81 On Defence and Security Procurement article 56 1 b on damages.

3 Pachnou, D. *Bidders' Use of Mechanisms to Enforce EC Procurement Law* [2005] 14 PPLR Issue No. 5 p. 256.

4 EU procurement law is basically restricted to regulate contracting authorities, so both contracting in disregard of the standstill period as well as direct contracting without a call for competition could be said to harm the interests of the private party affected.

(COM(2011)896 (2011-12-20) Draft Directive on public procurement.⁵ The expected law reform does not include pecuniary remedies.

Compared to competition law surveillance and enforcement instruments, procurement law compliance in national sector is not primarily monitored by administrative authorities, but in the horizontal decentralised bid protest regime initiated by rejected or otherwise non-successful candidates - or even non-participating potentially would-be-candidates. Neither Commission nor EFTA Surveillance Authority (ESA) is involved in the *ex post* economical settlement of mal-procurement. An evasive approach to the prerequisites for award of damages could therefore be said to counteract the effective enforcement of the procurement rules along the same line of arguments as in the C-81/98 *Alcatel* (1999-10-28) case.

The European Court of Justice has dealt with legal remedies in a number of procurement cases. Most of these are about efficiency and transparency requirements⁶ and the focus is on inaccurate or insufficient statutory national implementation of the remedies' requirements – either in cases under TFEU on Treaty violations – or preliminary rulings where MS legislation is challenged. Few cases – preceding the 2010 *Strabag* and *Spijkers*⁷ rulings (to be discussed *infra* 7.) – have dealt with the proper interpretation of the remedies' provisions on damages for procurement infringements.⁸ Whereas few cases have dealt with the proper interpretation of the provisions on damages for procurement infringements by Member States, several cases on damages have been litigated in the EU General Court (EUGC)⁹ as first instance claims under TFEU article 256 for EU institutions' own contract awards.¹⁰ Several such cases have been dismissed, and are therefore of less interest in the context of this article. The

5 On Utilities Procurement COM(2011)895 furthermore (a new) COM(2011)897 Draft Directive on the award of concession contracts).

6 On non-acceptable national procedural conditions or time limits for such claims, C-470/99 *Universale Bau* (2002-12-12) and C-406/08 *Uniplex* (2010-01-28) or on questionable subjective conditions on fault, C-275/03 *Commission v Portugal* (2004-10-10) on non-acceptable Portuguese legislation requiring fraud or fault as conditions for damages.

7 C-314/09 *Strabag* (2010-09-30) and C-568/08 *Spijkers* (2010-12-09).

8 C-395/95 *Geotronics SA v Commission* (1997-04-22) [1997] E.C.R. I-2271 on procedure, C-275/03 *Commission v Portugal* (2004-10-14) on non-compliant Portuguese legislation requiring fraud or fault as conditions for damages, followed by a ruling on financial penalty for failing to amend legislation C-70/06 (2008-01-10).

9 Ex Court of First Instance CFI - TFEU article 256.

10 Cf. on the EU institutions' civil contract and tort liabilities such as in the area of award of contracts TFEU article 340 (ex TEC article 288), with somewhat vague references not to EU law but to 'the law applicable to the contract in question' and (non-contractual) to 'the general principles common to the laws of the Member States.' Whether this rules out the 2010 *Strabag* drift towards strict liability (*infra*) could be questioned. Strong policy considerations indicate that EU institutions should not benefit from more lenient rules on liability than contracting authorities in MS. EU competitive contract awards are also about inner market mobilities, cf. Fredriksen, H. Haukeland *Objektivt ansvar for anbudseil?* Lov og Rett 2010 pp. 600 et seq.

11 T-145/98 (2000-02-24), C-13/99 (2000-06-15), T-40/01 (2002-11-28), T-226/01, T-411/06 (2008-10-08), T-226/01 (2006-09-13), T-411/06 (2008-10-08), T-406/06 (2008-11-12), T-

EUGC claim for damages T-160/03 *AFCon Management Consultants and others v Commission* (2005-03-17) came out successful for the plaintiff, but only for costs plus interests¹² incurred in challenging the tendering procedure. Claims for loss of profit, 'loss of profile' and 'harm to reputation' were rejected in that case.

The Utilities' Remedies' Dir 92/13 article 2 No. 7 "loss of chance" provision has so far not been submitted for interpretation by neither of the EU/EEA Luxembourg courts.

Select comparative studies on damage for violations of the EC Procurement Rules were compiled in the (2006) No 4 Issue of Public Procurement Law Review (PPLR) pp 159-230.¹⁴

Following the *Strabag* og *Spijkers*' cases, academic comments have emerged.¹⁵

This article will discuss the status in Norwegian case law as per date 2012, setting recent Norwegian Supreme Court rulings in the EU and comparative Nordic dimension. That question can be raised both in relation to *basis for liability* (strict liability, negligence or qualified requirements on seriousness of breach), in relation to *proximate causation* and on calculation of *proof for loss* caused.

195/08 (2009-12-10), T-387/08 (2010-09-09), T-247/08 (2010-09-28). Note the passage in T-226/01 *Cucchi di Frutta* (2006-09-13) recital (26) "According to settled case-law, for the Community to incur non-contractual liability within the meaning of the second paragraph of Article 288 EC, a series of conditions must be met, namely, the conduct of which the institutions are accused must have been unlawful, the damage must be real and a causal connection must exist between that conduct and the damage in question [...]". An EU CJ appeal case on dismissing damages: T-13/96 was upheld in C-13/99 *Team Srl v Commission* (J 2000-06-15).

12 Recitals (109) and (133) - EU Central Bank interest rate plus 2% p. a., in addition compound interest subsequent to judgment.

13 Recitals (109) and (133) - EU Central Bank interest rate plus 2% p. a., in addition compound interest subsequent to judgment. Case comment by p. Braun (2005) 14 PPLR NA98, and p. Kalbe (2005) 14 PPLR NA121.

14 Articles by Treumer, St., Lichère, F., Rubach-Larsen, AQ., Bowsher, M. and Moser, P., Krüger, K. and Slavicek, M. Cf Arrowsmith, Sue *The Law of Public and Utilities Procurement* (2nd ed 2005) pp 1421-1425, Leffler, Henrik, *Damages Liability for Breach of EC Procurement Law: Governing Principles and Practical Solutions* (2003) 12 PPLR 151, Pachnou, Despina, *Direct and Indirect Effect of Directives and State Liability. Their Applicability in Relation to Procurement Remedies* (2000) 9 PPLR 251, Lichère, F. "Damages for Violation of the EC Public Procurement Rules in France", Hjelmberg, S. E. and others *Public Procurement Law – the EU directive on public contracts* (Copenhagen 2006) pp 390-418, Steinicke, M. – Groesmeyer, L. "EU's Udbudsdirektiver" (2008) pp.132-144. Simonsen, L. *Prekontraktuellet ansvar* (1997) (dr.jur. thesis) furthermore Næss, T. "Erstatning til forbigått anbyder – kommentar til Høyesteretts dom av 30. august 2001" Tidsskrift for forretningsjuss 2001 Issue 3 pp 366 et seq, Articles in D Fairgrieve and F Lichère (eds) *Public Procurement Law. Damages as an Effective Remedy* (2011).

15 *T Kotsonis* (2011) 20 PPLR NA59, *D McGowan* (2011) 20 PPLR NA 64, H H Fredriksen op cit.

2 The Remedies Regimes – Nordic Variants

EU/EEA procurement law has not been approximated at all in the Nordic countries. There are differences both in substance and on procedure.

Norwegian public procurement law consists of a short 1999-07-16 No 69 framework statute authorising a comprehensive set of ministerial regulations both on EU/EEU level and on sub-threshold contracts (“procurement light”).¹⁶ The basic structure was maintained in the 2006 implementation of the two 2004 public procurement directives and will apparently apply also after the Dir. 2007/66 law reform expected by 2012/2013.¹⁷ Damages in case of faulty procurement is addressed in the 1999 Act § 10, only stating in a single sentence that the contracting authority violating the statute - or regulations issued under the statute - incurs liability for the loss inflicted on the harmed party.¹⁸

The provision succeeded in part provisions issued under the first generation procurement regulations as from 1996, which, however, only addressed damages for violations within the utilities sector. The reason for this was the legislator’s assumption that Norwegian non-statutory law on damages, such as liability for bad public administration generally, was sufficiently in compliance with the EEA obligations and therefore called for no specific legislative action. The later 1999 EEA-oriented law reform did not address the question of damages except for brief remarks in the preparatory committee report NOU 1997:21 (p. 118) and in the following ministerial Ot prp nr 71 (1997-98) draft bill p. 68, assuming that minor violations are not relevant so liability should assume “material” infringements, although proof of a loss in itself was said to indicate that the violation is not minor. Whereas the 1997 committee report addresses the question whether reluctance in relation to positive interest might be questioned under the EEA requirement on effective remedies, the ministry resigned on the issue by simply stating (1998) that procurement damages should be left to case law. A later 2006 amendment to the 1999 statute introduced deterrent penalty (“overtredelsesgebyr”) for un-authorized direct purchases. The insertion involved legislator’s considerations on insufficient damage remedies, but did not reconsider the 1999 § 10 provision (Ot prp nr 62 (1995-1996) p. 8, referred to in Rt. 2008.982 *Catch-Ventelo* at p. 992). A pending law reform Spring 2012 on Dir. 2007/66 (Prop. 12 L (2011-2012) is expected to end the Complaint Board KOFA penalty remedy and authorise general courts to impose both penalties and the “ineffective contract” remedy stated in Dir. 200766

16 On abolishing the distinction between A and B services, *see* now Draft Directive COM(2011)896 Explanatory Memorandum at p. 8.

17 Prop. 12 L (2011-2012) (NOU 2010:2).

18 In contrast to the other Nordic countries, the Norwegian implementation was (replacing a short 1992 act with regulations) effectuated in a short 1999 framework 1999 act (§§ 1-12) with additional comprehensive ministerial regulations for public (2006-04-07 No 402) and utilities (2006-04-07 No 401) sectors. The act states the general principles such as the liability rule in § 10 whereas the regulations deal with all the details, some taken from the directives, others filling in lacunas in the EU regime or even reiterating pre-EEA government procurement law from regulations of 1899, 1927 and 1978 (“REFSA”). A ministerial EEA-adapted 2006 Guide (“FAD Veileder”) explains certain aspects of the black letter provisions to help public authorities (COs) in their contracting activities.

article 2d. The 2012 law reform, however, does not bring about any legislative development on the liability agenda.

Seen as a whole, the remarks in the Norwegian preparatory documents preceding the provision on damage in the 1999 Act § 10 (and its historical account) offer modest guidelines on the issue – particularly when procurement violations are contrasted to otherwise relevant public administrative case law on liability towards private parties for bad procedures or faulty exercise of discretionary public competencies.¹⁹

The EEA match to the Treaty preliminary EUCJ/EUGC rulings is the EEA and ODA Agreement on optional submittal to the EFTA Court for advisory opinions. However, no Norwegian procurement legal issues have been submitted since the EEA came into force in 1994.²⁰ Supreme Court rulings prevail in these matters, but as will be shown: The Court pays attention to the EUCJ rulings.

The EEA (Norwegian/Icelandic/Liechtenstein) dimension on law in substance is identical to the EU. The EFTA Surveillance authority (ESA) investigates procurement infringement cases in private complaints or *ex officio*, but mainly to correct or to call attention to errors made and with the objective to improve the future practice.²¹ Private operators and their interest in compensation for faulty procurement would normally only benefit indirectly from such proceedings.

The Norwegian Procurement Complaint Board (Klagenemnd for Offentlige Anskaffelser) (KOFA) established under the 1999 Act on procurement § 7a (effective as from 2003), is a purely responsive expert panel,²² authorised by statutory regulations to opine on whether a submitted bid protest is legally substantiated or not. Interim injunctions and full trial of damages and – prior to contract - reversal/corrections in a current award procedure is exclusively a matter for the courts. KOFA deals with complaints filed by any party or person having an interest in viewing the procedure or decisions of a contracting authority.²³ Since 2007 the Board has been authorised to impose penalties up until 15 % of contract value (“overtredelsesgebyr”) for serious direct purchases – and has done so in 25 cases by the end of 2011. The Board is otherwise authorised to issue advisory opinions on alleged violations which, if

19 Cf. Bernt J Fr., and Krüger, K. *Hvor mye EØS rett tåler norske kommuner?* in Bonus Pater Familias. Festschrift til Peter Lødrup) (2002) pp 121-156, further references *infra* under 8.

20 On ESA involvement in Norwegian procurement disputes, see NOU 2012:2 *Utenfor og innenfor* pp. 411-412 and on remedies in the EEA regime in general pp. 198 et seq with a list of EU/EEA-related court cases (Supreme Court and subordinate courts) Annex 7 (pp 903) (whereof 27 cases on public procurement).

21 ESA cases are reported in Annual Reports. In 2004, ESA dealt with appr. 20 cases, all Norwegian cases. As to Commission’s surveillance, cf. Delsaux, A. (2004) 13 PPLR 130. Since the establishment of the Norwegian Complaint Board KOFA in 2003, the number of ESA procurement investigations has gone down (annual reports on “eftasurv.int”).

22 10 Board Members: 4 judges, 4 procurement attorneys including the chairman, 2 university professors. The Board has per August 2010 dealt with appr 1500 cases since 2003.

23 Regulation on procurement complaints (“Klageforskriften”) 2002-11-15 No 1288 § 6.

substantiated, may be solved voluntarily by correcting, terminating or reversing the award procedure. Alternatively, or where contracting authority challenges the KOFA opinion, the complainant may submit the award to court litigation.

²⁴The Board may not award - but can opine on - damages when so requested by complainant, but will normally not do so since the complaint procedure is somewhat summary and with limited access to evidence required when the liability issue is to be clarified. Furthermore, KOFA does not have the authority to order a standstill in the award procedure. It is left to the complainant to submit a request for judicial interim injunction (“midlertidig forføyning”) under Civil Procedure Act 2005-06-17 No 90 Chap 34. For these reasons, the KOFA Board cannot be considered as a “review body” under any of the Dir. 89/665, 92/13 or 2007/66 Remedies’ Directives.

A private party may initiate court proceedings for damages directly subsequent to the KOFA favourable advisory opinion, but may also choose to litigate without having had the case reviewed by KOFA first.

The *Swedish* two-pillar regime authorises the public pillar courts to rule on violations whereas the civil courts will deal with liabilities.²⁵ Provisions on damages for faulty procurement are inserted in the Swedish comprehensive Statutes on public and utilities procurement (SFS 2007:1091 public sector and SFS 2007:1092 utilities) (“Upphandling”), amended on the occasion of Dir. 2007/66 by SFS 2010:571 (in force 2010-07-15)²⁶ with provisions on damages in amended Chap 16 20-21 §§.

Danish EU procurement law is the black letter procurement directives as such²⁷ with a minimum of supplementary regulations outside the scope of the directives themselves.²⁸ Remedies in case of faulty procurement are as of July 2010 now addressed in the 2010-05-12 No. 492 Act on remedies (“håndhævelse”) with provision on damages in § 14 (in force 2010-07-01) (with a second paragraph reflecting the Utilities’ Remedy Dir. 92/13 article 2 No. 7 on loss of chance negative interest).

The Complaint Board “Klagenævn for udbud”²⁹ handles (since 1992) bid protests and is even (from 2000 – subject to subsequent judicial review) authorised to award damages in infringement cases³⁰ – and has done so in a

24 The contracting authority will normally only challenge a KOFA-response if the complainant instigates court review in a case for remedies (such as damages).

25 Bjørklund, D. – Madell, T. *Skadestånd vid offentlig upphandling* Svensk Juristtidning 2008 pp 579-602 at pp. 581-584.

26 The law reform initiated 17. December 2009 (“Lagrådsremiss”), followed by Reg. Prop. 2009/10:180 and Act SFS 2010:571 in force as from 2010-07-15, transposed EU Dir. 2007/66 (amending Dir 89/665) with provisions on damage for faulty procurement - Chap 16 sects 20-21 (comments Prop. pp 225-226 in case of ineffective contracts).

27 Bekendtgørelse (decree) nr. 937 2004-09-16 (amended 12.6.2006-06-12).

28 Act on sub-threshold procurement 2005-05-18 No 338 (“Tilbudsloven”)(amended 2007-06-06 No 572), furthermore Act on procurement remedies No 2010-05-12 No. 492, replacing Act on Complaints Board (“Klagenævnet”) 2000-05-31 No 415.

29 “www.klfu.dk”.

30 Act 2010-05-12 No. 492 § 14 succeeding preceding provisions on Complaint Board’s competences on damages Act 2000-05-31 No. 415 § 6 3rd para.. The utilities “loss of

number of cases, some of which have been reviewed by the courts.³¹ The board (staffed with 9 judges and 19 procurement law experts) is an optional alternative to court law suites. Steen Treumer argues that complaint cases on damages are more inclined to award damages based on strict liability for violations than the Danish courts.³²

The *Finish* legislation on procurement is similar to the Swedish – two comprehensive statutes on public and utilities procurement – with provisions on damages in statute on public procurement 30.3.2007/348 84 § and on utilities 30.3.2007/349, in which there is a reference to the public sector provision on damages (61 § “Rättsmedel”).

The Nordic implementation of Dir. 2007/66 on *inter alia* ineffective contracts (article 2d) has been effectuated in Denmark³³ and Sweden³⁴ and is under Norwegian parliamentary preparation spring 2012 (Prop. 12 L (2011-2012) - NOU 2010:2 “Håndhevelse av offentlige anskaffelser”). KOFA will remain advisory without extended authorities whereas in Denmark the new competences on “ineffective contracts” fall under the Complaint Board (Klagenævn for udbud).³⁵ In Sweden, the public law competences are to be handled by the public administration courts (“förvaltningsdomstolarna”) whereas the civil law liabilities fall under the general court system.

The “ineffective” rule in article 2d³⁶ raises the question whether the affected supplier left without a contract (*ex tunc* or *ex nunc*) should be barred from claiming damages under Dir 89/665 article 2d. The Danish and Swedish preparatory documents assume that the supplier (save contributory negligence) may claim for damages³⁷ whereas the Norwegian committee preparing the

chance” rule is expressly stated in second paragraph of the 2010 Act Sect 14. On Danish damage awards of public procurement *cf.* Steinicke, M. –Groesmeyer, L. *EU’s Udbudsdirektiver* (2nd ed 2008) pp 132 et seq, Poulsen, S.T.– Jakobsen, P.S. –Kalsmose-Hjelmberg, S.E. *EU Udbudsretten* (2nd ed) pp 560 et seq. Høg, T. *Erstatningsansvar i forbindelse med udbud* (displayed “udbudsportalen.dk”).

31 The Danish Complaint Board has been recognized as a “review body” authorised to submit questions for preliminary rulings by ECJ - C-275/98 (J 1999-11-18).

32 (2006) PPLR No 4 pp 159-170 on pp 164-167, commenting on the Complaint Board ruling 2005-03-01 *BN Produkter Danmark AS mod Odense Renovationsselskab*. In a number of later rulings, it appears as if the Complaint Board’s practice is to consider claims for damages without assuming or addressing any qualified conditions for liability, such as the 2009 on negative interest 2009-01-09 *C C Brun Entreprise v AS Storebælt*, 2009-01-12 *Jysk Erhvervsbeklædning ApS v Hjørring Kommune*, 2009-05-18, *Brøndum AS v Boligforeningen Ringgården*, 2009-07-24 *Lyreco Danmark AS v Varde Kommune*. On the Danish more reluctant court cases see below.

33 Danish Act No 492 2010-05-12 in effect 2010-07-01. Cases: 3.1.2012 *Danske Arkitektvirksomheder mod Thisted Gymnasium og HF-kurser*, 3.1. 2012 *Danske Arkitektvirksomheder mod Skanderborg Gymnasium*.

34 Swedish Act SFS 2010:571 (amending SFS 2007:1091 and 1092) in effect 2010-07-15.

35 2010-05-12 No 492 Remedies (“Håndhævelse”) Act § 18.

36 In cases of unlawful direct purchasing or on concluding contract in disregard of statutory “standstill” obligations – Dir. 2007/66 article 2d with further references.

37 Danish L110 (2010-01-27) p. 22, Swedish Reg. Prop. 2009/10:180 pp. 225-226.

amendment expressed doubts as to whether the “ineffective” rule would be undermined, at least if the supplier were allowed to claim for loss of contract.³⁸ The ministerial response (Prop. 12 L (2011-2012 p. 64) is that the question on liabilities should be left to development in case law. The 2010 EUCJ *Strabag* ruling is observed (prior to *Spijkers*), but with the remark that it should be up to the courts to assess its impact in subsequent cases.³⁹

Except for the pre-legislators’ comments on the ineffective contract scenario, the Dir 89/665 provisions on damages were not reviewed in the 2010 Nordic law reform package so as for Norway the provision in the 1999 Act § 10 as applied in cases prior to 2012 stays unaffected.

Whereas the EU case law on procurement damages have dealt with MS’ inaccurate or questionable statutory implementation of the remedy directives (or EU institutions procurement), none of the Nordic provisions on procurement damage have yet been challenged in EUCJ or in the EFTA-court (Norway – Iceland) litigation.⁴⁰

Whether MS’ or Nordic national case law is EU/EEA compliant is therefore not primarily about the provisions as such, but on the borderline exercise undertaking by the national courts to apply the relatively widely phrased provisions on faulty procurement when challenged by affected claimants (runner-up bidders and market operators challenging a foul award).

3 Liabilities’ Layout Alternatives

The basis for faulty procurement liability could be approached in at least four ways.

Firstly, one could simply refer to the unqualified black letter text of the damage provisions in the directives and in the corresponding Nordic statutory provisions, which – supported by Dir. 89/665 Preamble consideration quoted above - simply state that damage follows as a direct consequence of any procurement violation.⁴¹

38 NOU 2010:2 pp. 174-176. The consequential effects of article 2d on subcontracts for construction works, consultant services or supplies is not provided for in the directive nor in the Nordic 2010-2012 law reform documents. Implications on termination, cancellation etc must be solved under the relevant contract regime or otherwise default contract law principles depending on the contract category.

39 Krüger, K. *Kontraktsrettslige virkninger av anbudsfeil ved offentlige anskaffelser (upphandling - udbud)* Festschrift till Torgny Håstad 2010 pp 363 et seq at pp. 395-400.

40 An old EFTA Court case *Fagthun* E-5/98 (1999-05-12) is not about liabilities.

41 Arrowsmith, Sue *The Law of Public and Utilities Procurement* (2nd ed 2005) pp 1379-1385 and pp 1421-1425, commenting on UK leading QB case *Harmon CFEM Facades v The Corporate Officer of the House of Commons* (2002) (reference to reports in table of UK cases p lxvi), in which it was assumed that serious breach was no condition for the award of procurement violation damages. Some support for the strict alternative under EU law may also be derived from C-275/03 *Commission v Portugal* (2004-10-10), banning statutory Portuguese *culpa* prerequisites. The utilities remedies Dir. 92/13 article 2 No 7 on negative interest can be read to state unconditional damages “...the person making the claim shall be required only to prove an infringement...”.

Secondly, one could argue that the substance of the open-ended remedies' provisions on foul procurement damages should be derived from EUCJ cases on Treaty infringements generally, underscoring that any breach of the procurement regime is in fact at the same time undermining the Treaty principles of free movements of goods and services in the public sector.⁴² Arguments in support often refer to the *Francovich*⁴³ and *Brasserie du Pêcheur and Factortame III* cases.⁴⁴ Reference to Treaty violations has two dimensions: The positive observation that damages must impede proper reparation⁴⁵ – and the assumption that only *serious and grave violations* should qualify for loss coverage, thereby excluding petty infringements.⁴⁶ In the dualistic EEA setting, the *Francovich* doctrine has not been found directly applicable, but the EFTA Court has applied an almost identical reasoning based on the interpretation of the 1992 EEA Treaty.⁴⁷

Thirdly, liability might be based on *culpa* as in widely accepted European private statutory or default law on torts. In the Norwegian legislative setting, the common basis for public and private sector liability is the *alter ego* principle on statutory employment *vicarious liability* stated in the 1969 Act on Civil liability § 2-1. Public and private employer is liable to compensate for economical losses caused by subordinate employees' deliberate or culpable mal-performance of work or service within the employment, however having regard to *whether reasonable expectations on the work or service have been harmed*. The provision compromises previous case law and makes no distinction between private and public sector.⁴⁸ It would be applicable on procurement flaws if not for the special provision in the 1999 Act Section 10.

42 TFEU articles 34, 56 and 49, succeeding TEC articles 28, 49 and 43.

43 *Frankovich v Italy* C-6/90 [1991] E.C.R. I-5357.

44 Joined cases C-46/93 and C-48/93 [1996] E.C.R. I-1029 (55-56).

45 C-6/90 and C-9/90 *Francovich* E.C.R. I 5357 (43).

46 C-46/93 and C-48/93 [1996] *Brasserie du Pêcheur and Factortame III* E.C.R. I-1029. The ministerial report preceding the 1999 Norwegian law reform also assumes that there must be a substantial violation ("vesentlige feil") Ot. prp. nr. 71 (1997-98) p. 68 – and there is made no distinction between negative cost recovery, loss of chance or loss of contract. One Dir. 89/665 Recital states that "clear and manifest infringements" should induce action by the Commission, but has no explicit similar reference in the preceding (unnumbered) Recital on Member States' obligations to establish "compensation of persons harmed by the infringement". Substantial infringements were required in the Norwegian *Nucleus* ruling on loss of contract, but whether this also applies for negative cost recovery is open ended, as will be discussed below.

47 E-9/97 *Sveinbjörnsdottir* (1998-02-11), E-4/01 *Karlsson* (2002-05-30), Rt. 2006.1365 (plenary) (*Finanger* II). Critical comments on reluctance in Norway to submit EEA issues to EFTA Court by Fredriksen, H Haukeland *Om mangelen på tolkningspørsmål fra norske domstoler til EFTA-domstolen*, Jussens Venner Issue 6 2006 pp 372-402.

48 A long lasting debate in academic writings together with a number of Supreme Court cases from early 20th century and onwards was apparently put at rest with a meticulously drafted provision in the 1969-06-13 No 26 Act on civil liabilities § 2-1 on employment vicarious liability, attempting both to codify previous case law and to provide guidelines for subsequent jurisprudence. The provision abolished any distinction in principle between private and public employment tort law, making the (public) employer (government or

Forthly, applying a principle of *equivalence* one could look to national case law on public (government or municipal) award scenarios similar to public contracting such as public administrative disputes over alleged failure to award concessions, licenses and permits - or even from scenarios where private interests are otherwise exposed to harm in case of administrative violations, such as in cases on gender equality.⁴⁹ The issue and degree of fault or negligence as a possible prerequisite may also be open for discussion, possibly as part of the question of whether a violation in public administrative procedure is sufficiently serious – taking flaws in category, numbers or degree into consideration – such as contracting officers’ allegedly excusable mal-interpretation of complicated rules on the award procedures.

A related approach may possibly be derived from the latest 2010 *Strabag* and *Spijkers*’ rulings: arguably compromising the EU Treaty-based “serious breach” formula and a fault rule into an overarching *sui generis* assessment of the merits of the case, accepting that national courts and complaint boards may exercise procurement specific policy considerations in litigation for damages.

A moderate view arguably compliant to EU efficiency, subsidiarity and equivalence policies might be to accept that public procurement mistakes are just another public administrative procedural tort applicable in national (statutory or case) law. This would mean that procurement economical remedies might comply with EU/EEA law, provided that such remedies are not dealt with less severely than in national law for equivalent non-procurement award cases (concessions, permits, grants) – and at the same time not more leniently than required for EU/EEA procurement deterrent and efficiency objectives (principle of proportionality). Those who advocate this approach, as this writer would tend to do, might also point to the possibility that EU/EEA procurement remedies according to the remedy regime should basically pursue effective enforcement policies in accordance with the Dir 89/665 recitals. Compensating harmed interests should ideally be an *indirect* but not a *targeted* consequence of the primary purpose, which is to enhance good procurement practices through “horizontal” private law enforcement measures. For such reasons, liability should be placed in a national legal setting, but subject to *ad hoc* considerations based on the simple fact that private remedies are meant to be the primary instrumental enforcement measure in procurement law.

The following analysis will seek to expand along those lines of reasoning.

municipality) vicariously liable in tort for economic damage caused by subordinate public servants). However, to compromise the obvious “floodgate” argument in public sector, the provision goes on to state that the basis for liability must reflect to - and rest on - the presence of reasonable expectations justified in relation to the activity or service in question. Subsequent abundant Supreme Court cases have dealt with public liability issues clarifying the contents of this provision, exempting petty infringements from liability.

49 C-177/88 *Dekker* E.C.R. 1990 I-3941, cf. Nielsen, R. *Udbudsret* (3rd ed. 2005) pp. 343-344, suggesting a distinction between fundamental Treaty aspects and procurement details, also Leffler, H. *Damages Liability for Breach of EC Procurement Law: Governing Principles and Practical Solutions* [2003] 12 PPLR pp. 151 et seq at p. 174.

4 Cases on “Negative Interest” in the Nordic Jurisdictions – Viewed Comparatively in the Light of the EU and EEA Remedies Regime – from the Norwegian Observatory

All Nordic countries had various procurement regulations in place long before EU membership and the EEA Agreement, at least for government contracts.

As for Norway and preceding the EEA Agreement in Norway,⁵⁰ a comprehensive regime for government procurement dated 1978 (“REFSA”) ruled all government contracting of supplies,⁵¹ services and works from the private sector, historically adopted from the construction industry and with origins in preceding regulations from 1899 and 1927. The standard terms for tender procedures NS 3400 dated 1972 reflected customary procurement *code of conduct* in the construction and fabrication works industry, and these terms were made mandatorily applicable through express reference in the 1978 REFSA regime.⁵² The ministerial regulations were formally designed as internal instructions to state contracting entities and therefore based on the assumption that the regime had no external legal effects whatsoever – let alone to be relied on as a basis for liabilities towards non-successful contract candidates.⁵³ Consequently these rules – and infringements – could neither be invoked in favour of the private party nor by the government authority to the detriment of that party. The general understanding was that procedural procurement errors in tendering or negotiating contracts did *not* establish basis for claims for damages at all. Whether general public administrative law might be invoked in support of claims for damage in bad procurement cases was not addressed in this initial stage, neither in court cases nor in the academic literature. However, this traditional approach was broken in bid protests brought before district courts in the late 1970s and the 1980s. Initial cases opened the door for “negative interest” claims in faulty procurement, much welcomed by the private contractors in cases which primarily involved the construction industry.⁵⁴ The negative interest avenue to compensation was gradually recognized and was endorsed in principle by Supreme Court in the Rt. 1997.574 “*Firesafe*” case – although the claim was lost *in casu* for lack of causation. The question of subjective conditions for liability was not

50 The EEA Agreement 1992 (in force from 1994) means that EU inner market policies are identical in EU and EEA states Norway, Iceland and Liechtenstein except for certain procedural intricacies in connection with the EFTA court jurisdiction in relation to the EU Court of Justice. Consequently EU procurement law is applicable in all Nordic countries including Norway.

51 Municipal procurement was not covered by the REFSA regime, but municipalities were recommended to apply rules similar to Government (“Normalinstruksen”) 1978.

52 Regulation 1978-03-17 § 10.

53 NOU 1975:9 p. 9.

54 Unpublished 1979-03-28 Oslo (District Court), RG 1982 p. 330 Drammen (District Court), later to be followed by RG 1987.982 Lofoten (District Court), RG 1990 p. 993 Hålogaland (regional Court of Appeal). (RG=Rettens Gang – Law Reports with published cases in district and regional appeal courts).

pinpointed since the violation at any rate was a deliberate disregard of up front notice of the service qualifications.

The facts of the *Firesafe* case –from mid-1990s - barely preceded the EEA agreement which came into force as of 1994-01-01. However, the case is still considered to be the leading Norwegian case on negative interest in a procurement infringement scenario, since no later Supreme Court case as yet has awarded tender costs recovery and therefore there has been no indication to review the 1997 judgement under the EEA remedy regime.⁵⁵ So it is possibly still the leading case on “negative interest”.

The case involved a number of contractors tendering for a Bergen municipality’s works’ contract subject to the express condition that the successful contractor must employ apprentices – and it was stated in the tender documentation that tender bids failing to comply with this would be rejected.⁵⁶ In spite of this, after opening of bids, the municipality awarded the contract to one lowest bidder “Firesafe” which did *not* employ apprentices. In the Bergen district court, all passed-over tenderers were awarded “negative interest” costs in their futile preparation of tender bids. The defendant municipality then paid out the awarded amounts to those tenderers which were next in line for winning the contract.⁵⁷ For the remaining tenderers, the case was tried in the regional appeal court (“Gulating Lagmannsrett” for Western parts of Norway), where the claims were rejected. The remaining five tenderers also lost their case on appeal to Supreme Court. In Norway, the rule of procedure is that the reasoning of the court is voiced by one leading judge of the chamber members (“førstvoterende”),⁵⁸ the others (4) consenting with brief standard statements to that effect – or with a more extensive reasons if there is a dissenting opinion or need to add or qualify arguments without support from all the other judges (which was not the case here). In the case at hand, the leading judge stated in general terms that one should not operate with a restrictive approach to the issue of causation. General tort law principles were to apply, although adapted to considerations particularly relevant to tender procedures.⁵⁹ The *Firesafe*

55 Claims for negative interest were rejected with reference to no errors made in Rt. 1998.1951 *Klubben Ulvik* and Rt. 2000.1076 *Faber Bygg*. On the *Catch – Ventelo* case on costs to halt an award procedure, see *infra*.

56 Such contract requirements are now formally authorised by Dir. 2004/18 article 26 (the “Beentjes” formula - C-31/87)

57 In fact, and interestingly, the closed chance of acquiring the contract for these tenderers could be said to apply the utilities’ “loss of chance” rule in Dir. 92/13 article 2. But the issue was not addressed by Supreme Court.

58 In fact, the reasoning of this judge is heavily elaborated on also by the other judges collectively “in chambers”, although this is not reflected in the final wording of the reported judgment.

59 These are interesting remarks since the question of a more relaxed approach to proof has been a disputed issue, cf. Høegh, K. and Lorentzen, H. in an article published in UfR 2003.B.381 *Om bevisbyrde ved krav om erstatning for overtrædelse af udbudsreglerne*, whereas S. Treumer op cit seems to applaud the Danish Complaint Board for tending to lower the burden of proof for complainants which challenge an award procedure in claims for economical losses. On the possibly more restrictive 2000 *Faber Bygg* case, see below.

mistake could be said to be fairly obvious and deliberate: One unambiguous condition for participation was openly disregarded – and the municipality also violated the express *quasi* contractual term that non-compliance with the apprentices’ requirement would lead to the rejection of the tenderer. In spite of this, and even applying a liberal approach to the proof issue, there was no sufficient evidence of *causation* since the tenderers contesting the award apparently would have participated (or more precisely: did not prove that would *not* have participated) if they had been aware of the hypothetical possibility that the winner of the award - Firesafe - would not be rejected for its non-compliant tender bid.⁶⁰ This does not leave much hope for frustrated passed-over tenderers. To put it bluntly: The tougher the market, the less chance for the passed-over tenderers to be awarded preparation costs where the contracting authority fails to comply with its own rules for qualification. Failing employment in a buyers’ market, any contractor would cling to the hope for a contract award even if one anticipates that the terms for the competition will be disregarded in the end. And therefore submit their tender bid.

Since there was no causation, the court did not comment on the basis for liability. Whether affirmative causation would have led to discussion of fault or strict liability, or even requiring substantial mistake, was left in the open. However, the facts of the case indicate a blatant and twofold disregard of the “up front” tender document notices set for the award, so it may be assumed that there was no question of whether that violation was sufficiently serious. The matter was simply not addressed at all.

Whether the *Firesafe* judgment is good law also under the EU/EEA remedies regime Dir. 89/665 article 2, is questionable. For policy reasons, it could be argued that a strict application of causation parameters runs counter to the policies and objectives of the remedy regime, which are to enhance compliance with the rules – and the tougher the market, the more important to remove any elements that might dissuade a sloppy procedure, such as allowing for the *Firesafe* causation defence. In Norwegian cases preceding the 1997 judgement, there seems to have been an accepted position more or less that the standard *de facto* “penalty” for breaking the tender procedure rules would be the collective “negative interest” liability for costs.⁶¹ But the pre-1994 regime was simpler and easier to handle, so possibly the questions of fault, seriousness and causation were not properly observed.

Supportive to the Norwegian reasoning in the 1997 case – and even more restrictive - are two Danish Supreme Court procurement cases - UfR 2004.1294 H *Skjortegrossisten* and UfR 2005.1799 H *Ørestad Metro*. In both cases claims for negative interest were denied along similar arguments on lack of proof for causation as in *Firesafe*, but without the comments allowing for lenient considerations on proof for causation in public contracting. The

60 Since the candidates next in line had been paid out in the out-of-court settlement following the district court proceedings, there was no reference to a possible “loss of chance” approach in Supreme Court.

61 Questions of proof and causation for cost recovery were not really raised or explicitly addressed in the district court cases preceding *Firesafe* 1997 Supreme Court ruling.

Ørestad Metro case was decided under the utilities' regime (Copenhagen city metro installations), and the Court denied as well the argument that the claimant had been deprived of a chance to earn the award. Negative interest for costs were however honoured by the Danish Supreme Court (majority decision – dissenting opinions) in the case reported UfR 2002.1180 H KKS. In that case (works contract for municipal water purification systems) there could be no question of causation since the contracting authority was deemed to have been pre-determined already at the outset to award the contract (wrongfully) to the plaintiffs' competitor and thereby excluding the Norwegian *Firesafe*-argument on lack of causation. On the issue of basis for liability the majority only stated that the contracting authority had wrongfully decided prior to the procedure on the award issue and therefore was found liable. The three Danish negative interest cases could really not be said to endorse the "serious breach" test on negative interest, but are in line with the Norwegian *Firesafe* causation approach.

There are per date no *Swedish* Supreme Court rulings on negative interest cost.⁶²

One could ask rhetorically: Why distinguish between predetermination to award in disregard and predetermination not to abide by the set conditions for qualifications and rules on rejection? And should not a contracting authority breaching fundamental rules rather than the harmed tenderers collectively carry the burden of proof for non-participation in the tender procedure?

Burden of proof for causation lies normally with the harmed party claiming damages. But causation is in itself not always a fixed technical *conditio sine qua non* parameter. It may and should include policy considerations and even some flexibility and discretion on allocation. In Norwegian tort law, it seems acceptable to shift the burden of proof to the party defending liability in cases where there is a basis for assuming a normal chain of events. In tender procedures, it could consequently be argued that at least failing deliberately to comply with express statutory or even self-designed terms for participation in the run for the contract, should lead to a shift of burden of proof in favour of the unlawfully passed-over or rejected candidate(s).

Possibly, the Danish courts are less inclined to award damages than the Complaints Board "Klagenævnet". The Board does not seem to question the subjective or substantive elements when awarding compensation for negative costs. *S. Treumer* applauds the Danish Complaint Board in departing from otherwise applicable strict Danish jurisprudence in reluctant policies on damages, thus emphasising the deterrent effect of the enforcement regime, and therefore in substance complying with EU policies.⁶³ However, the Danish Supreme Court cases do not seem to support such suggestions. Furthermore, and less stimulating for this line of reasoning, it has been questioned whether the EU courts themselves really could be said to take a liberal stand in this

62 Preliminary observations in NJA 2000.712 *Tvättsvamparna* on p. 724, but the claim was for positive interest, see *infra* under 5.

63 Op cit pp 563 et seq at p. 576.

respect.⁶⁴ But such cases are decided by the EU General Court, not by EUCJ,⁶⁵ they are about loss of contract and not negative interest costs – and furthermore they deal mostly with defects in the tender bid from the party seeking damages, shortcomings which would anyway have impeded successful claim for loss of contract.⁶⁶

Subordinate court cases are in the Nordic legal culture evidently not considered to have the same persuasive authority as Supreme Court rulings. However, such cases may indicate trends and general arguments advocated successfully in litigations. Improved web site access to un-published cases challenges the distinction between published and un-published cases.

Norwegian regional court of appeal rulings are referred to for each of the 5 regions Borgarting, Eidsivating, Gulating, Hålogaland, Frostating. District un-published court cases are not regularly reported in the official “Lovdata” data base and have not been examined systematically in this and the following survey. “RG” (Rettens Gang) is the law journal for select subordinate cases not tried in Supreme Court (“Rt.”). Cases only identified by date and number id are accessed in official data base “Lovdata” (“www.lovdata.no”).

Under 1999 statute on public procurement § 10 four recent cases where negative interest *was awarded* are; RG 2009.1529 Borgarting , Borgarting 23. February 2009 LB-2008-74693. Hålogaland 8. June 2009 LH-2009-3900, Hålogaland 22. December 2010 LH-2010-116189.

The utility negative interest cost rule is different than the “classical” rule. Dir. 92/13 article 2 No. 7 states that “negative interest” costs will accrue on any tenderer which has been adversely affected in losing the *chance* to win the contract. That rule has not yet been tried neither in EUCJ nor in EUGC. There are also no Norwegian cases on the provision,⁶⁷ and as from 1999 it was silently removed from the statute with no comments from the ministerial drafters at all.⁶⁸ In Denmark, the “loss of chance” argument was actually

64 Høegh, K. and Lorentzen, H. op. cit. 82-383. *cf.* adversely on the policy issue A. Brown [2003] PPLR NA41 (commenting T-40/03 CFI).

65 Which raise the issue whether the EUGC (rulings have the same authority as EU law precedents as cases in Court of Justice, let alone the implication in an EEA setting such as Norwegian Supreme Court proceedings, *cf.* Sejersted, F. and others *EØS-rett* (2nd ed 2004) p. 137 (footnote 200).

66 Both EUGC T-40/03 and T-365/00 are about loss of contract and are based on the assumption that the applicant himself submitted a tender bid which might have succeeded. T-175/94, T-336/94 and T-267/94 are not procurement cases.

67 Oil and gas industry is within the Utilities’ sector, but since 1990s Norwegian enterprises in the industry have acquired the “alternative procedure” Dir. 93/38 article 3, now Dir. 2004/17 article 30 (3) Annex XI G. The utilities’ Remedy Dir. 92/13 still applies in principle, but there are as yet no reported Norwegian court cases on the utilities’ issue of damages.

68 Ot prp nr 71 (1008-98) p. 68, NOU 1997:21 p. 118, whereas the “loss of chance” rule has now been observed in the Danish and Swedish 2010 remedies’ Act amendments.

addressed and rejected by Supreme Court in the 2005 utilities' sector case *Ørestad Metro*.⁶⁹

One could argue that the "loss of chance" provision is a clear case of liberal approach to causation since "chance" requires less than hard core causation, although one could also argue that the chance provision appears as the express exception which proves the main rule that the normal prerequisite of causation evidently applies. To the extent that the Norwegian *Firesafe* out-of-court settlements, preceding the Supreme Court case, reflect good law, an assumption open to argument, there is basis for saying that the "loss of chance" alternative might still be open in public contract sector as well, as advocated by Norwegian writer *L. Simonsen* in his doctoral dissertation 1997 on pre-contractual liability.⁷⁰

A claim for *quasi* negative interest damages was successfully honoured in Rt. 2008.982 *Catch – Ventelo*.⁷¹ Due to misleading and inaccurate publication of a contract for computer hardware (omitting services also required), the potential contract candidate Catch-Ventelo abstained from participation in the competition for the supply of computer equipment and services. It later found out that the contract also included ancillary digital services which would have led to participation. The fact that Catch-Ventelo did actually not participate was found irrelevant since the case was based on misleading handling of information in the published contract documentation, causing the potential candidate not to submit a tender bid. Successive attempts were made by the candidate to have the award procedure halted for correction or reversal. The measures were plentiful: requesting ministerial intervention, filing of complaint for KOFA, attempts to instigate the EFTA Surveillance authority as well as futile request for court injunctions. The case was in the end won by claimant in district court (Oslo) and in regional Appeal Court (Borgating). In Supreme Court legal standing for the suit was recognized. Damages for the costs were also awarded, but only up to the time when the preferred bidder's contract was actually concluded by the contracting authority. The mere interest in achieving a statement on breach of the rules – short of having the procedure reversed or corrected - could not justify these subsequent actions. Subjective conditions for liability seem not to have questioned in the case, possibly because contracting authority was assumed to have acted deliberately.

Concluding on negative interest, the Norwegian 1997 *Firesafe* ruling accepts damages in principle, but puts up a causation restriction which presumably most often will bar successful claims since candidates might be expected to have tendered for the contract even with knowledge that the

69 UfR 2005 at p. 1862: "Det er heller ikke de fornødne holdepunkter for å antage, at den manglende overholdelse af udbudsreglerne har medført, at en reel mulighed for EMG for at få kontrakten er blevet forspildt, jf. den gældende § 13a i Lov om Klagenævnet for Udbud".

70 Prekontraktuelt ansvar (1997) p. 885.

71 A dissenting judge rejected the claim since positive and negative interests for a party actually participating to win a contract award were seen to be exhaustive and therefore excluding costs inflicted on a non-participant affected. That argument is apparently contradicting Dir 89/665 Article 1 on legal standing for "any person having or having had an interest in obtaining a particular public supply [---] contract...."

contracting authority might not conduct a proper procedure.⁷² Otherwise, the invoked failure was rather serious: Disregarding an obvious element in the “up front” publication for the service in demand. The 2008 *Catch – Ventelo* honours the claim for damages in a similarly blatant violation scenario, but the intricacies of causation in that case have limited bearing on the more typical “negative interest” issue.

5 Loss of Contract (“Positive interest”)

It remained unclear and disputed for a long time in the Norwegian setting whether a passed over or rejected contractor might succeed in a case for loss of a contract profit (“positive interest”). The issue remained unresolved at least up until the EEA Agreement 1992, effective from 1994 – and even afterwards as well.

The Norwegian Rt. 1997.574 *Firesafe* Supreme Court ruling touched *obiter* upon the issue of liability for loss of contract. There are statements in the court’s reasoning to the effect that a non-successful contract candidate might recover positive loss of contract interest, provided it is clear that he would have won the contract if the procedure had been conducted properly (p 578). This statement is unqualified as to issues of fault or “sufficiently serious breach”.

The Rt. 2001.1288 *PEAB* ruling is really not a procurement case at all. Admittedly, positive interest for loss of contract was awarded, but the case was about contracting authority’s dis-honouring a *de facto* conclusion of contract accepting the claimant as the contractor.⁷³

In the later case Rt. 2000.1076 *Faber Bygg*, a claim for loss of contract was rejected.⁷⁴ There was said to be no commitment on part of the contracting authority to accept any of the tender bids and there was no other basis for liability (reference to pre-EEA standard agreed contract terms NS 3400). In light of the EEA regime, the reasoning in this case is not convincing since subsequent Supreme Court rulings evidently accept evidence supporting pure *factual* probability for an award - regardless of obligations - as sufficient as basis for damage. The leading “førstvoterende” judge did not comment on the possible EEA dimension on remedies at all, apparently because the municipal construction contract at hand did not amount to the required threshold value in the then applicable Works Directive (Dir. 93/37).⁷⁵ A contention based on a three-fold duty for the municipal contracting authority to reject the tender bid submitted by the winner of the contract, was also denied, partly because the

72 The same argument was applied in the Danish 2005 *Ørestad Metro* case.

73 Previous cases to the same effect are Rt. 19094.122 *Sjøen* and Rt. 1997.1922 *Loddefjord Kirkegård*.

74 The district court awarded negative interest costs, but that part of the case was not appealed to Supreme Court. If the case had succeeded on loss of contract, the already awarded negative costs would have had to be deducted from the award.

75 The present § 10 of the 1999 Act makes no distinction between EU/EEA contracts and sub-threshold contracts.

court did not accept a duty to reject in the interest of the complainant competitor, partly because there simply was no duty to reject formally defective tender bids since the formal shortcomings had been later duly amended.⁷⁶

The Dir 89/665 article 2 (1) (c) makes no distinction between negative and positive interest and may therefore apply to either.⁷⁷

By the late 1990's and early 2000s, claims for loss of contract in bad procurement were successfully litigated in both Denmark, Norway and Sweden. These cases coincide in time and clarify that loss of contract is a recognized valid remedy measure in Nordic procurement law. The cases could be said to be inter-supportive, and therefore benchmarking in all Nordic public contracting. However, the path to full compensation for loss of contract is "up hill" – some would say close to mountaineering – and the advancing must also pass by bends and pitfalls.

The Norwegian forecast case on loss of contract was not a genuine procurement case at all. The Rt. 1998.1398 *Torghatten* ruling was a dispute over an exclusive license for the operation of a regional coastal liner network in the North-Western region of Norway, awarded under a *quasi* procurement statutory concession tender procedure.⁷⁸ Supreme Court was challenged to review several allegations on procedural infringements in that procedure, and found in favour of the unsuccessful non-resident tenderer *Torghatten*, whereas the winner Møre Fylke turned out to be the regional semi-municipal ship owner which had served the network previously. The outcome of the case was a substantive award of unsuccessful bidder *Torghatten*'s calculated lost profit for not having been awarded the license. The multiple procurement infringements consisted of unauthorised rejection of claimant's tender bid, disqualifications by contracting officers ("inhabilitet")⁷⁹ as well as erroneous assessment of award criterion on service speed – characterized as indisputable basis for liability ("klart").

The 1998 *Torghatten* ruling was much debated in the years to follow. Some argued that the case could be taken as an indication by analogy in favour of positive interest also in procurement law; others argued that the case should be

76 That part of the judgment could be questioned for transparency reasons. The 2001 regime states a duty to reject tender bids where the candidate is in lack of required formal qualifications, with two limited exceptions for tax documentation and so-called HMS documentation (working environment facilities) 2006 regulations §§ 10-10 / 18-12.

77 The Utility Remedy Dir 92/13 article 2 No 67 "loss of chance" provision states a case for negative interest, but can arguably not be read to exclude a regular negative cost interest claim – nor a claim for positive interest. *Cf.* also a simple provision on damages in Dir 2009/81 on defence procurement article 56 No 1 (b).

78 *Cf.* now COM(2011)897 Proposal for a Directive on the award of concession contracts with draft amendments including concession awards under both remedies directives (Draft articles 44-45).

79 Conflict of interests is not specifically addressed in the present procurement directives, but see Draft Dir (2011)COM896 article 21.

distinguished and not adopted as a vehicle towards more liberal solutions in the area of pure procurement remedies.⁸⁰

Interestingly, the Norwegian *Torghatten* case coincided with the first break through for procurement positive loss of contract interest in the Swedish Supreme Court – the *Arkitektjänst* case - NJA 1998.873. That case (municipal construction works - “kommunalt bygningsprojekt”) was decided on the basis that the municipality – failing to state award criteria in the contract documentation - apparently had no other relevant award criteria available than lowest price, that furthermore the candidate requiring damage was unlawfully rejected for having submitted an abnormally low price bid with no attempts on part of the municipality to clarify with bidder as required both in the directive and in the Swedish statute. Since the candidate *Arkitektjänst* was deemed to be put in a position as if a regular lawful procedure had been applied, the claim for loss of contract succeeded, but without any reference to a “serious breach test”.⁸¹ The issue of subjective or substantial seriousness of the procedure was not addressed, but it is noteworthy that apparently there was only one not particularly serious mistake: Lack of clarifying dialogue with the candidate to justify an allegedly abnormally low tender price rejection (Dir 2004/18 article 55). The NJA 2000.712 *Tvättsvamparna* rejection of a claim for loss of contract is a case on unlawful direct purchase. The case was essentially argued on lack of proof for causation: A potential candidate to the municipal service which was actually awarded without any publication carries a heavy burden of proof when there are no listed competitors. On the question of basis for liability there are only vague *obiter dicta* statements in the judgement reasons to the effect that liability for positive interest rests on an overall assessment of the merits of the case – and the potential seriousness of a public direct purchase is not addressed at all.⁸² In the later NJA 2007.349 *Ishavet – Virgo* case, the procurement violation was an erroneous assessment in relation to the contract documentation (scope of services required) plus mistake on technical details concerning the vessel offered by the unsuccessful tenderer for the service. The ruling accepts faulty procedure without qualifications (p 367 “fel i förfarandet”). True, there is a reference to the EUCJ (ECJ) “*Brasserie du Pêcheur and Factortame III*” formula, but only to justify that there is no culpa requisite (“uppsåttligt eller vårdslöst”) once there is a clear violation of EU law (“klar överträdelse av gemenskapsrätten”) – leading to the concluding

80 Statements to this effect also in the *Faber Bygg* case discussed above - Rt. 2000 at p. 1080.

81 Wahl, N. *Juridisk Tidskrift* 1997-98 pp. 619 et seq and (critical to the ruling), Hellner, J. *Juridisk Tidskrift* 1998/99 p. 950, later Björklund, D. - Madell, T. *Svensk Juristtidning* 2008.578 at pp 586-587. The Norwegian Rt. 1998.1951 *Klubben - Ulvik* case rejected a claim for loss of contract (snow plough services), but here the plaintiff's tender bid was rightfully rejected due to ambiguities which were beyond what could have been clarified without violating the ban-on-negotiations rule. This case was not subject to the EEA regime (municipal contract below threshold values).

82 NJA p 725 ”Goda skäl kan anföras för att ersättningen som regel bör utgå med hensyn till bl a överträdelsens karaktär, nedlagda kostnader och utsikter till vinst uppskattad skäligt belopp” [followed by references to legal theory].

statement that procurement liability is strict (“Skadeståndsansvaret är sålunda strict när en överträdelse konstaterats”).⁸³

Two Danish Supreme Court cases in the same period deal with procedures where the contracting authority had committed itself to award to lowest bidder (“bunden licitation”). That definitely improved the case for the plaintiff. In UfR 1997.1308 *Horsens Byhus* the final assessment of the competing tender bids for a municipal hall assessed the plaintiff as lowest bidder and therefore entitled to compensation (assessed by discretion) when the contracting entity decided to award otherwise. Two years later the next loss of contract case was tried – the UfR 2000.1561 *Fårup Sommerland*. In this case, the semi-public entity putting up a recreational water park published a competition for a (apparently) metal water slide – subject to terms which committed to accept the lowest tender bid. The procedure was unlawfully terminated, and contract was thereafter awarded to a contractor which had not already participated in the tender procedure. The lowest bidder was awarded loss of contract assessed discretionally to the amount of DAK 400.000.⁸⁴ The reasoning includes a passage reference to the merits of the case (“I hvert fald under disse omstændigheder...”) but there was no further discussion over the conditions for liability issue. One dissenting judge argued that the plaintiff’s bid was too high so that the municipality most probably would have abstained from award anyhow. In fact, the disagreement in the Supreme Court essentially pivoted on whether the termination of the procedure was lawful or not. But the case could also be said to deal with level of proof for causation, since the dissenting judge rejected that a hypothetical award was sufficiently probable.⁸⁵ These two cases are about contracts under EU threshold values. The *Fårup Sommerland* was decided under the Danish sub-threshold construction contracts’ “licitationsloven”⁸⁶ under which the unauthorised termination of a tender procedure replaced by a direct purchase is a crime. The question therefore remains whether an EU approach to the matter would have been considered differently.⁸⁷ A 2007 ruling UfR.2007.2106 “*Arriva*” awards loss of contract assessed at discretion in a utilities case where the court found a clear and substantial (p. 2127 - “klar og væsentlig”) breach of the principle of equal

83 NJA 2007 p. 367. The Swedish 2007 ruling is also relevant on the causation intricacies in the Swedish case scenario variants, *see* below.

84 A Norwegian unpublished regional appeal court judgment 2004-02-13 (Agder) is a Norwegian response to the question of termination of procedure followed by negotiating the contract for a lower amount than offered in the procedure. The court found in favour of the contracting entity. One dissenting judge voted for an award of cost recover on the grounds that the preceding tender procedure was fake.

85 Rejecting loss of contract is also UfR 2002.1180 *KKS* (dissenting opinions on the issue of causation).

86 Later replaced by “tilbudsloven” No 450 7 June 2001.

87 In UfR 2004.1294 *Skjortegrossisten*, the claim for loss of a supply contract was denied since the contract award based on “economically most advantageous” criterion had not been proven to be affected by the faulty procedure.

treatment of tenderers.⁸⁸ The latest Danish case *Amager Strandpark* UfR 2011.1955 awards a runner-up tenderer loss of contract estimated to 8 mill DAK. The selected contractor should have been rejected due to material reservations in its tender bid and not contested that the plaintiff would have won the contract if that mistake had not been made.

A special Danish challenge is to assess the parallel development in courts – preferably on Supreme Court level – and the Complaint Board. Many of the Complaint Board cases on damages have been sustained by courts,⁸⁹ others have been reviewed, but not on the liability issue.⁹⁰ In most of the cases on damages, however, the Complaint Board rulings have stayed without any subsequent court litigation. The cases reviewed by courts must be read with all reservations: The court litigation may have been redesigned in arguments and pleas, the facts of the case may have been presented differently, some of the cases are about whether there was a (sufficient/relevant) violation and so on. Furthermore, there are Complaint Board rulings on award of damages which have not been reviewed by the courts.⁹¹ It appears, however, as if the Danish Complaint Board in recent cases have gone more directly to assuming liability and therefore possibly less reluctant than Danish Courts in such awards. In principle, Danish Supreme Court is the primary source of Danish law, but a review body under the EU directive regime such as the Danish Complaint Board, may in turn argue that a proper interpretation of supra-national EU law must always prevail.

88 Loss of contract awarded in an Icelandic Supreme Court ruling on unjustified termination of the tender procedure - 2005-11-17 (Nordisk Domssamling).

89 UfR 2007.2106 (Sup Ct) *Arriva* sustaining Complaint Board ruling 2000-06-21 on violation (the issue of damages was not addressed by the Complaint Board), further Complaint Board ruling 2007-09-03 upheld by Horsens city court 2009-05-20, Complaint Board ruling 2007-04-24 upheld by Vestre Landsret 2009-05-15, Complaint Board ruling 2007-08-10 upheld by Århus city court 2009-03-30, Complaint Board ruling 2003-04-08/2003-04-28 upheld by Østre Landsret (UfR 2008.1331 *Taxi Stig*), Complaint Board ruling 2004-12-6/2005-07-07 upheld by Veste Landsret 2007-03-06, Complaint Board 2005-03-07 award (positive interest) upheld by Vestre Landsret 2006-04-11. Complaint Board award 2004-10-12 award positive interest upheld by Østre Landsret 2005-12-19. In a Complaint Board ruling 2008-10-01, the rejection of a claim for damages was reversed by Østre Landsret 2010-05-14 (positive interest awarded), similarly court overruling a Complaint Board rejection of negative interest by Østre Landsret 2009-05-19, Complaint Board ruling 2004-11-01 rejection of positive interest overruled by Esbjerg city court 2007-04-30, Complaint Board award 2005-03-08 of positive interest overruled by Østre Landsret 2008-02-05. The Complaint Board ruling 2007-13/2007-12-04 awarded positive interest. The dissenting Board member was supported by Østre Landsret 2009-03-05 on rejecting of positive but award of negative interest. Complaint Board award 2004-08-20 of positive interest overruled by Vestre Landsret 2006-03-31. Complaint Board award 2001-09-14/2002-07-03 positive interest overruled and replaced with a limited award negative interest – Vestre Landsret 2004-03-16 (“Judex”).

90 Such as UfR 2004.1294 (Sup Ct) *Skjortegrossisten* discussed above, further UfR 2005.1799 (Sup Ct) *Ørestad Metro*, UfR 2005.1648 (Vestre Landsret).

91 One celebrated Complaint Board ruling is the *Magnus* case 2001-11-22, awarding negative interest costs.

Under the Danish 2010 remedies' law reform, it is now stated in the remedies' Act 2010-05-12 No. 492 § 1 second paragraph that the act (including liability under § 14) applies both on EU level and on the ancillary acts on sub-threshold procurement, similar to the Norwegian 1999 Act § 10.

Termination of procedure raises some special challenges since the plaintiff then must prove both that the termination was unlawful,⁹² that the alternative scenario would have been a continued or a rescheduled procedure – and that the plaintiff under these assumptions can prove to have won the contract.

The Swedish Supreme Court *Danderyd/Lillebil* case NJA 2001.3 (hospital ambulance services) accentuates the termination of procedure issue without any award of contract. In that case, the contracting entity decided to terminate the tender procedure for the transportation for a health institution. The service was awarded to an in-house entity (Transland). The pending issue was whether this could be done without having to give any reasons. Supreme Court seems to accept that turning to in-house services would preclude claims for loss of contract to lowest bidder, even if no reasons for doing so were to be presented. The termination of the procedure for convenience was no breach of procurement law. The case therefore does not involve a probability assessment as in the *Arkitektjänst* (and later *Nucleus* discussed below), and it differs from the Danish case in that the procedure was concluded with no award at all, whereas the Danish outcome was soliciting another private supplier of the service. While the Danish approach seems to adopt the rule that termination of a procedure must be sufficiently substantiated, this was not the case in the Swedish ruling. Arguably, allowing for the termination of a tender procedure – succeeded by direct informal direct purchase – does not seem recommendable unless the contracting authority can provide and substantiate reasons for its action. Tender procedures for market testing should not be acceptable.

The “point blank” Norwegian follow-up of the 1998 *Torghatten* case is the Norwegian ruling on loss of contract decided by Supreme Court in 2001 – the Rt. 2001.1062 *Nucleus*. In this case, a cluster group of architects, Nucleus, was awarded a calculated loss of profit due to errors committed by the contracting authority, a regional municipality, classified as multiple, serious and sufficiently connected in fact to the actual loss caused thereby. The case demonstrates abundant errors: Non-equal treatment of tenderers, applying preceding technical dialogue as an award argument *in favour* of the entity providing consultant services (sic) - and unjustified geographical preferences (other arguments by the complainant were rejected). In the assessment, the leading judge summarised by the following statement (in this author's translation Rt. 2001 p. 1075)

“As a whole, I consider that the municipality has committed substantial errors. These are not misinterpretation of complicated provisions or error in the difficult assessing of factual circumstances [...] On the contrary, the breach involved central and fundamental principles and regulations in procurement

92 Not addressed in the Dir 04/18, but in Norwegian regulations 2006 § 22-1 explained in FAD 2006 Veileder p 197, cf. Arrowsmith, S. op cit pp 556-558 reference to general community (EU) law.

law, which the regional municipality – being a big and professional employer of contracts within the construction industry – with which it should have familiarised itself. There is not only one mistake, but several mistakes, partly by the municipal administration, partly by the committee in charge of the project. [...] In view of these facts, I concur with the regional appeal court in observing that there was basis for critical rebuke.”

This statement could be said to mirror the fundamental principles expressed on EU and EEA liability for treaty violations as expressed. In that respect, the *Nucleus* judgment is hardly developing the law at all since failing to meet EU/EEA Treaty requirements surely would constitute procurement liability as well. Neither could the statements be said to set the borderline for procurement liability as such, implying that mistakes or violations short of the facts and assessments in this case would not have incurred liability. The interesting passages in the quoted statement is the antithetic references to hypothetical circumstances which possibly *might* have exempted from liability such as the excusable - although doubtful - understanding of procurement law as well as a disputed administrative assessment of the factual evidence in the procedure. It is also open for question whether an express reference to multiple errors could be interpreted to mean that hypothetically only a few – or even a single - mistake might exonerate.

Further support of the previously disputed loss of contract liability is found in various arguments: The fact that a proper tender procedure will identify the selected winner, the need for efficiency, the shortcomings of a negative interest limitation of liability – and the fact that loss of contract awards have already been recognised in both Swedish and Danish Supreme Court cases (reference to the Swedish *Arkitektjänst* 1998 and the Danish *Fårup Sommerland* 2000 rulings).

Possibly in distinction from *Firesafe* 1997, the leading judge in *Nucleus*

tightens up the proof requirements: Problems in ascertaining whether an infringement has impacted on the award decision, the complainant must carry the risk of doubts when claiming that he would have won the contract. That part of the reasoning is allegedly not entirely convincing. The Swedish Supreme Court has (NJA 2007.349 *Virgo Ishavet*) suggested a distinction between scenarios with remaining contract candidates in position to win the contract (NJA 2000.712 *Tvättsvamparna*) as opposed to a pure direct purchase without publication of contract where a claim like in the Norwegian 2007 *Catch Ventelo* must be supported by evidence showing that the candidate seeking compensation would have prevailed over an unknown number of hypothetical contract candidates.⁹³

Summing up, the leading judge in *Nucleus* reiterates that the contracting authority is much to be blamed for substantial infringements, more than only excusable misinterpretation of complicated statutes.

93 Compare the Norwegian Rt. 2007.983 *Reno Vest* case, in which the disputed loss scenario involved the alleged alternative of in-house service, excluding any loss of contract at all (dissenting opinions).

Comparing the loss of contract outcome of the *Nucleus* with the negative interest *Firesafe* case discussed above, it is hard to tell whether the cases really differ on the question of basis for liability. The *Firesafe* breach was deliberate and twofold, and there seems to have been no question as to liability at all if sufficient causation had been proven.⁹⁴

On positive interest loss of contract damages a handful reported Norwegian regional courts of appeal cases *sustain* such claims under the 1999 statute on public procurement § 10⁹⁵ - RG 2007.1390 Hålogaland, Frostating 13. November 2010 LF-2010-63049, Borgarting 9. January 2012 LB-2010-176631.

There are many more positive interest cases on dismissal of claims, either because no mistake found, very minor mistakes – or for lack of causation such as Borgarting 2. February 2009 LB-2008-56919, Hålogaland 8. June 2009 LH-2009-3900, Hålogaland 22. December 2010 LH-2010-116189.

Earlier cases: *sustaining* claims: Frostating 2000-04-10, RG 2002.1132 Borgarting RCA, Frostating 2002-02-22, Frostating 2004-11-15, RG 2007.1390 Hålogaland, whereas reported cases *denying* such claims: RG 1998.178 Eidsivating, RG 2000.1269 Agder, Eidsivating 2001-12-07, Borgarting 2002-10-18 Borgarting, Borgarting 2003-06-04, RG 2005.469 Hålogaland, Agder 2004-02-13, Borgarting 2007-11-01 (district court case: 1998-04-15 Skien og Porsgrunn).

The loss of contract / causation issues raised in *Nucleus* were addressed again in Rt. 2007.983 *Reno-Vest* (ex KOFA Complaint Board case 2003/259). The case was about a call for competition on renovation services. Due to grave bias impartiality in conflict of interests similar to the *Nucleus* scenario (contracting officer was also director of the award winner) and the failure to reject the winner, this error alone was considered to have been material. Responding to the claim for positive interest, the contracting authority argued that the price level displayed in the case indicated that one would hypothetically have terminated the procedure and performed the service in-house. If so, the claimant would evidently have no case for loss of contract. The majority in the court found that a termination of the award procedure would have been economically unacceptable.⁹⁶ Assuming this, it was beyond doubt that the

94 A later case Rt. 2005.1638 *BAF* rejects a claim for loss of contract in a defence procurement exempted from EEA through article 123, although the alleged breach of equal treatment principle apparently might have qualified under the EU/EEA procurement regime. Supreme Court found that possible non-statutory general principles on proper procurement procedures should not prevail over the assumption that military procurement afforded less protection for tenderers than otherwise in procurement law. The Dir 09/81 law reform tend to align defence procurement with classical public procurement, stating provisions on damage liability for faulty procurement in article 56 No 1 b second paragraph. At any rate, the Norwegian 2008 ARF defence procurement regulations will have to be adapted to the EU law reform (including also the updated security list in Dir 09/43 Annex).

95 Prior to law reform 1999 *sustained* claims: 1999; 1998-12-18 Hålogaland, 2001-04-09 Sunnfjord (District court), 2001-12-7 Eidsivating. – claims *denied*: RG 1998.178 Eidsivating, RG 2000.1269 Agder RCA, 1998-04-15 Skien og Porsgrunn (DC).

96 Ministerial regulations 2006 No 402 § 22-11.

claimant SB Transport was in line for the contract – and loss of contract was awarded. The two dissenting judges accepted adversely that the most probable in-house alternative would preclude a claim for loss of contract.⁹⁷

The latest Norwegian case as per date, Rt. 2008.1705 *Trafikk og Anlegg*, rejects a claim for loss of contract, but this time not for lack of causation. In the preceding complaint board case, KOFA had issued an opinion to the effect that a contracting authority was considered free to assess a tender bid which offered “discount” for additional award of other works contracts published at the same time (KOFA 2004/192 - 2004-11-22). Supreme Court found otherwise and assumed that this was a violation of procurement rules since the contracting authority had not made it clear in the tender documents that this was an option for *all* contract candidates (one judge dissenting on this issue).⁹⁸ The candidate who challenged the discount claimed loss of contract under a joint assumption in court that the causation issue would not be contested: Except for the error, the contract would have gone to the claimant. However, on the issue of damages, the leading judge made a reference to the *Nucleus* ruling, reminding that liability assumed material violations. The judge found support in EUCJ (ECJ) cases on Treaty violations (C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame III*) on the issue⁹⁹ and stated (in this author’s un-authorised translation):

“(55) EU/EEA law is setting rigid requirements for the effective enforcement of the directives. But liability for Member States for failure to comply with EU law incurs liability only if the violations are of an evident or grave nature, and the question of excusable misinterpretation of the law forms an element in the assessment of the liability issue.

(56) I can not see that it is possible to deduce from EU law, accepting the requirement on effective implementation, that there should be room for a stricter liability for the (contracting authority) in its violation of the rules in this case than what was follows from the *Nucleus* ruling, and I will apply this in our case.”

This is the pr date the latest Supreme Court ruling on loss of contract in Norwegian jurisprudence.¹⁰⁰

97 The Danish Supreme Court ruling UfR 2005.1799 *Ørestad Metro* rejects a loss of contract claim for lack of causation.

98 Support for the dissenting opinion in L Simonsen *Prekontraktuellet ansvar* (1997) pp 634-635 – in line with the KOFA opinion.

99 Critical comments by this author and Bernt, Jan Fr. *Hvor mye EØS-rett tåler norske kommuner?* (fn 2 above) questioning whether the high level for liability laid down in *Nucleus* is in accordance with the enforcement effectiveness policies underlying the EU remedies regime as in Dir 89/665.

100 Rt. 2005.1481 *SØRAL* states that violation of the *ban-on-negotiations* in tender procedure has no contractual impact on the subsequent contract negotiated deletions of lawful tenderer’s reservations on price escalation. The issue of damages for loss of the reserved position was not raised in the case. In principle, the rule on damage for procurement violations should also be available for contractual effects of procurement infringements such as conducting negotiations in the tender procedure.

The 2008 case reference to EC Treaty violation jurisprudence might, however, be questioned. The ruling could formally be said to disregard the express provisions in the procurement Remedies directives discussed above, simply stating that claimants are entitled to economic losses. This approach has so far not been adopted in any of the Nordic reported rulings.¹⁰¹ On the other hand, applying the “manifest and serious” test on procurement violations in all liabilities scenarios could be said both to depart from public administrative law cases on bad administration since such cases in Norway are based on the joint rule of vicarious culpa liability applicable in both private and public sector.¹⁰² The “seriousness issue” in such cases have been raised as to whether *error in iuris* could be said to form a convincing part of the *culpa* issue on faulty negligence: Excusable interpretative errors committed in conducting a legally complicated administrative procedure with plentiful pitfalls could said not to constitute negligence at all, bringing the liability issue under the Norwegian setting well within the provision on vicarious liability in the general act on civil liability 1969 § 2-1.¹⁰³ Adversely, and for general policy reasons, the fact that damages is the sole available remedy in most of the procurement violations indicate that there should not be rigid obstacles to compensation for harmed interests. One could add that the rigid “ineffective” rule on Dir. 2007/66 violations (amended Dir. 89/665 article 2d) is not softened by any adaptation in regard of graveness of the violations. If the direct purchase ineffective contract-remedy under Remedies 89/665 amended Dir. article 2d is to be applied regardless of any subjective excuses,¹⁰⁴ it is hard so see why the qualified “seriousness” argument should prevail on damages in other violation scenarios.

Also, the qualified causation requirement launched in the 2001 *Nucleus* ruling is problematic in view of the non-contractual law on damages, where (1) the wrongdoer in best position to provide evidence of hypothetical change of events is also the one normally in the position to lift the burden of proof – and (2) there is no case support in tort law for *qualified* probability of causation. If the loss is accepted to be the most probable (<50%) consequence of the harmful event, then why should the claimant be left without compensation?

The public procurement directives do not openly distinguish between costs and loss of contract.

101 Close to strict liability without qualifying prerequisites are statements in NJA 2007.349 *Ishavet/Virgo* p. 367.

102 Statute on Civil liability (“skadeserstatningsloven” - skl) 1969 § 2-1 – further *infra* 8.

103 The 1969 Norwegian tort law reform – compromising a preceding long time debate on Government liability - designed public third party liability (including Government and municipalities) on the same basis as private employers’ vicarious liability, applying two cumulative conditions. (1) error by negligence *plus* (2) (strict) departure from general reasonable expectations towards the actual service rendered. This is still formally the statutory point of departure even for EEA public procurement liability.

104 “Direct purchase” could in a number of cases depend on intricate interpretation of procurement provisions, such as the urgency excuse, extended in-house, failure to suspend time limits for binding tender bids and others. The non-culpa exception seems recommendable, but is still questionable in view of ECJ ruling in C-275/03 *Commission v Portugal* 2004-10-10.

Whereas the *Firesafe* 1997 ruling accepts a liberal approach on the issue of causation, although deciding against the passed-over tenderers, the Supreme Court's *Nucleus* 2001 approach to causation could be turned upside down. The reasoning could be said to be somewhat surprising. Not only should there be a substantial infringement of the procurement rules, there should in addition also be a "clear" evidence of causation between the infringement and the loss of contract.¹⁰⁵ Why this is so, is not really discussed in depth by the leading judge. One might therefore question whether policy considerations justify an extra burden of proof on the party which successfully proves in excess of 50 % probability to be next in line for the contract, provided that the preferred candidate should not have been the winner. Procurement remedies seem to be best served with a more moderate approach to causation than applied in the 2001 case, even though the plaintiff won his case in the end. One senses a fear for the absurdity in making the contracting authority to pay twice for the same procured service.¹⁰⁶

For deterrent purposes liability for simultaneous costs incurred by tender bidders seems to be appropriate and maybe one might argue for not requiring too much, especially not if the *Firesafe* causation doctrine is adopted, which seems to be the general consensus in the Nordic states.

6 Calculation of Losses – Positive Interest

The two Norwegian loss of contract/concession cases *Torghatten* and *Nucleus*, won by the plaintiff, illustrate challenges on the actual calculation of relevant elements in the loss claimed for.

Tendering for contracts would normally not display budget figures sufficient to verify actual anticipation of profit. Still, costs involved must be essential to prove the relevant loss of profit. This is obviously a burden of proof to be lifted by the tenderer which did not win the contract.

In contracting, the tender bid proceedings may well extend into the period where the actual award is followed by the winner's performing the service or the contract. This may be indicative, but the question would still be: Can the claimant prove a more profitable management of the contract/licence than the actual contractor/licensee? How relevant is the actual progress of the contract as indication of the hypothetical performance which the claimant would have undertaken – in terms of complications, the probability for disputed or undisputed change orders, potential disputes inherent in the contract documentation etc.

105 The Swedish ruling NJA 2000.712 *Tvättsvamparna* assumes that proof of loss of contract must be qualified when compared to award of negative costs, even though the case was about a serious non published direct municipal purchase of maritime training services. See however arguments for distinguishing the cases in the NJA 2007.349 *Virgo Ishavet* ruling. In cases on non-procurement public administration flaws mere probability seems to rule – Rt. 1995.781 (*Peelorg*), Rt. 1997.343 (*Nordal Brungst. 9*).

106 Strongly argued by Hellner, J. in a critical comment *Juridisk Tidskrift* 1998/99 p. 950.

In the 1998 *Torghatten* case, Supreme Court scrutinised plaintiff's estimates over running costs for the vessel rejected by the regional municipality (fuel consumption, crew wages and maintenance costs), assessing the actual scenario as compared to the hypothetical scenario with claimant's smaller vessel of a different high speed category. In this case, the tenderers were required to submit budget figures, and much of the assessment dealt with these as compared to the actual figures for the vessel which acquired the concession. There was a disagreement on certain figures in connection with plaintiff's alleged replacing of the vessel offered for the service (2 dissenting opinions did not accept non-budget figures on loss of sales profit). When the case was finally decided in Supreme Court, 3/5 of the 5 year period for the award had elapsed; consequently the court did make an overall assessment without discounting future figures for accumulation of late payment interest to be calculated from the date of the award (1995).

In the 2001 *Nucleus* case, the leading judge emphasised that trends in procurement law narrow down discretionary decisions on part of the contracting authority, so that the potential outcome of a correct procedure can be assessed more accurately than in earlier procurement procedures. The fact that a contracting entity may be entitled to terminate or cancel the procedure so that none of the tenderers have any protected right to get a contract, was not found to be relevant: The question is one of assessing *factual* probabilities, and in this case there was no doubt at all that the claimant would have won the contract if the procedure had been conducted properly.

In the two Danish Supreme Court cases *Horsens Byhus* and *Fårup Sommerland*, the successful claim for loss of contract was assessed as a discretionary lump sum basis.¹⁰⁷ That was also the case in UfR 2011.1955 *Amager Strandpark*, but Supreme Court emphasises (p. 1985) uncertainty in the assessment of loss, pointing to whether the invoked profit was realistic in regard to available resources and cost estimates. In the Swedish NJA 1998.873 *Arkitektjänst* Supreme Court did not expand on calculation of losses, later followed by NJA 2000.712 *Tvättsvamparna*, assuming qualified proof of loss in a direct purchase scenario. That case could be said to have somewhat qualified by NJA 2007.349 *Virgo Ishavet* award of loss of contract in a tender procedure with two competitors, whereof one was the plaintiff which therefore succeeded in a causation scenario more favourable than in the *Tvättsvamparna* direct purchase case. In the 2007 case, the successful candidate was selected as a result of erroneous assessment of selection and award criteria. The damage (disposal of a vessel) was assessed on a daily rate basis, deduction for costs – and on the accepted assumption that attempts had been made to mitigate the loss through alternative commitments.

107 UfR 1997.1308 and UfR 2000.1561.

7 The 2010 EUCJ *Strabag* and *Spijkers* Rulings – Implications

Two recent EUCJ 2010 rulings attempt to refine the arguments on the damage issues. Their impact on Nordic law is still (2012) unsettled, as is the possible need to reconsider the arguments applied previously in the Nordic Supreme Court rulings. The following remarks are more prophecies than valid statements on the law of procurement damages.

The *C-314/09 Strabag* (2010-09-30)¹⁰⁸ preliminary ruling strikes down an Austrian 1998 piece of legislation stating that the right to damages for an infringement of public contract law (*in casu* a non-compliant tender bid for asphalt supplies) is conditional on *culpa*. This applies even if the statutory application favours the complainant with a presumption that the contracting authority is at fault so that the authority will have to rebut the onus that it is not accountable for the alleged infringement.

EUCJ – reminding of the Dir 89/665 Recitals - reiterates in (31) the Member States' duty to take measures necessary to ensure the existence of effective and rapid review of procurement decisions – in (32) specified on powers to award damages to persons harmed by an infringement.

Whereas the directive only lays down a “minimum” level of conditions for review procedures, the ruling goes on to acknowledge Member States' competences to legislate in domestic law on –

“(33) ... the measures necessary to ensure that the review procedures effectively award damages to persons harmed by an infringement of the law on public contracts (see, by analogy, *GAT*, paragraph 46).”

Furthermore, although

(34) “[...] the implementation...in principle...comes under the procedural autonomy of the Member States limited by the principle of equivalence and effectiveness...”

it must be noted that

“[---] it is necessary to examine whether that provision, interpreted in the light of the general context and aim of the judicial remedy of damages, precludes a national provision such as that at issue in the main proceedings from making the award of damages conditional in the circumstances set out in paragraph 30 of this judgment, on a finding that the contracting authority's infringement of the law on public contracts is culpable.”

The remedy of damages under article 2 (1) (c) thus opens for national implementation

108 Comment by *T Kotsonis* (23011) 20 PPLR NA59. In Norwegian literature, the case is discussed by Fredriksen, H.H. *Objektivt ansvar for anbudsfeil?* LoR 2010 pp. 600-615, L Simonsen o Gyldendal “rettsdata.no” .

(35) [...] in no way indicates that the infringement in the public procurement legislation liable to give rise to a right of damages in favour of the person harmed should have specific features such as being connected to fault –proved or presumed on the part of the contracting authority, or not being covered by any ground for exemption of liability.”

And to comply with the principle of effectiveness

(39) “[---] is no more dependent than the other legal remedies provided for in article 2 (1) of Directive 89/665 on a finding that the contracting authority is at fault.”

These passages have been read to eliminate literally not only black letter statutory culpable requisites for liability (even as in the Austrian act supplied with a burden of proof disfavouring the contracting authority to the benefit of the complainant),¹⁰⁹ but also the *Factortame III* “sufficiently serious breach “ formula.

The 2010 *Strabag* ruling is not stating that *any* public procurement violation causing losses to relevant harmed interests should be compensated according to Dir 89/665 art 2 1(c) on a strict liability basis. But it is worth observing that the *Factortame III* “sufficiently serious breach” test advocated by many in relation to article 2 (2) (c) is not referred to at all in the ruling. On the contrary

(35)“--- the wording of ... Article 2 (1) ... and the sixth recital in the preamble to Directive 89/556 in no way indicates that the infringement of the public procurement legislation liable to give rise to a right to damages in favour of the person harmed *should have specific features, such as* being connected to fault – proved or assumed – on the part of the contracting authority, *or not being covered by any ground for exemption from liability*” (emphasis added).

The *Strabag* ruling therefore could be said not only to reiterate C-275/03 *Commission v Portugal* (2004-10-10) extended into ruling out not only statutory excessively burdensome procedural impediments on the claimant litigating for damages¹¹⁰ - but also to strike down other restrictions on liability of “specific features” such as the “sufficient serious breach” formula.

Arguably, and closing down on the scope of *Factortame III*, one might envisage two scenarios, one where the public contracting authority such as a regional municipality applying a *compliant* national implementation of the EU *acquis* incurs liability for mal-procurement – a point blank article 2 (1) (c) arena, whereas alternatively the government legislative body might have been found liable in damages for non-compliant legislation on liability - but protected under the *Factortame III* qualified level for liability, such as making

109 Reiterating C-275/03 *Commission v Portugal* (2004-10-10) extended to rule out also excessively burdensome procedural impediments on the claimant litigating for damages.

110 Such as unreasonable time limits and others. C-145/08 *Club Hotel Loutraki* (2010-05-06) rules out Greek statute which deprives an individual member of a temporary association to claim for damages suffered individually in a particular procedural setting, compare earlier cases C-327/00 (2003-02-23) *Santex* and C-315/01 (2003-06-19) *GAT*.

damage cover dependent on culpa or any other “special features”. The *Strabag* ruling is unquestionably about a *non-compliant* Austrian statute which does not give the protection for indemnity required by Dir 89/665 – so *query* why not comment on the Austrian state treaty infringement in mal-application of article 2?

In dealing with domestic legislation the *Strabag* case the setting is of limited interest to the Nordic legislature since there have so far been no attempts in reported litigation or complaint board cases to challenge the various Nordic provisions expressly on procurement damage for being in their wording or preparatory documents non-compliant with EU/EEA law.¹¹¹

However, an notably, the parallel Norwegian 1969 § 2-1 provision on vicarious liability for (private, government and municipal) employees’ culpa (“skade som voldes forsettlig eller uaktsomt”) is probably ruled out in procurement litigation in so far as the provision expressly *requires* employee’s fault as a fragment condition in the public authority’s *alter ego* vicarious liability prerequisite. However, the remaining fragment in that provision on authority’s failing to meet proper service standards (“de krav skadelidte med rimelighet kan stille til virksomheten eller tjenesten”) stands unaffected and might possibly by analogy be found revitalised in a public procurement litigation with support in *Strabag* references to effective remedies (paragraphs (32)-(33)).

The subsequent December 2010 ruling C-568/08 *Spijkers* (2010-12-09)¹¹², (substantial irregular changes in the contract documentation after time limit for submittal of tender bids for bridge construction works project in Holland) appears to restore the *Factortame III* threefold formula on liability (conferred rights, sufficiently serious breach, causal link). Somewhat confusing, the Dir. 89/665 article 2 (1) (c) on contracting authority’s liability for mal-procurement is in (87) and (92) now displayed as a rule on *State liability*.

Accepting (88) that EU case law at present (and even after Dir. 07/66) has not set out more detailed criteria for mal-procurement damage, it is –

(90) “...for the legal order of each Member State to determine the criteria on the basis of which damage arising from an infringement of EU law on the award of public contracts must be determined and estimated...provided the principles of equivalence and effectiveness are complied with...”

In that context, the subsequent reasoning in (92) is a two-fold exercise. The *Factortame III* “sufficiently serious breach” fragment is not rigidly set under EU procurement law (as many have suggested), but short of such –

(92) “...it is for the internal legal order of each Member State, once those conditions have been complied with, to determine the criteria on the basis of which the damage arising from an infringement of EU law on the award of

111 Although the Norwegian 1999 law reform leaving out the utility loss of chance rule may have been questioned under Remedy Dir 92/13 article 2 No 7.

112 Comment by D McGowan (2011) 20 PPLR NA 64.

public contracts, must be determined and estimated, *provided the principles of equivalence and effectiveness are complied with*" (emphasis added)

This approach recognises arguably equivalence-based legislation, possibly accepting that even the "sufficiently serious breach" test might include the fragment "fault" as a sub-criterion under domestic MS legislation or case law (as opposed to *Strabag* out-ruling fault as an indispensable "condition").

In dealing with Dir 89/665 article 2-1 (c) the case could possibly be read applicable also where the legislative domestic setting is unquestionably EU-compliant but the contracting authority has made procurement mistakes. Since the Court of Justice rarely will rule on domestic procurement mistakes under a regime of correct statutory implementation of the directives, this issue may remain unresolved because the EUCJ scenarios will avoid gap-filling interpretation of wide and general provisions such as the Nordic statutes on procurement liability as long as basic principles are not infringed.

Spijkers develops *Strabag* in so far as the ruling – reiterating *Factortame III* "sufficient serious breach" – also seems to leave appreciable latitude for national autonomous handling of principles on equivalence and effectiveness in setting the threshold for relevant breaches. Even if "fault" is ruled out as a statutory condition for damages, subjective elements on part of the contracting authority might arguable still form part of the test for which breach – or cumulative breaches – are sufficient in a given case for damages.

Neither of the two cases seems to appreciate a distinction between a contracting authority's liability for faulty procurement as opposed to a Member State's liability for non-compliant EU legislation on damages. The Dir 89/665 article 2.1 (c) only states that the person harmed shall be compensated for damages without distinguishing legislator's derogation and contracting authority's faulty procurement. So *query*, does EUCJ impliedly assume the same basis for liability in the two scenarios whereas EU/EEA case law so far only is about derogatory non-compliant MS legislation? Might the policy objectives to ensure deterrent remedies for mal-procurement allow for more severe sanctions than if the case is for statutory infringement of the procurement *acquis*? Admittedly, however, the Directive 89/665 article 2 (1) (c) makes no literal distinction between the two scenarios and the *Spijkers* references on state liability are expressly related to the national remedy statutory provision.

As to the situation in Norway, the provision on damage for faulty procurement in the 1999 Act § 10 could be said to coincide with the 1969 § 2-1 widely framed fragment "reasonable expectations justified in relation to the activity or service in question".¹¹³ That would simplify the workload for courts since faulty procurement might be handled in the same way as in cases on non-procurement public (state or municipal) liability. However, the additional assumption of vicarious *alter ego* identification with culpa on part of the employee is admittedly at odds with the *Strabag* ruling since that fragment sets

113 This criterion was emphasised in Rt. 2002.1337 (*Nordsjødykkerne*) (89)

personal culpa as a *condition* for liability.¹¹⁴ Then on the other hand, in the recent cases on public liability there seems to be a main focus on broad assessment of “reasonable standards” than on actual *culpa*, and therefore arguable in line with a *Factortame III* rephrasing, accepting culpa as a relevant *ingredient* in the equivalence liability assessment compliant with *Spijkers* guidelines.

8 ***Equivalence and Effectiveness Principles on Stand; Side-view on Public Administrative Law Scenarios for Non-procurement Awards and Protection of Quasi-contractual Expectations in Private Relations to Public Authorities***

EU/EEA procurement law prevails over national law, both private law and public law, provided that the legal regime has been correctly implemented in national statutory law.¹¹⁵ Principles of strong presumptions support solutions compatible with both directives and EUCJ and EUGC whenever there is a reasonable doubt as to the contents of national law.

Since the actual contents of EU/EEA law on liability for bad procurement is open for some discussion and therefore can not be said to be settled ultimately, the question remains whether a principle of equivalence might support solutions in national law which bring procurement liabilities basically in line with other public administrative tort law scenarios.

In the Norwegian *equivalence* and *effectiveness* context, the starting point is the basic observation that public procurement as a legal family is to be classified as public administration, even if award decisions are not formally considered subject to more specific rules on exercise of authority (Public administration statute 16, February 1967 Statute on “enkeltvedtak” - § 2 (1) a) and b)). Procurement has many policy similarities with competitive awards in public sector, and private parties are exposed to the risk that bad procedures impede the gaining of attractive legal prerogatives such as in procedures for licensing, granting permits or similar exclusive or special rights according to statute or otherwise (such as in the *Torghatten* case discussed above).

Procurement remedies are mirrored in national public administrative law. As in the procurement scenarios, it has been a highly debate issue in Norwegian writings whether *fault* is required in addition to objective wrong.¹¹⁶

114 The Danish treatises on EU procurement law seem to assume that the general Danish principles on damages in tort apply also in procurement scenarios – M. Steinicke – L. Groesmeyer op. cit. p 133, S. Troels Poulsen – P. S. Jakobsen- S. E. Kalsmose-Hjelmberg op. cit. p 565.

115 Norwegian EEA “Master” statute 1992-11-27 No. 109 § 2.

116 Hagstrøm, V. op.cit. reads Rt. 2010.291 as “exit” strict liability for administrative flaws. In a later later case Rt. 2011.991 (municipal fire department failure to secure against re-igniting of house fire) the leading judge undertakes a comprehensive general statement of the case of public liability pp 996-997 – concluding on no liability). Followed by a 2012 ruling 2012-02-01 on a local municipality’s liability for prosecution and mobbing in

Supreme Court cases may be said to tend towards overall policy assessment on this issue, thus allowing for assessing excusable errors in the handling of particularly complex statutory regimes.¹¹⁷ In the EU/EEA procurement setting, one may question whether any putting up of a fault prerequisite is violating any Court of Justice rulings – or whether human error or negligence rather should be accepted as an integrated element where the question is whether a violation is sufficiently substantial to incur liability. Add to this the “Scylla and Charybdis” dimension: Solution X will induce litigation from non-successful contract candidate A whereas solution Y may lead to adverse claims from winner candidate B.

The Norwegian 1969 Act on tort liability (“skadeserstatningsloven”) allows for mitigation of total loss both in cases of contributory negligence or risk allocation – and more generally in the “flood gate” scenarios where full recovery may appear unreasonable (1969 Act § 5-2 “lemping av erstatningsansvar”).

A long era of Supreme Court rulings on public liability for faulty administration before and after the law reform 1969 is now topped with a “state of the art” 29. June 2011 ruling – Rt. 2011.991.¹¹⁸ In that case the municipality of Drammen (in the Oslo region) was charged with liability for their fire brigadiers exiting a site after having failed to secure a house fire with the result that the fire reignited and led to a total loss of the building (insurance recourse). Displaying a selection of previous cases¹¹⁹ and Norwegian academic writings on the liability issue,¹²⁰ the leading judge states that the persons in charge *must be allowed some latitude for erroneous assessments* (“feilvurderinger”).¹²¹ That observation seems to fit well with the crucial question in most of the public contract award scenarios namely: is the mistake in handling the procedure, assessment and award scenario failing to meet reasonable standards in public administration (1969 act § 2-1). Personal culpa

elementary school stating *cumulative flaws* in municipal employment surveillance plus *disregarding effects* to impede and combat atrocities on the school campus.

117 The 1969 codification was meant to conclude an ongoing debate in case law and academic writings on whether there was a more lenient (“mildere”) legal setting for public administration liability than in the private sector, brought to an end with the 1969 law reform aligning private and public vicarious liability.

118 Succeeding Rt. 2010.291 (*Persaunet*) rejecting strict liability and followed by the 2012-02-01 ruling (fn 116).

119 Such cases are Rt. 1972.578 (*Randaberg*), Rt. 1991.954 (*Spanor*), Rt. 1992.453 (*Furunculose*), Rt. 1995.781 (*Peelorg*), Rt. 1997.343 (*Nordahl Bruns gt. 9*), Rt. 1999.517 (*Selbusjøen*), Rt. 2000.253 (*Asfaltkant*), Rt. 2002.654 (*Barnehage*), Rt. 2009.1237 (*Nordjødykkerne*) and Rt. 2010.291 (*Persaunet*).

120 Hagstrøm, V. (1997) *Prekontraktuelt erstatningsansvar* (doctoral thesis), textbooks Lødrup, P. (2009), Nygaard (2007).

121 Similarly statements in Rt. 2000.253 (*Asfaltkant*) at p. 264 (“spelerom for ei fagleg vurdering”), and the earlier Rt. 1972.578 (*Randaberg*) at p.494 “...den nye bygningslov på en rekke punkter innførte nye begrepet og uttrykk, samtidig som den påla kommunen nye og større oppgaver”.

on part of the contracting officer seems less relevant than the assessment of the mistake in an overall objective setting.

The procurement cases so far have not addressed the relationship to case law on public liability. The Norwegian procurement cases on positive interest have been solely oriented towards the *Factortame III* “sufficiently serious breach” formula. In the cases accepting basis for liability there has been a solid surplus of faulty actions, decisions or failures clearly above the critical border line for liability.¹²² It is conceivable that it would not have mattered whether these cases hypothetically had been addressed under the 1969 act § 2-1 provision. The only Norwegian case rejecting liability where mistake was assumed is Rt. 2008.1705 *Trafikk og Anlegg* where mistake was found obviously minor and therefore excusable (on a questionable interpretation of award criteria). None of the public authorities have questioned statutory mitigation of the amount of losses asked for – and brought to evidence – in the cases up to date.

In view of the *Strabag* and *Spijkers* references to efficiency and equivalence, it seems arguable that the Norwegian case law on non-procurement public damage liability might also indicate the relevant level of liability also in the procurement law application of the Dir 89/665 based 1999 statute § 10. There is allegedly no EEA offence in aligning a “sufficiently serious” test to the parameters now apparently relevant in the cases on state or municipal liability for faulty administration in general.¹²³

9 Sideviews to Fraudulent and Corruptive Procurement

Plain bribery, fraud and similarly corruptive actions to achieve public contracts will normally imply one or more insiders’ collusion and therefore constitute violations of procurement rules such as unlawful direct purchasing, improper contract administration and others. Corruptive contracts might therefore often be considered *ineffective* under the Dir. 2007/66 regime article 2d. Furthermore, the remedies’ rules under Dir. 89/665 and Dir. 92/13 would enable honest competitors to claim for *damages* from the contracting authority, applying (classical) Dir. 89/665 article 2 No. 1 (c) or (utilities) Dir. 92/13 article 2 No. 1 (d).

Implementation of the 1999 Council of Europe Civil Law on Corruption articles 3-7¹²⁴ took place in Norway 2008 by inserting a provision in the 1969 Act on Civil liability § 1-6,¹²⁵ stating civil liability for the person guilty of

122 Rt. 1997.574 *Firesafe* (rejection for lack of causation), Rt. 1998.1398 *Torghatten*, Rt. 2001.1062 *Nucleus*, Rt. 2007.983 *Reno-Vest* (rejection for lack of causation).

123 Cf. Sørum, T. *EØS-rettens innflytelse i erstatningsretten – kasuistisk harmonisering* Tidsskrift for Erstatningsrett 2001 pp 121-124.

124 Dealing with Compensation for damage (article 3), Liability (article 4), State responsibility (article 5) and Contributory negligence (article 6).

125 Dated 11. January 2008 in force 1 March 2008 - prepared in ministerial Ot prp nr 73 (2006-2007).

corruption as defined in amended 1902 Criminal Code §§ 276a-276c as well as semi-subjective vicarious liability for the guilty person's principal/employer. Liability may not incur if the principal/employer ("arbeidsgiver") can prove that all reasonable precautions have been undertaken to avoid corruption *and* furthermore - alternatively - that liability should not be imposed in view of an overall assessment of the merits of the case. That provision may very well overlap a typical fraudulent direct purchase under procurement Dir 07/66.

The 1969 statutory provision on contributory negligence (§ 5-1) was not considered by the 2008 amendment. Nor was the Norwegian liability provision in § 10. It could therefore be argued that the public authority itself might be barred from claiming damages if a corruptive award of contract did take place vicariously by a disloyal staff member operating without any interference or knowledge on part of his superiors.

The corruption provision might overlap the otherwise applicable provisions on liability for faulty procurement when the activities addressed involve award of public contracts. The 2008 insertion does not exclude or limit further going liability in procurement law. However, the corruption rule might itself go beyond procurement remedies and open up for claims by innocent competitors raised against the not-so-innocent corruptive co-supplier for loss of contract or negative costs.

10 Summing up

Nordic provisions on liability infringements in procurement vary in form, but provide only vague responses to the similarly open ended provisions in the directives on damages, and similarly less explicit explanatory comments in the ministerial supporting *travaux préparatoires*.

Norwegian EEA procurement law does not differ from EU law, but the surveillance and monitoring regimes are formally different whereas the EFTA Surveillance Authority functions in the same way as the E-Commission. Different from EU, and therefore differing from Danish and Swedish law, Norwegian Supreme Court is the last instance in substantive national EEA-based procurement law since the EFTA Court is only advisory in preliminary cases - and almost never resorted to in procurement disputes. After establishing the advisory Complaint Board KOFA 2003, the number of procurement cases has also gone down by the EFTA Surveillance Authority (ESA).

Denmark and Norway have established complaint boards for handling bid protests. Whereas the Danish board may award damages and does so (subject to court review), this competence is exclusively a court matter in Norway since the Norwegian KOFA Board is only advisorily responsive. A special challenge is to ascertain whether the Danish courts and the Danish Complaint Board authorised to award damages coincide in their assessment of the various procurement liability issues. In Sweden, the competences in procurement remedies system are shared between administrative courts and civil courts and there is no complaint regime like in Denmark and Norway. The civil courts deal with procurement liability once an infringement has been established.

None of the Nordic rulings or complaint board awards has been reviewed by EUCJ or EFTA court in preliminary cases. Stating the law is therefore a matter of reading preliminary rulings originating in other EU Member States.

Nordic Supreme Courts have ruled on awards of both negative cost damages and loss of contract liabilities. The still leading pre-EEA Norwegian 1997 *Firesafe* ruling accepts in principle negative interest cost recovery, but does not state the minimum requirements for liability. Later cases fail to clarify both whether (1) there is a requirement on seriousness for award of costs and (2) whether there is a difference in requirements between negative and positive interest. The main obstacle to cost recovery seems to be the causation issue adopted in the 1997 *Firesafe* ruling: The bid protesters will have to prove that each and one of them would *not* have spent time and costs preparing their bids if they could have anticipated the forthcoming infringement on the part of the contracting authority. Supportive and restrictive cases matching the *Firesafe* ruling are the Danish *Skjortegrossisten* UfR 2004.1294 and the *Ørestad Metro* cases (UfR 2005.1799) whereas Swedish Supreme Court has not yet expanded on negative interest claims.

On positive interest loss of contract, the Norwegian Rt. 2001.1062 *Nucleus* ruling requires substantial infringements plus an overload of evidence that contract would have been awarded in a proper procedure - reiterated in the Rt. 2008.1705 *Trafikk og Anlegg* case. Those rulings jointly imply that cases for loss of contract are hard to litigate in Norway. Possibly, the *Factortame III*-inspired “serious breach” test has been practiced a little more leniently in the Swedish NJA 1998.873 *Arkitektjänst*, NJA 2000.712 *Tvättsvamparne* and the latest NJA 2007.349 *Ishavet – Virgo* cases.

The Danish UfR 2007.2106 *Arriva* is a clear positive interest ruling, but the court states that the case was about manifest and substantial breach of the fundamental principle of equal treatment of tenderers, which could be said to bring Danish law close to the Norwegian *Nucleus* and *Trafikk og Anlegg* approach.

Both Danish and Swedish Supreme courts are inclined to assess the damage award by discretion, possibly not quite in line with the otherwise applicable tort law default principle that all and every proximately foreseeable (“adekvat”) loss caused by the harm should be compensated.

The causation prerequisite may preclude claims both for cost recovery and loss of contract. One obstacle to loss of contract has been raised in cases where the contracting authority asserts that the preferred alternative to a proper award would be a termination followed by an in-house arrangement for the required service (Rt. 2008.982 *Reno-Vest*, NJA 2001.3 *Danderyd/Lillebil*).

There are subordinate cases in Norway awarding damages both for negative costs and for loss of contract, but the majority of such cases deny such claims. Such cases are suited for illustrations, but are not wuthoritative.

No Nordic procurement rulings have as yet explicitly awarded recovery on a pure loss of chance basis. The utilities Dir. 92/13 article 2 No 7 remedies’ chance provision has not yet been litigated in any of the Nordic countries,¹²⁶

126 Excepting statements on loss of chance in the Danish UfR 2005.1799 H *Ørestad Metro*.

and it is therefore similarly unsettled whether a chance proportionate recovery may be converted to the public sector procurement, although this view has been advocated in theory.

All the Norwegian *Torghatten*, *Nucleus*, *RenoVest* and *Trafikk og Anlegg* rulings show certain challenges on causation when the basis for calculating an acceptable basis for loss of contract, pointing to a comparison between the actual chain of events (the faulty award) and the hypothetical award scenario if the procedure had been conducted properly.

The article questions whether faulty procurement damage – in the lack of clarifying EU statutes and EUCJ rulings - should rather fall in line with national tort law on civil liability for bad public administration, sampling a current Norwegian 1969 provision on employers' vicarious liability and abundant case law on mal-administration, possibly justified by the assumptions underlying TFEU article 340 (ex TEC article 288) and the overall EU principles of subsidiarity and equivalence. This approach will facilitate the handling of procurement liability cases in domestic law, leaving open the question of whether this approach is essentially leading to more or less liability as compared to the EUCJ (ECJ) *Factortame III* standard. The 2010 *Strabag* and *Spijkers* rulings may arguable allow for a flexible aligning of procurement flaws with equivalent case law on reasonable policy standards for public mal-administration in public sector (government and municipal) – tolerating minor mistakes such as mis-interpreting provisions on procedure, assessment and awards. The EUCJ insisting on effective remedies in procurement may not differ much from policy considerations applied under the Norwegian 1969 § 2-1 provision.

The consequences of the Dir. 2007/66 on contracting authority's liability for awarding ineffective contracts are unsettled in Nordic law, possibly leading to a more favourable status for the affected supplier in Swedish and Danish law as compared to the probable outcome of the Norwegian 2012 law reform.

Norway has legislated on corruption liability such as illegal direct purchase in case of bribes (1969 Act § 1-6). However, this implementation of the 1999 Council of Europe Civil Law on Corruption (articles 3-7) is badly coordinated with procurement statutory remedies and implications in relation to Dir. 89/665 and Dir. 2007/66 article 2 (1) (c) and the 1999 Act § 10 have apparently not been observed.

