

ICAPP 2024 Damages as a Remedy – Recent Developments and Future Perspectives



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Damages for lost opportunities in EU Public Procurement Law

The Departure Point

- Art 2(1)c Remedies Directive 89/665/EEC
 - damages must be available to „*persons harmed by an infringement*“

- Art 2(7) Remedies Directive for Utilities Sector 92/13/EEC
 - Special regime for recovery of bid costs
 - Claimant must only prove infringement and „*that he would have had a real chance of winning the contract and that, as a consequence of that infringement, that chance was adversely affected*“

A Turning Point?

- CJEU 6.6.2024, C-547/22 (INGSTEEL)
 - Damages claimed under the Remedies Directive „*may cover the loss or damage suffered as a result of the loss of opportunity*”
 - Damages for lost opportunities ≠ damages for lost profits
 - Reference to case concerning EU Institutional liability regime
- *General concept of damages for loss of opportunity in EU Procurement law?*

Which Way Forward? – Possible Future Developments

- „Institutional Liability Approach“ → loss of opportunity as an autonomous head of damages
 - „Utilities Sector Approach“ → claim for bid costs made available on basis of real chance as compensation for the loss of opportunity
- *Revision of Art 2(1)c of Remedies Directive for adequate balance of protection of diverging interests*

Thank you for your attention!



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