

Damages from a nordic perspective

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Agenda

1. Damages – EU law
 - Remedies Directive
 - CJEU - C-547/22, *Ingsteel*
2. Danish perspective
 - The Danish Complaints System
 - Will *Ingsteel* have any influence on damages in Denmark?
3. Points for discussion



1. Damages – EU-law perspective

- **Remedies Directive art. 2 (1)**

- 'Member States shall ensure that the measures taken concerning the review procedures (...) include provision for powers to: ...

(c) award damages to persons harmed by an infringement.'

- **CJEU - damages (MS responsibility):**

- E.g. C-6/90 & 9/90, *Francovich*, C-46/93 & C-48/93, *Brasserie du pêcheur*, C-445/06, *Danske Slagterier v Tyskland*,

- **CJEU – damages (procurement cases):**

- C-275/03, *Commission v. Portugal*, C-314/09, *Strabag*, C-568/08, *Combinatie Spijker*, C-547/22, *Ingsteel*
- EFTA – E-16/16, *Fosenlinjen I* + E-7/18, *Fosenlinjen II*



1. C-547/22, Ingsteel

- Main question in Ingsteel:
- *Does EU law require Member States to admit a claim in damages for loss of opportunity by a tenderer unlawfully excluded from a procedure for the award of a public contract where that procedure has concluded and a contract entered into with the successful tenderer?*



1. C-547/22, Ingsteel

CJEU

Para 37 "The action for damages provided for in Article 2(1)(c) (...) was thus envisaged by the EU legislature as being the **legal remedy of last resort**, which must remain available to persons harmed by an infringement of EU law where they are de facto deprived of any possibility of benefiting from the effectiveness of one of the other remedies provided for in that provision."

Para 48 "Article 2(1)(c) of Directive 89/665 must be interpreted as precluding national legislation or a national practice which excludes the possibility, as a matter of principle, for a tenderer excluded from a procedure for the award of a public contract because of an unlawful decision of the contracting authority, of being compensated for the damage suffered as a result of the loss of the opportunity to participate in that procedure"



2. Damages in the Member States

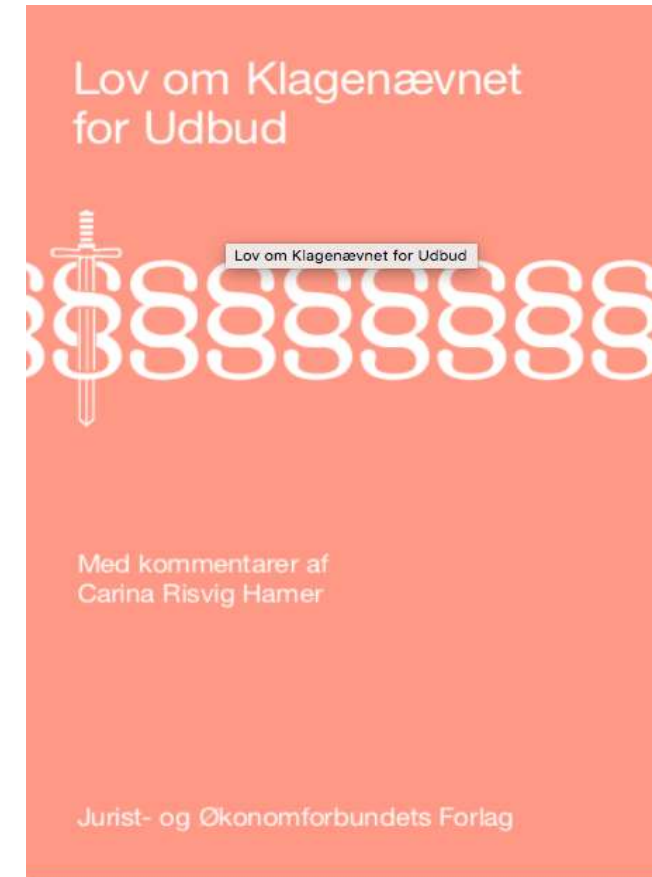


Advocate General Collins, in *Ingsteel*,

"At the present stage of the development of EU law, it is difficult to envisage a homogeneous regime of remedies that would function equally effectively in all Member States in the field of public procurement law."

1. The Danish complaints system

- **Competences:** Breaches of the EU procurement rules (not contract law)
- Around 70 complaints at the Complaints Board for Public Procurement every year
 - (Mandatory for complaints during the standstill period)
- **Remedies:** Power to grant interim measures, to set aside decisions, to award damages for breaches of the procurement rules and to declare certain types of contracts ineffective.
- **Damages:**
- 2023 - 2025: so far 6 cases



Remedies for breaches of the public procurement rules in Denmark – Is the Danish enforcement system effective?, UrT, available at: www.urt.cc/?q=node/255 .

Annual reports the Complaints Board:
www.klfu.dk

2. Damages Denmark

- **Liability:**

- Almost objective – some cases mention culpa – in practice the award decision must be annulled (but that is not a requirement in the legislation)

- **Loss:**

- Negative v. positive (loss of profit)
- No examples of loss of opportunity

- **Causal link:**

- Complainant must prove that he would have been awarded the contract if the breaches of the procurement rules had not occurred
- If the contracting authority can justify that the procedure would have been cancelled in case the complainant had won = no damages
- If a procurement procedure is so illegal that it cannot form the basis for a legal award = no damages

2. Damages – lack of prequalification

- Decision of April 7, 2021, *Babcock Scandinavian AirAmbulance AB v. Region Midtjylland*
- Regarding the need for urgency:
 - Babcock SAA has no possibility under the general rules of damages to obtain financial compensation if Babcock SAA (was unlawfully excluded, edt).
 - Babcock SAA has not submitted a tender and will therefore not be able to be compensated neither in the form of negative contractual interest or positive (loss of profit).



3. Points for discussion

- Difficult in Denmark to obtain damages – question of whether it is too difficult?
What is considered effective enforcement?
 - Are damages always necessary for an effective enforcement system?
 - Are damages necessary if it's possible for a review body to terminate the contract?
- Will C-547/22, *Ingsteel* change the way damages are awarded in the different Member States?
- What is loss of chance and when does it occur?
- Should the Remedies Directive be amended?



**Questions &
comments?**

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