

The new Remedies Directive: would a diligent businessman enter into ineffective procurement contract?

Abstract:

Looks at possible claims for damages against contracting authorities by the other parties to procurement contracts should the contract become ineffective due to article 2d (1) of the new Remedies Directive and the importance of dealing with the issue. Examines if the right to a loss of profit can be related to the behaviour of the claimant upon entering into the procurement contract and if so, what is the standard of diligent behaviour applicable towards the claimant. Compares with the standard of diligent businessman as applied in cases of returning illegally received state aid.

1. Introduction

The new Remedies' Directive (2007/66) subjects member states to an obligation to guarantee ineffectiveness of procurement contracts entered into with certain most serious violations of the EC procurement law. After the respective remedies will be introduced into the national legislations,¹ there is a possibility that the other contracting party may claim damages, *incl.* lost profit from the contracting authority caused as a result of such ineffectiveness. Such claims may be based on different private law grounds (*e.g. culpa in contrahendo*, breach of contract) as will be shown in part 2 of the paper. Despite of the specific legal grounds for the claim, the right to positive damages (loss of profit) often depends on the knowledge of or participation by the set-aside contractor in the breach that caused the ineffectiveness.

In assessing whether such knowledge or participation existed, in part 3 of the paper I suggest to apply the standard of a *diligent businessman* to the concerned contractors, analogically to applying the same standard by the European Court to recipients of illegal state aid. In the case of damages due to ineffectiveness, that would mean proceeding from a presumption that when signing a procurement contract under the circumstances of violations specified in art 2d (1) of the new Remedies Directive, a contractor as a diligent businessman had to know of the procurement law being violated.

¹ As of May 18th when preparing this paper, only 2 of the member states – Czech Republic and France - had communicated of national execution measures concerning the Directive 2007/66/EC. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:72007L0066:ET:NOT#FIELD_BE last visited May 18

2. The possibility of contractors claiming damages based on contract *ineffectiveness*

2.1 Significance of the issue of damages due to ineffectiveness

Several complex issues arise with regard to achieving the end result of *ineffectiveness* as required by the new Remedies' Directive (2007/66). Firstly, Member States have to choose whether to achieve ineffectiveness retroactively or prospectively, through which remedies – either by contract rescission, acknowledgment of such contracts as null and void or (in case of prospective ineffectiveness) by mandatory termination. In addition, national private law systems that did not allow ineffectiveness of illegally entered procurement contracts until now (for example Estonia² and Germany until recently³) possibly have to deal with the issue of giving unsuccessful bidders the right to challenge such contracts as third parties' might under normal circumstances not necessarily be vested with such procedural rights at all or would be subject to a major burden of proof. In some cases, such as Ireland for instance where ineffectiveness has been in practice already earlier, the issues are how to adjust the well working present system with the new requirements.⁴

A particular issue in relation to the ineffectiveness is however worth attention despite of the path to achieving the ineffectiveness that a particular member state may choose and regardless of the fact that it falls within the national jurisdiction. Namely, the possibility of damages, *incl.* loss of profit, payable by the contracting authority to the other party of the procurement contract that is made ineffective in light of the new Remedies Directive. The possibility and *reality* of such claims under French law has already been described by Joel Arnould in *Damages for performing an illegal contract: the other side of the mirror – comments on the three recent judgements of the French Council of State*.⁵ As J. Arnould points out, the issue has not been dealt with by the literature on EC public procurement literature but that EC law *should not be indifferent to the solutions of the national systems*.⁶

² According to § 4 section 2 of the Estonian Public Procurement Act (PPA), non-compliance with requirements of the procurement act has no impact on the validity of the public contract, except when the contract is awarded before the end of the required standstill period (§ 69 section 1). - Public Procurement Act, RT I 2000, 84, 534, English translation is available at:

<http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=XXX0005&keel=en&pg=1&ptyyp=RT&tyyp=X&query=riigihang> (last visited May 8, 2009)

³ as evidenced by the well known Case C-503/04, Commission of the European Communities v Federal Republic of Germany, ECR 2007 p I-06153, and Joined cases C-20/01 and C-28/01: Commission of the European Communities v Federal Republic of Germany, ECR 2003 p I-03609

⁴ C. Donnelly. Remedies in public procurement law in Ireland. P.P. L.R. 2009, 1, 18-41.

⁵ P.P.L.R. 2008, 6 NA 274-281

⁶ J.Arnould. Damages for performing an illegal contract: the other side of the mirror – comments on the three recent judgements of the French Council of State. fn 5, p 275

Agreeing completely, I would like to further elaborate on this issue. The topic having not been dealt with is evidently related to the traditional perception that there was no duty based on EC law to terminate or invalidate a public contract concluded in breach of the procurement rules.⁷ The shift in the perception was brought by the Case C-503/04, following Joined Cases C-20/01-01 and 28/01,⁸ and the duty of ineffectiveness is at present directly established under the new Remedies Directive. In my mind, especially after becoming an unavoidable, *compulsory* remedy to follow certain breaches, a discussion on consequences of ineffectiveness might benefit the compliant application of EC law.

National application of EC procurement law is subject to the principle of effectiveness in a very broad sense, including overall compliance and impact.⁹ In describing the importance of the shift that the Case C-503/04 brought to the efficient enforcement of the EC public procurement rules, Prof S. Treumer has noted that it is likely *to lead to increased compliance with the rules*.¹⁰ On the other hand, J. Arnould points out that even when the contractors were perfectly informed of the infringement of procurement rules but are still entitled to be generously reimbursed for their damages, the consequences of invalidity soften considerably and there is no incentive for the preferred bidder to ask for information about the legality of the awarding procedure, nor to inform the contracting authority about possible infringements.¹¹ Thus, feeling overly secure in the right to positive damages - even in situations where the contract turns out to be ineffective due to the *most serious* breaches of procurement procedure as referred to in the new Remedies Directive -, the contractors certainly lack any stimulus for favouring diligent behaviour patterns in procurement proceedings. In such case the expected increase in effectiveness of remedies might suffer a drawback and a significant burden may be added on the taxpayer.

If however not only mandatory ineffectiveness follows serious breaches of procurement rules but in addition the set-aside contractors' rights to positive damages depend upon the their awareness of the breach (including of course but not requiring any cases of active participation in the violation), the incentives for lawful behaviour would be present and the compliance with procurement rules could increase even further.

⁷ About the traditional approach: S. Arrowsmith. *The Law of public and utilities procurement*. London, Sweet & Maxwell, 2005, 1458, 1460-1461, and a change to such perception: S.Treumer. *Towards an obligation to terminate contracts concluded in breach of the E.C. public procurement rules – the end of the status of concluded public contracts as sacred cows*. P.P.L.R. 2007, 6, 371-386.

⁸ S.Treumer, fn 7, p 372, 373.

⁹ D.Pachnou, "Enforcement of the EC Procurement Rules: The Standards Required of National Review Systems under EC Law in the Context of the Principle of Effectiveness" (2000) 9 *Public Procurement Law Review*, p 61

¹⁰ S.Treumer, fn 7, p 385

¹¹ J.Arnould, fn 6, p NA 278

2.2 A variety of private law grounds for claims of damages

As described by J. Arnould, under the French law, a set-aside contractor may claim damages on the grounds of unjust enrichment and the negligence of the contracting authority. Unjust enrichment clauses entitle the company to direct costs only and no lost profit, the company's negligence is irrelevant there. Conditions for receiving lost profit are stricter: the contractor's negligence may weaken or exclude such liability. When there is fraud on the part of the contractor, both kinds of damages are excluded. In determining if a contractor was or should have been aware of illegality of the procurement procedure, different circumstances are taken into consideration, including the experience of the tenderer and the nature of the breach.¹²

It is submitted that under the French law, also in case of serious breaches such as referred to in art 2d (1) of the new Remedies Directive, the same problematic possibility may be real: a company to which the contract was illegally awarded might be entitled to claim damages for past as well as for the future *i.e.* expected but not received profit until the end of the contract term. Such an outcome would even allow companies sometimes *to keep a stronger position on the market than the position it could have reached if the public procurement rules had been correctly applied.*¹³

Under Estonian law, the decision has yet to be taken as to how the new Remedies Directive will be transplanted into the national law. The most probable choice will be retroactive nullity which arguably follows the German version.¹⁴ In case retroactive ineffectiveness is applied, a procurement contract violating art 2d (1) of the new Remedies Directive will probably be regarded as void according to § 87 of the General Part of the Civil Code Act (GPCCA).¹⁵

In case a newly void contract has already been performed (a possible although relatively less threatening scenario when deadlines for claims of ineffectiveness are reasonably short), anything received through performing the void contract is mutually returnable under unjust

¹²J. Arnould, fn 6, p 275-277, 280

¹³ *Id* p 280. As the court cases referred to in the article were from the 1980s and 1990s, it is also suggested in the article that if ruling on more recent contracts, French courts would take into account today's contractors' better knowledge of procurement rules – p. NA 280

¹⁴ Interview with Mrs Kadri Teder, lawyer of Public Procurement Department for Ministry of Finance of Estonia, concerning preparation of the draft of amendments to the existing Public Procurement Act, on May 7, 2009

¹⁵ RT I 2002, 35, 216, 2007, 24, 128 (in Estonian). English translation of the Act is available at <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X30082K2&keel=en&pg=1&ptyyp=RT&tyyp=X&query=%FCIdosa+seadus> (last visited May 7, 2009) According to the said article a contract in breach of the law is void when *the purpose of the prohibition is to render the transaction void upon violation of the prohibition, especially if it is provided by law that a certain legal consequence must not arise.*

enrichment clauses of the Law of Obligations Act (LOA).¹⁶ Should actual return of *that which has been received* be impossible, the recipient must compensate the *usual value* of the same.¹⁷ Return is near always impossible in case of service contracts when compensation of the usual value is regarded as *the average local market price of such services*.¹⁸

Consequently, should a procurement contract be declared void under Estonian law and return of the received assets appear impossible, the compensation payable to the contractor would *not* be calculated pursuant to the original agreement of the parties. Instead, the calculations must be done according to the average local market price and may therefore actually be either higher or lower than the original contract price – even significantly so. How such price is to be determined is an issue in its own – ironically a new, properly conducted procurement procedure can be the best indicator. It is also worth mentioning that a procurement contract having a price in excess of the market price may be regarded to contain an element of state aid as any payment which exceeds the market price can be considered an economic advantage which is not being obtained under normal market conditions.¹⁹

Similarly to the above referred French system of unjust enrichment, no loss of profit would be claimable - the reason is plainly that there is no valid contract as such. Evidently, national laws of member states differ considerably in the regulation on unjust enrichment. For example, in determining the price of services performed, the new Draft Common Frame of Reference (DCFR) considers the price that the parties have or would have lawfully agreed.²⁰

Culpa in contrahendo is another ground for possible claim of damages that a set-aside contractor may resort to under Estonian law: based on § 15 section 2 of the LOA, the contractor is entitled to damages caused by its trust in the contract's validity if the contracting authority knew or had to know of circumstances that caused nullity of the contract in the pre-contractual stage. Payment of damages under the same or similar principle in the general contract law is acknowledged by the majority of private law systems – however, there are

¹⁶ Chapter 52 of the LOA, RT I 2001, 81, 487. English translation of the Act is available at <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X30085K2&keel=en&pg=1&ptyyp=RT&tyyp=X&query=v%F51a%F5igusseadus> (last visited May 7, 2009)

¹⁷ § 1032 section 2 of LOA

¹⁸ A.Värv. The Draft Common Frame of Reference's Regulation of Unjustified Enrichment: Some Observations from Estonia's viewpoint. *Juridica International* XC/2008, p 74

¹⁹ J.Hillger. The award of a public contract as state aid within the meaning of article 87 (1) EC. *P.P.L.R.* 2003. 3, p 111.

²⁰ C. von Bar, E. Clive, H. Schulte-Nölke (eds.). *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference. Interim Outline Edition.* München: Sellier 2008. VII-5:102, 5:103

differences in the extent and basis of calculating the damages.²¹ In Estonia, such damages generally are regarded to include so-called negative damages or restitution for lost reliance, for example costs made in trust that the contract is valid. Loss of profit is normally excluded,²² but may be granted in exceptional cases.²³

The right to compensation is further restricted by sections 3 and 4 of the same § 15 of LOA. Namely, section 3 excludes any compensation when the party claiming compensation itself was aware or should have been aware of circumstances rendering the contract void, whereas section 4 prescribes that *if a person was unaware of circumstances with legal effect due to gross negligence, it is deemed that the person should have been aware of the circumstances*. The cited clauses derive from the general principle of good faith - knowingly entering into invalid contract and demanding damages based on such action would not be compatible with good faith behaviour. The same applies to cases when a contractor has ignored certain circumstances through gross negligence, *i.e.* has failed to exercise necessary care to a material extent.²⁴ The following occasions have been named to constitute gross negligence in the meaning of § 15 section 4 of LOA: a failure to follow legal requirements applying to a particular contract, a failure of a contractor to follow changes to the existing laws even when that should have been customary in the trade.²⁵

Therefore, for the purpose of claiming damages under the *culpa in contrahendo* principle, a decisive issue may be whether the contractor knew or should have known of the breach mentioned in art 2d (1) when entering into such procurement contract – this is despite the fact that the contractor is not subject to such procurement rules. If failure to know such regulations was caused by the contractor's own gross negligence then compensation under *culpa in contrahendo* principle is excluded.

Due to limited space of this paper and because no certain information of how the new Remedies Directive will actually be taken over by different jurisdictions, I will not analyse other possible grounds for damages, *incl.* effects of *prospective* ineffectiveness (termination).

Prospective termination will assumingly be chosen as the way to ineffectiveness by UK according to the Consultation Document on implementing the new Remedies Directive.²⁶

²¹ DCFR, II-6:204, Notes

²² Supreme Court decision in civil case No 3-2-1-89-06

²³ P. Varul *et al*, *Võlaõigusseadus I. Üldosa* (§§ 1-207). Kommenteeritud väljaanne, Tallinn 2006, lk 66

²⁴ § 104 section 4 of LOA

²⁵ P. Varul *et al*, fn 23, lk 66

²⁶ Office of Government Commerce. Consultation Documentation. 2nd Consultation on implementing the new Remedies Directive (including Draft Regulations), 29. April 2009

Even though the issue of damages from ineffectiveness was not directly raised in the Consultation Document, the concern was implied firstly in the context of possible court discretion over ineffectiveness and secondly in relation to contract drafting. Namely, in answer to the question, should the court's discretion in ineffectiveness proceedings address *the consequences of contract ineffectiveness*, the opinion was that the court should have the power to resolve the issues of *restitution or compensation* between the parties to the ineffective contract if the court finds it convenient to do so.²⁷ Also, concerning PFI/PPP contract drafting, the issue of possibility of *indemnities* in case of ineffectiveness was raised. The offered solution was that parties should be able to negotiate on ineffectiveness terms in order to marginalize the risks of uncertainty without however evading ineffectiveness.²⁸ Thus, the issue of compensation to the contractor is inherently present in such cases.

In all probability, under national jurisdictions that will implement prospective termination, contractors will be able to claim expectation interest due from ineffective contracts more successfully than in cases of retroactive ineffectiveness as prospective termination by definition means recognition that a valid contract has existed and profit expectations clearly arise from such. However, even in such a case, the contractor's duty to mitigate,²⁹ the rule prohibiting abuse of rights or the rules about fault under the contract laws of national jurisdictions may justify reducing or disallowing the contractor's rights to damages.³⁰ Application of such rules all depend on whether the contractor has behaved reasonably, prudently, diligently in avoiding the avoidable loss.³¹ The duty to mitigate has in exceptional cases even been known to include the obligation to give up contractual rights or to terminate contracts.³²

In conclusion, both retroactive and prospective ineffectiveness of procurement contracts may result in claims of damages under national laws, *incl.* claims for loss of profit, against contracting authorities. Reduction or evasion of claims of lost profit often depends on whether the contractor was aware of the breach that caused the ineffectiveness (*i.e.* violation described in art 2d (1) of the new Remedies Directive), and/or if negligence in failing to avoid excessive

²⁷ Office of Government Commerce. Consultation Documentation. 2nd Consultation on implementing the new Remedies Directive (including Draft Regulations), 29. April 2009, p 16

²⁸ *Id.*, p 17.

²⁹ LOA § 139

³⁰ DCFR III.-3:704 and III.-3:705, Notes

³¹ See generally: Stephan Reifegerste et Guillaume Weiszberg. Obligation De Minimiser Le Dommage Et <<Raisonnable>> En Droit Du Commerce International, [2004 Intl Bus. L.J. 181 \(2004\), pp 181-195](#)

³² P. Varul *et al.*, fn 23, lk 488

damages can be attributable to the contractor. I will show in the following part that knowledge of such breach should be presumed from the contractor as a diligent businessman.

3. A diligent businessman in procurement

3.1 Nature of the violations covered by article 2 d (1) of the new Remedies Directive

Art 2d (1) (a) refers to direct contracting, *i.e.* awarding a procurement contract without a prior publication of a contract notice in the *Official Journal of the European Union* when this is not permissible. Such violations have been held to result in an adverse effect on free movement of services and have been called *most serious* by the European Court.³³

Art 2d (1) (b) concerns occasion of failure to follow the rules of the review process, namely: (i) when the Member State has required that a person seeking review of procurement decision must first apply to the contracting authority and that having been done, the contracting authority has failed to suspend the conclusion of the contract as required under art 1 (5); (ii) when an independent review body reviews a contract award decision and the contracting authority concludes the procurement contract before a decision is made concerning either interim measures or review as under art 2 (3); (iii) the procurement contract is concluded during the mandatory standstill period as required under article 2a(2) of the new Remedies Directive. Certain additional criteria pertain in order for art 2d (b) to be applicable by tenderers. Art 2 d (1) (c) refers to cases of Article 2b(c) of the new Remedies Directive, when a Member State have invoked the derogation from the standstill period for contracts based on a framework agreement and a dynamic purchasing system.

Some of the above violations – particularly breaches mentioned in art 2d (1) (b) - are of relatively straightforward nature. Application of art 2d (1) (a) is more complicated as the rules of publication of notice have a variety of exceptions where direct awards are applicable. However, any contracting authority with a borderline direct award case can freely follow the rules in good faith in order to avoid doubts as to lawfulness of the procedure.³⁴ All these violations are substantial and serious and as such have been subjected to new remedies with the aim of achieving more efficient compliance than under the earlier regulation.

³³ Commission v. Germany, Case C-503/04; Commission v. Germany, Joined cases C-20/01 and C-28/01, fn 3

³⁴ C.Donnelly, fn 4, p 37

The contracts on the other hand are of significant financial value and as such would require correspondingly diligent contracting partners - even if where not awarded in procurement but as ordinary commercial contracts. Therefore, it is in my mind not overly excessive to presume that before entering into a contract of such magnitude, any reasonably diligent business partner would make itself aware of regulations applying to the contract.

3.2 Diligence presumed of a businessman receiving state aid

The assumption that a diligent businessman is expected to learn about regulations relevant to the contract that it is about to enter into finds support by a category of somewhat similar cases, namely the decisions of the European Court concerning claims by recipients of illegally received state aid.

Based on art 87 section 1 of EU Treaty, any state aid is illegal unless allowed by the Commission. Since 1990s the Commission has claimed back illegally granted state aid based on Council Regulation (EC) No 659/1999,³⁵ such claims itself are proceeded under national laws.³⁶ Recipients of illegal state aid - *innocent third parties* in this context - have repeatedly tried to rely on arguments of legal certainty and legitimate expectations in order to avoid returning the illegally received aid; however the European Court has mostly rejected such claims.

The standard is strict: in the Court's opinion, an undertaking to which aid has been granted cannot entertain a legitimate expectation that the aid is lawful unless it has been notified as foreseen in the due procedure; a diligent businessman is normally able to determine whether the required procedure has been followed.³⁷ In the case of *Brandt*,³⁸ the Court considered it *impossible* in the circumstances *that a diligent business operator ... could fail to be aware of the unlawful nature of the measure at issue. ... A diligent business operator must normally be in a position to confirm that that procedure has been followed, even if the State in question was responsible for the unlawfulness of the decision to grant aid to such a degree that its revocation appears to be a breach of the principle of good faith (Alcan Deutschland, paragraph 41, and Case T-109/01 Fleuren Compost v Commission [2004] ECR III27,*

³⁵ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty - OJ L 83, 27.3.1999, p. 1–9

³⁶ Commission notice on the enforcement of State aid law by national courts OJ 2009 C85/1, 09/04/2009, p. 0001 – 0022, p 2

³⁷ C-24/95 *Alcan Deutschland* [1997] ECR I1591, para 25

³⁸ Judgment of the Court of First Instance (First Chamber) of 12 September 2007. Italian Republic (T-239/04) and *Brandt Italia SpA (T-323/04) v Commission of the European Communities. (Brandt)*, ECR 2007, p II-03265

paragraph 135). To justify the national court not ordering recovery of illegal state aid, a specific and concrete fact must have generated the recipient's legitimate expectation.³⁹

This is not to say that cases of returning illegal state aid could be taken as a direct basis for deciding cases of damages from illegal procurement contracts - even though certain overlap of state aid and procurement cases has been found to be possible, for instance aid element in public contracts awarded in breach of EC procurement rules that as a result are not entered into at the market price.⁴⁰ Then again, certain analogy can be found: in the same way with procurement, state aid decisions are the sole responsibility of State and even so, the recipient is subjected to some responsibility in the way of requirement of diligence and (in most cases) left without legitimate expectations into the aid's lawfulness. Similarly, should the contractor under ineffective procurement contractor bring a claim of damages against the contracting authority, even though the latter is responsible for procurement decisions, the contractor can be subjected to some of the responsibility through the legal standard of diligent behaviour.

3.3 Diligence presumed of a businessman entering into a procurement contract

It is certainly difficult to determine a generalised level of diligent, reasonable awareness. On one end of the scale I find it clearly justified to expect some knowledge of fundamental principles and general rules of procurement. For instance, illegal direct contracting is referred to as an *obvious infringement* in J. Arnould's article.⁴¹ The assumption that a diligent contractor should normally at least roughly be aware of procedures required for awarding procurement contracts is indirectly supported by the overall establishment of procurement system based on supplier review as such. As described by Xingling Zhang in an article published in 2007, one of the values of supplier review systems consists in the efficiency that it provides for deterring breaches of rules and achieving enforcement – an overall high knowledge of contractors participating in procurement can be deduced and presumed.⁴²

Furthermore, it is probably also reasonable to assume the presence of gross negligence when a business operator is offered an illegal direct contract and it fails to do *anything* to confirm legality of such award, *e.g.* to inquire from a lawyer or from the same contracting authority about applicable laws and/or specifically legality of the award. Should the contract later be

³⁹ Cf. Advocate General Jacobs' Opinion in Case C-39/94, *SFEI and Others*, [1996] ECR I-3547, para 73; and Case 223/85, *RSV v Commission*, [1987] ECR 4617, para 17.

⁴⁰ J.Hillger, fn19, p 120-121.

⁴¹ J.Arnould, fn 6, p 280

⁴² X. Zhang. Supplier review as a mechanism for securing compliance with government public procurement rules: a critical perspective. P.P.L.R. 2007, 5, p 327, 329,351.

declared ineffective, the contractor's unreasonably gross negligence is probably a fair basis for excluding or reducing such contractor's claim for positive damages (depending on the grounds of the claim).

In his article about procurement contract termination,⁴³ Prof S. Treumer proposes several criteria for assessing whether a contracting authority has an obligation to terminate the contract when there has been a breach of procurement procedure. Among the circumstances listed as relevant are the knowledge and/or state of mind of the contracting party: *if ... the contract party has been fully aware that the ... rules have been disregarded, this will presumably reduce the consideration given to the interest of the contract party maintaining the contract. It might even lead to the exclusion of consideration to this interest ... in cases where they have been fully aware of violation ... combined with very active participation in the violation.*⁴⁴ Similar factors clearly must have an impact when establishing the extent or existence of the contracting party's financial rights once the contract has turned ineffective. The standard of diligent businessman should provide for such assessment: fully aware and/or active participation in a serious violation is clearly out of the question for a diligent businessman as is ignorance of disregard for procurement rules. Knowledge of minor breaches or legal intricacies however is not required of a diligent businessman.

The contractor who has been set aside through contract ineffectiveness has sometimes been referred to as an innocent third party: *innocent third parties would be penalised for a breach committed by another.*⁴⁵ As shown above, one can only partly agree with that position.⁴⁶ In cases concerning ineffectiveness due to breaches mentioned in art 2d (1), such third parties may or may not be *innocent*, depending on whether they acted as diligent businessmen when entering into the concerned procurement contracts. A clear example of *innocence* would be, if the contractor in order to ascertain itself of the contract's correctness has made a respective inquiry to the very contracting authority and received a satisfying (alas misleading!) answer as to the validity of the contract. In such a case there truly is an innocent third party who probably should be entitled to damages. Such situations could grant the contractor with even wider variety of remedies. For instance, when the Member State has chosen *prospective* ineffectiveness in way of the obligation to terminate the contract, a question may even come

⁴³ S.Treumer, fn 7, p 379-382.

⁴⁴ S.Treumer, fn 7, p 381.

⁴⁵ M. Niestedt. Penalties despite compliance? A note on case C-503/04, *Commission v Germany*, (2005) [1. P.P.L.R. 2005, 6, NA164-170](#), at NA 169; R. Williams, "Remedying a breach of Community law: the judgment in final Cases C-20/01 and C-28/01, *Commission v Germany*" (2003) 12 P.P.L.R. 5 at NA 109.

⁴⁶ I do not refer to the case of *Commission v Germany* in particular but to cases of ineffectiveness in general!

up, could the contractor be able to avoid (or - as the jurisdiction may require - claim that the court invalidated⁴⁷) the contract based on either fraud or mistake caused by the contracting authority and claim the related damages? Under the general contract law, it is widely recognised that damages are available where the ground for avoidance of the contract was the result of the fault of one of the parties.⁴⁸

Generally however, I would proceed from the *presumption* that as a diligent businessman, any contractor has to be aware of at least the most important rules applicable towards the procurement contract it intends to enter into, and/or to make at least minimum efforts towards learning that the contract is being awarded in harmony with such rules. Consequently, a contractor *presumably* should recognise a breach of art 2d (1). As this is only a presumption however, it is of course possible for the contractor to prove that the opposite is true due to circumstances of the case.

4. Conclusions

As was shown above, after becoming an unavoidable, compulsory remedy to follow certain serious breaches of EC procurement law, a discussion on consequences of ineffectiveness might benefit the compliant application of EC law. Excessive rights to positive damages might lessen the expected effectiveness of the new remedies.

Ineffectiveness of procurement contracts may result in claims of lost profit against contracting authorities that are based on different grounds under national laws of Member States. The right to such damages often depends on whether the contractor was aware or should have been aware of the breach that caused ineffectiveness.

Similarly to cases of returning illegal state aid, the standard of diligent businessman should be applied towards claims of loss of profit from ineffective procurement contracts.

In procurement cases, the presumption should be that a diligent businessman should normally have to be aware of at least the most important rules applicable towards the procurement contract it intends to enter into, and/or to make at least minimum efforts towards learning that the contract is being awarded in harmony with such rules. This is only a presumption and the contractor can always prove the opposite due to special circumstance of the case.

⁴⁷ see Notes to II. – 6:209, DCFR

⁴⁸ see Notes to II. – 6:214, DCFR .