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The liability of a contracting authority for an infringement of public procurement rules leading to contractual ineffectiveness – a Finnish approach

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1. Introduction

The remedy of contractual ineffectiveness, based on the article 2 d of the Remedies Directive 2007/66, was implemented in Finland by the Act on Public Contracts (laki julkisista hankinnoista 30.3.2007/348, later referred as “APC”) in June 2010. The Remedies Directive 2007/66 left it to the Member States to decide whether the contractual ineffectiveness has retrospective (ex tunc) or prospective (ex nunc) effects. Unlike Sweden, Finland chose the latter. According to section 96.4 of the APC, a contract may be declared ineffective solely concerning the unperformed contractual obligations. The remedy of prospective contractual ineffectiveness applies only to contracts above the EU thresholds in Finland.2

Since the implementation of the Remedies Directive 2007/66 (and by the end of June 2015) the ineffectiveness remedy has been imposed only twice in Finland.3 One of the reasons for the sparse application of this remedy may be found within the Finnish Court system. The lengthy court proceedings seem to prevent the effectiveness of the ineffectiveness remedy. Even though interim measures are made available also after the contract has been signed, they are very rarely claimed together with the ineffectiveness remedy. Thus, there might not be any contractual obligations unperformed at the time of the court ruling.4

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2 The national thresholds in Finland are currently 30 000 euros for supplies and services, 100 000 euros for social and healthcare services and 150 000 euros for works. Although rises in thresholds are expected in 2016 when the new 2014 procurement directives are implemented.

3 See the Finnish Market Court cases MaO 20/14 and MaO 510/12.

4 This was the result in the Market Court cases MaO 438/14, MaO 57/14 and MaO 205/13. The first instance proceedings in the Finnish Market Court still often take more than a year and the appeal proceedings in the Supreme Court of Administration may take two years or more.
Also in some cases the Market Court has granted interim relief or decided not to declare a contract ineffective due to overriding reasons relating to general interest.5

Regardless of whether the ineffectiveness of a contract is retroactive or prospective, the question of a contracting authority’s liability is relevant in all Member States. A contracting authority’s liability for damages caused by contractual ineffectiveness has also interested legal professionals and academics since the adoption of the Remedies Directive 2007/66.6 The actual consequences of an ineffective contract and the potential liability of a contracting authority towards its contractor have also received some attention in certain legislative proposals and case law of the Member States.7 As the remedy has only been imposed twice in Finland and no claims of damages have been, at least to my knowledge, been presented relating to these above-mentioned cases, the question of a contracting authority’s liability towards its contractor due to contractual ineffectiveness remains unresolved.

The purpose of this article is to examine the consequences of an ineffective contract inter partes under Finnish law. Therefore, claims of other tenderers or potential suppliers having been harmed by a contracting authority’s infringement

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5 On interim relief, see MaO 35/14, MaO 142/14 MaO 689/14. On overriding reasons relating to general interests, see MaO 464/15, MaO 189/14, MaO 19/14, MaO 212–213/13 and MaO 200/13.

According to the Finnish legislative proposal on the remedies reform, a contracting authority may be held liable for contractual ineffectiveness and consequences of ineffectiveness would be determined under principles of contract and damages law. See HE 190/2009 vp., pp. 23–24 and 36.

The Swedish government states in its legislative proposal that the contracting authority’s liability for an ineffective contract is based on the principles of Swedish civil law. See prop. 2009/10:180, pp.136–137. Nevertheless, it is also suggested that the injured party may claim compensation for damages under Chapter 16 Section 20 of the Swedish Public Procurement Act (Lagen om offentlig upphandling, LOU). See prop. 2009/10:180, p. 361.

On Norwegian approach see NOU 2010:2, p. 175.

Under French law one cannot claim damages based on the contractual relationship if a contract is considered ineffective. As there are no damages provisions in the French public procurement legislation (Code de Justice Administratif and Code des Marchés Publics), a contracting authority’s liability is quasi-contractual (extra-contractual but related to a contract-like situation). The rules and principles of such liability are based on the French Council of State (Conseil d’État) case law. See CE 10.4.2008, Société Decaux and Departement des Alpes-Maritimes and CE, 26.3.2008, Société Spie Batignolles. See also J. Arnould, P.P.L.R. 2018, p. NA275.
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are excluded from the scope of this article. Nevertheless, it is important to point out that a contracting authority could face claims for damages both from its contractor due to the contract’s termination and from other suppliers having an interest in obtaining the contract.

One could argue that the risk of contractual ineffectiveness is not real if a contracting authority avoids direct awards or publishes a voluntary transparency notice for each contract it intends to award directly to a certain contractor. However, in C-19/13 Fastweb the CJEU held that the ineffectiveness remedy may be imposed regardless of the publication of a transparency notice and compliance with the standstill rules, if a contracting authority has not acted diligently while evaluating the grounds for a direct award.\(^8\) The burden of proof concerning diligent behaviour lies with the contracting authority.\(^9\) The CJEU’s Fastweb ruling increased the risks for contracting authorities as prior to Fastweb it was assumed in many Member States, Finland and Sweden included, that the ineffectiveness remedy cannot be imposed if a voluntary transparency notice is published and stand-still requirements relating thereto respected.\(^10\) In addition, taking into consideration the new detailed rules on contract modifications included in the new Procurement Directives 2014/24, 2014/25 and 2014/23\(^11\), it can be argued that the risk of contractual ineffectiveness may be present in any procurement contract. The consequences of significant contract modifications were elabora-

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\(^8\) *Ministero dell’Interno v Fastweb SpA* (C–19/13) September 11, 2014 (not yet published in European Court Reports), para 49–50.

\(^9\) For instance, see *Commission v Greece* (C–601/10) [2011] E.C.R. I-00163 para 32 (available in French), *Commission v Italy* (C-337/05) [2008] E.C.R. I-02173 para 57 and 58 as well as Commission v Germany (C-126/03) para 23. Thus contracting authorities should diligently record the grounds for a direct award.


ted by Simovart in an earlier issue of UrT this year. The risk of ineffectiveness should be taken into consideration when evaluating the possibilities to amend the contract under EU procurement rules.

This article is based on my recently published doctoral dissertation on contractual ineffectiveness and its consequences between the contracting parties in Finland. This article focuses on the different possible liability regimes applicable to a contracting authority’s liability in the event of contractual ineffectiveness.

2. The position of EU procurement rules

According to article 2(1)(c) of the Remedies Directive 2007/66, the Member States shall ensure that national review bodies have the power to award damages to persons that have suffered due to an infringement. Taking into account the wording of the above mentioned provision it might seem that any damages of any person would be recoverable under the Remedies Directive. If so, wouldn’t the Remedies Directive compensate the loss of an economic operator whose contract has been declared ineffective? Are all damages caused by breaches of public procurement rules recoverable under the EU procurement rules? As professor Treumer has argued, the formulation of rules in the Remedies Directive on damages is rather vague and does not contribute to the creation of a clear legal situation. According to Treumer this ambiguity is not limited only to the Remedies Directive, but also to national procurement rules.

The Remedies Directive 2007/66 primarily protects the rights of tenderers or suppliers, who have not been awarded a contract or the possibility to place a bid due to a contracting authority’s infringement. If the Remedies Directive is primarily designed to compensate those who have been deprived of the possibility to be awarded a contract, would then a contractor whose contract with a contracting authority has been declared ineffective be entitled for damages under the Remedies Directive at all? Has this contractor lost or actually gained from the infringement?

In the Remedies Directive 2007/66 it is stated that a review procedure should be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks of being harmed by an alleged

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14 S. Treumer, "Damages for breach of the EC public procurement rules – changes in European regulation and practice" (2006) 4 P.P.L.R. 159, pp.162–164. According to Treumer such ambiguity prevents the efficient enforcement of public procurement rules both at EU and national level.
The liability of a contracting authority for an infringement of public procurement infringement. A contractor’s right to damages after contractual ineffectiveness is not directly addressed in the Remedies Directive 2007/66. However, the European Commission has stated in the impact assessment report of the Remedies Directive 2007/66 that if a contract is declared ineffective, a contractor would lose any profit unduly expected from the project and costs that have been incurred to secure the contract. Despite of this, a contractor could be compensated in accordance with national legislation for costs relating to the performance of the contract. Due to lack of case law and the above-mentioned European Commission’s impact assessment report, it appears unclear whether the contractor is deprived of the use of remedies under Remedies Directive in any situation and also in an exceptional event where the contractor could show that it would have won the contract if the rules had been complied with.

In order to receive damages under EU procurement rules tenderers or suppliers are usually required to prove that they would have won the contract had there not been an infringement. This requirement of causality is based on the idea that damages occur only to the supplier who would have won the contract, as all tenderers but for the winner would need to cover the bidding costs themselves anyway. Such proof on the prospects of winning is difficult to attain if the contract has been awarded directly. Therefore, in the event of contractual ineffectiveness, it seems that a contractor would not in most cases receive compensation under the Remedies Directive as the contractor is required to prove that he would


If however a claim for damages concerns only bidding costs, the link of causality isn’t as strict. Then a contractor would have to show a real chance of winning. Though bidding costs are less relevant regarding damages caused by contractual ineffectiveness as the contract may have been awarded directly and there aren’t necessarily any bidding costs.

18 In KHO 2009:88 and KHO 2006:49 the Finnish Supreme Court of Administration established that in an event of direct award, there is no certainty of what would have been the terms of the award, which companies would have tendered and what would have been the prices and the terms of the bids.
have won the contract had the rules been complied with.\textsuperscript{19} However, one should bear in mind that EU directives are minimum regulations and Member States may extend the applicability of the rules further than required. For example in RH 2002:15, Swedish Göta Appeal Court held that any tenderer suffering damages due to the contracting authority’s infringement, should be entitled to compensation under the rules of LOU (\textit{lag 2007:1091 om offentlig upphandling}, the Swedish Procurement Act) regardless of the fact whether such tenderer would have had a real chance to win the contract.\textsuperscript{20}

It appears that the Remedies Directive 2007/66 is not applicable to a contractor’s damages if the conditions of contracting authority’s liability regarding the chain of causality are not met. If the liability of the contracting authority is not based on EU procurement rules, but rather the rules and principles of national contract and damages law, it seems that the CJEU case law on condition of negligence is not applicable. According to the CJEU case law, the liability

\textsuperscript{19} Same conclusion was reached by Treumer and Burgi, see S. Treumer, \textit{Enforcement of the EU Public Procurement Rules}, 2011, p. 291 and M. Burgi, \textit{Enforcement of the EU Public Procurement Rules}, pp. 147–148.

\textsuperscript{20} The Göta Appeal Court stated “Vad som här anförts om kausalitetskravet bör ses mot bakgrund av följande. Lagbestämmelsen vilar på artikel 1 (c) i rådets direktiv 89/665/EEG och artikel 2 (d) i rådets direktiv 92/13/EEG. Direktiven har tillkommit ytterst för att upphandlings-förfaranden skall öppnas för konkurrens inom hela gemenskapen genom att medlemsländerna åläggs att tillhandahålla effektiva rättsmedel, bl.a. i form av rätt till skadestånd (jfr ingressen till respektive direktiv). Det nämnda kausalitetskravet ligger inom ramen för detta syfte. Emellertid är det ingalunda så att direktiven ger uttryck för någon avsikt att begränsa de nationella skadeståndsreglerna till att gälla enhart de fall då en anbudsgivare har förlorat kontraktet till följd av överträdelser. Snarare ligger det i sakens natur att även överträdelser, som försorsakar sådana onyttiga anbudskostnader varom fråga är i förevarande mål, är ägnade att på sikt motverka konkurrensen i upphandlings-förfarandena. I allt fall innebär direktiven inte att de nationella skadeståndsreglernas räckvidd skall anses begränsad i det hänseende varom fråga är i målet.”

of a contracting authority shall not be conditional on negligence.\textsuperscript{21} Although since C-568/08 \textit{Spijker}, the position of the CJEU regarding the condition of negligence has not been quite clear.\textsuperscript{22} Even though at first it might not seem to be too important whether the compensation for damages is based on national or EU law, it is, if the liability under national law is conditional on negligence or ever more, if the liability is conditional on proof of severe violation of law. If a contract is awarded directly, one might suggest that a contractor would unlikely (or this is at least very difficult to show) have won the contract if there had been an award process. And even though a contract has been declared ineffective due to a violation of law, the same violation has led to awarding of the contract in a first place. This approach has been enforced in French case law. In case \textit{Decaux} the French Council of State (\textit{Conseil d’État}) took into consideration the fact that the contractor had gained from the infringement. According to the Council such benefit should reduce or remove the liability of a contracting authority.\textsuperscript{23} Similar ideas have been presented in the Swedish legal literature by \textit{Andersson}.\textsuperscript{24} This approach seems appropriate provided that a contractor would not automatically be denied from compensation in the event of contractual ineffectiveness. If however, the protection of legitimate expectations is strong under national law, as is the case in Finland, a contractor should be entitled to compensation, if it was acting in good faith and thus, entitled to rely on the legality of the contracting authority’s actions.\textsuperscript{25} Nonetheless, in this case, a contractor

\begin{thebibliography}{99}
\bibitem{21} The liability would be strict and unconditional on negligence if based on EU law, see \textit{Stadt Graz v Strabag AG and Others} (C-314/09) [2010] E.C.R. I-08769, para 45 and \textit{Commission v Portugal} (C-275/03) October 14, 2004 (not published in E.C.R, available in French) para 32. In \textit{Commission v Portugal} and \textit{Strabag} the CJEU held that contracting authority’s liability under EU procurement rules shall not be conditional on negligence. Under Portuguese law, contracting authorities were liable for infringements of public procurement rules only if they had acted \textit{ultra vires} or fraudulently which according to the CJEU was not in harmony with EU law (para 8 and para 32.). In C-314/09 \textit{Strabag} the CJEU ruled that national public procurement law, according to which the right to damages was conditional on negligence, was in violation of the Remedies Directive 89/665 (current 2007/66). The CJEU reasoned that directive 89/665 must be interpreted as precluding national legislation which makes the right to damages for an infringement of public procurement law by a contracting authority conditional on that infringement being culpable, \textit{including where the application of that legislation rests on a presumption that the contracting authority is at fault.}
\bibitem{23} Under French law one cannot claim damages based on the contractual relationship if a contract is considered ineffective. As there are no damages provisions in the French public procurement legislation (\textit{Code de Justice Administratif} and \textit{Code des Marchés Publics}), a contracting authority’s liability is extra-contractual (\textit{quasi-contractual}). The rules and principles of such liability are based on the French Council of State (\textit{Conseil d’État}) case law. See CE 10.4.2008, \textit{Société Decaux and Département des Alpes-Maritimes}. See also Arnould, P.P.L.R. 2008, p. NA275.
\bibitem{24} H. Andersson, \textit{Upphandlingsjuridikens skadeståndsrättsliga aspekter – en systematiserande probleminventering"}, (2014) 1 Upphandlingsrättslig Tidskrift (UrIf) 11, p. 17.
\end{thebibliography}
would not be compensated under not under the EU or national procurement
rules, but under national liability rules such as *culpa in contrahendo* principles
or national Tort Liability Act (*vahingonkorvauslaki* 412/1974). These liability
regimes are addressed later in this article.

It seems that damages due to contractual ineffectiveness may be compensated
under national law, but often not under EU procurement rules.\(^26\) As according to
the Remedies Directive, if not otherwise regulated nationally like in Sweden,\(^27\) a
successful claim of damages based on the EU procurement rules may be presented
only by those who have or have had an interest in obtaining a particular contract
and who have been or are in risk of being harmed by an alleged infringement.

A contractor’s right to claim damages based on contractual ineffectiveness
is subject to each Member State’s national law. Here, the basis for contracting
authority’s liability would not often be the breach of EU procurement rules
resulting to contractual ineffectiveness (a breach that has actually benefited a
contractor), but *a breach of legitimate expectations towards the legality of contracting
authority’s actions*. The liability relating to contractual ineffectiveness has not yet
been addressed in Finnish Courts. Therefore different regimes of liability both
contractual and extra-contractual should be examined.

3. Liability for contractual ineffectiveness towards a
ccontractor under Finnish Law

3.1 Contractual liability under Finnish law

The ineffectiveness remedy under section 96.4 of the APC has only prospective
effects (*ex nunc*). Even though consequences of a prospective contractual inef-
ficiveness are not as severe as they would be if the effects were retroactive (*ex
tunc*), a contractor nevertheless suffers damages in the form of losses of profit
and investments that have become useless due to contract’s cancellation. As
contractual ineffectiveness concerns only unperformed contractual obligations,
a contract has existed and been valid up to the point of a court’s decision. This

\(^26\) Remedies Directive 2007/66 para 17. See as well S. Treumer, *Enforcement of the EU Public Procure-
ment Rules*, 2011, pp. 40–41 as well as M. Burgi, *Enforcement of the EU Public Procurement Rules*,
2011, p. 147.

\(^27\) According to Swedish legislative preparatory work (memorandum *”Nya rättsmedel m.m. på upp-
handlingsområdet”* Ds 2009:30, p. 153), the loss of profit is recoverable regardless of a claimant’s
chances to win a contract if a contracting authority has violated law or the trust of its contractor.

A contractor is entitled to damages on the basis that its contract has been declared ineffective
and no proof on the chances to win the contract is required. See Swedish Government’s Proposal
on remedies reform prop. 2009/10:180, pp. 225–226. This approach has however been criticized in
Swedish legal literature. *Anderson* suggests that the liability should be based on the rules of *culpa
in contrahendo* (see H. Andersson, UrT, 2014, p. 17).
kind of cancellation of a contract is a novelty in Finland. Thus, consequences of contractual ineffectiveness are difficult to determine.

According to the Finnish government’s legislative proposal on the remedies reform, the contractual ineffectiveness is an administrative remedy and not a new form of contractual nullity. Under Finnish law, contractual liability may be limited by contract provisions. It seems that the government is suggesting that the liability of a contracting authority could be contractual as the parties to the contract could, according to the government’s proposal, provide for the event of ineffectiveness by contractual provisions.  

According to Remedies Directive 2007/66 the Member States shall ensure that the contractual rights and obligations cease to be enforced and performed when a contract is considered ineffective. If all rights and obligations cease upon the declaration of the ineffectiveness, shouldn’t the right to claim damages under the contract or the possible limitation of liability clauses cease to be enforced as well? The views presented in the Finnish government’s proposal, in which the ineffectiveness remedy was deemed as a purely administtrational remedy, have been considered inappropriate in Finnish legal literature as the remedy intervenes to contractual rights and obligations of parties to a contract. If contractual obligations are not enforceable after a contract has been declared ineffective, contractual ineffectiveness cannot be purely administrational or in other words, to only have consequences in the context of public law.

Taking the wording in the Remedies Directive 2007/66 into consideration, it seems hard to argue that a contract would not be ineffective also in the context of private law. Many scholars agree that a contracting authority’s liability cannot be based on a contract after the contract has been declared ineffective. According to Clifton the formulation in the Remedies Directive is clear and no contractual rights or obligations remain after a contract has been declared ineffective. Lichère and Gabayet point out that in France the parties cannot take advantage of the contractual provisions, seek enforcement before a judge or claim compensation based on contractual liability if the contract is considered ineffective. Therefore it seems that the liability of a contracting authority shall not be based on a contract,

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28 The wording administrative “hallinnollinen” is used in the government’s proposal, even though it may be a bit inaccurate, perhaps a remedy with public law nature would be more appropriate.
29 Finnish government’s proposal on remedies reform HE 190/2009 vp., p. 36 and 72.
Also in Norway contractual liability is not considered possible due to the consequences of the ineffectiveness remedy. See Norwegian legislative preparatory work NOU 2010:2, p. 175.
But on grounds of extra-contractual liability. As only contractual liability can be limited by contract provisions, it seems that contracting authorities couldn’t provide for ineffectiveness by limitation of liability clauses.33

3.2 Liability under section 107.1 of the Finnish Act on Public Contracts

The principle of parallel claims is approved in the Finnish case law.34 Hence, a claimant could seek compensation simultaneously for damages under the rules of contract law, the APC, *culpa in contrabendo* and the Finnish Tort Liability Act (412/1974). A contractor should claim damages for all possible grounds at the same time as *res judicata* – the legal finality and preclusion rules prevent a claimant to claim damages later on different grounds.35

Section 107.1 of the Act of Public Contracts is based on the Remedies Directive 2007/66. Therefore, the conditions of contracting authority’s liability for damages due to contractual ineffectiveness are subject to the conditions set in the Remedies Directive. According to section 107.1 of the APC a candidate, bidder or supplier is entitled to compensation for all damages suffered due to an

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33 More on the validity of contract provisions aiming to limit contracting authority’s liability in the event of contractual ineffectiveness see Halonen, P.P.L.R., 2015, pp. 118–120 where I have concluded that any limitation of liability clause included in the ineffective contract is also ineffective as under the Remedies Directive all rights and obligations cease to be enforced. Even if the parties would have agreed on a limitation of liability clauses in a collateral contract, such provisions wouldn’t limit contracting authority’s liability as expectancy of profit and thus the claim for loss of profit is based on a contract that has been declared ineffective. Those provisions wouldn’t have a direct effect on the possible extra-contractual responsibility of a contracting authority either, but they can be used as a sign of contributory negligence. However, the national laws differ on this as such contract provisions are expressly accepted and considered binding towards the parties as well as the courts according to the section 101 of Public Contract Regulation 2015 of England, Wales and Northern Ireland.

34 See the Finnish Supreme Court cases KKO 1983 II 157, KKO 1992:165 and 166 as well as KKO 2004:36.

infringement of public procurement rules. As it has been noted above, it seems that the Remedies Directive 2007/66 is not applied to a contracting authority’s liability for contractual ineffectiveness unless a contractor shows proof that it would have been awarded the contract had there not been an infringement. Such proof is difficult to provide if the contract has been awarded directly.\textsuperscript{36} In addition, if a contract has been declared ineffective by the Market Court due to a breach of standstill or automatic suspension, the likelihood of winning is almost impossible to prove by the tenderer claiming damages for loss caused by the ineffectiveness in a District Court. In these events the remedy of contractual ineffectiveness itself entails a notion that the contract was wrongfully awarded to the party to the contract that has now been declared ineffective, and the Market Court can only impose the remedy of contractual ineffectiveness if the contracting authority has also breached other procurement rules and by doing so harmed the chances of the tenderer claiming for the ineffectiveness to win the contract. In other words, if the Market Court has ruled on the fact that the breach of the contracting authority has harmed the chances of the unsuccessful tenderer claiming for the effectiveness to win the contract, it is unlikely that a District Court would take an opposite position in favour of the party to the ineffective contract who has been harmed by the ineffectiveness.\textsuperscript{37}

The Member States may however extend the applicability of national procurement rules to protect also the rights of the contractor as was done in Sweden. This appears to be the case also in Norway.\textsuperscript{38} In accordance with the legislative proposal of the Swedish government, a contractor is entitled to damages under the rules of LOU on the basis that its contract has been declared ineffective and it seems that no proof of the chances to win the contract is required.\textsuperscript{39} This approach has been criticized by Andersson. He suggests that such liability cannot be based on the rules of LOU, but to the rules of \textit{culpa in contratbendo}, an argumentation that seems to be valid also in Finland.\textsuperscript{40} On the other hand, in Sweden, the position on the applicability of LOU’s rules was different in the Ds 2009:30 memorandum where it was stated, similarly to Andersson, that compensation could be based on the general rules of damages law under which the loss of profit is recoverable if a contract is considered ineffective and a con-

\textsuperscript{36} See fn 17.
\textsuperscript{37} Halonen, P.P.L.R 2015, pp. 112–113.
\textsuperscript{38} NÖU (Norja) 2010:2 s. 175 ”Etter gjeldende rett er det klart at § 10 ikke bare gjelder for forbigåtte leverandører, men for alle parter som måtte ha lidt tap i forbindelse med en anskaf-felsprosess. \textit{Dersom vil også oppdragsgivers medkontrahent i utgangspunktet kunne være erstatningsrettlig vernet dersom en kontrakt kjennes uten virkning}”.
tracting authority has acted negligently and violated procurement rules as well as the trust of its contractor.\textsuperscript{41}

Despite of the criticism presented by Andersson above, the rules of LOU seem applicable to a contracting authority’s liability according to the Swedish government’s proposal also in the event of contractual ineffectiveness. However, this appears not to be the case in Finland. In the legislative preparatory work the Finnish government has not addressed contracting authority’s liability in detail. Therefore, it appears that a contractor cannot claim damages caused by contractual ineffectiveness under the rules of Finnish procurement rules (APC) solely on the basis that a contract has been declared ineffective, but is required to show proof that it would have won the contract had the rules been followed. As stated above, such causal link is difficult to prove. Thus, it is not likely that in Finland, a contracting authority would be held liable under the rules of APC towards its contractor in the event of contractual ineffectiveness.

3.3 Liability for negligent behaviour under the rules of culpa in contrahendo

Due to the nature of contractual ineffectiveness and the requirement to show proof on one’s chances to win a contract, a contractor will unlikely recover damages under rules of contract law or the APC in Finland. A valid contract is a condition for contractual liability. Also it appears that claims for damages under the Remedies Directive 2007/66 or the national legislation (APC) which the Remedies Directive has been implemented into, are usually successful only if a contractor should have won the contract in any case.

*Culpa in contrahendo* is a regime of pre-contractual liability and it is based on malicious or negligent behaviour of a negotiating party. The liability may be based on *culpa in contrahendo* also when the contract is considered null and void. In negotiations parties have to be able to rely on the other party’s actions and good intentions. According to the doctrine of *culpa in contrahendo* the trust between the parties in negotiation is protected. An injured party may successfully seek

\textsuperscript{41} Swedish legislative preparatory work on procurement rules (memorandum ”Nya rättssmedel m.m. på upphandlingsområdet” Ds 2009:30, p. 153) ”Det som närmast avses är om en leverantör som har slutit ett avtal som ogiltig förklaras bör ha rätt till skadestånd. Om det inte införs några särskilda regler om skadestånd i LOU och LUF torde frågan få bedömas enligt allmänna regler om rätt till skadestånd vid avtals ogiltighet. Det framstår som naturligt att vid en bedömning i ett enskilt fall även beakta att det huvudsakliga ansvaret för att upphandlingsreglerna följs vilar på den upphandlande myndigheten eller enheten. Om den upphandlande myndigheten eller enheten förfarit försumligt och leverantören varit i god tro avseende avtalets förenlighet med upphandlingslagstiftningen, torde det innehåra att leverantören har rätt till ersättning för sina kostnader och för utebliven vinst. Om leverantören varit i ond tro framstår det som mer tveksamt om leverantören har rätt till skadestånd.”
compensation on damages resulting from a breach of trust regarding a fulfilment or legality of a contract.\textsuperscript{42}

In Germany \textit{culpa in contrabendo} is anchored in the German Civil Code.\textsuperscript{43} In Finland the pre-contractual liability is not regulated, but it is based on general principles and case law. The lack of an official doctrine and legislation has not however prevented Finnish courts from applying \textit{culpa in contrahendo} rules in situations where the traditional contractual or delict-based rules face difficulties.\textsuperscript{44}

According to the case law of the Finnish Supreme Court (\textit{Korkein oikeus}, KKO) contract negotiations are not binding and parties may exit the negotiations without consequences.\textsuperscript{45} On the other hand, if a party to negotiations has malicious or illegal intentions or is acting negligently which consequently leads to a contract’s nullity, the liability of such party is determined under the principles of \textit{culpa in contrahendo}.\textsuperscript{46}

In Finnish legal literature the nullity of a contract has been described as not binding and unenforceable.\textsuperscript{47} The consequences of contractual ineffectiveness in comparison to consequences of contractual nullity have received a little attention until recently. However, it seems that contractual ineffectiveness is also leading to the unenforceability of all contractual obligations. According to recital (21) of the Remedies Directive 2007/66, the Member States shall ensure that contractual rights and obligations cease to be enforced and performed when a contract is declared ineffective. \textit{Ineffectiveness is, according to the Remedies Directive, a cancellation of all contractual rights and obligations.} Thus, a contract is, at least in principle, valid until a declaration of ineffectiveness \textit{ex tunc} or \textit{ex nunc} is being made, but retrospective ineffectiveness leads to the same economic and judicial end result with a contract’s nullity, as a valid contract is cancelled by court’s decision from the beginning.\textsuperscript{48}

Contracting authority’s liability may be based on the rules of \textit{culpa in contrabendo} if a contract is considered null and void. Even though \textit{culpa in contrabendo} rules are typically applied in cases where a final contract is never entered into or where a contract is considered null and void, the rules of pre-contractual liability may be applicable also to contracting authority’s liability relating to contractual

\textsuperscript{42} The Finnish Supreme Court has applied the rules of pre-contractual liability for example in KKO 2008:91, KKO 2009:45 ja KKO 2011:6. On the Finnish \textit{culpa in contrahendo} rules see for example M. Hemmo, Sopimus ja delikti (Jyväskylä, 2008), pp. 203–204.

\textsuperscript{43} On the German \textit{culpa in contrahendo} rules, see M. Burgi, \textit{Enforcement of the EU Public Procurement Rules}, 2011, p. 148.

\textsuperscript{44} See fn 41.

\textsuperscript{45} KKO 1984 II 181 and KKO 2009:45.

\textsuperscript{46} KKO 2009:45.


\textsuperscript{48} Similar views are presented by Kaisto, Varallisuusoikeus ja julkiset hankinnat, 2009, p. 246.
ineffectiveness. Consequences of a contract’s nullity are similar to retrospective ineffectiveness. One could argue that the consequences of the ineffectiveness remedy and contractual nullity are similar. In addition, the consequences of ineffectiveness *ex tunc* and *ex nunc* differ, according to the Remedies Directive, only by temporal dimension. If the principles of *culpa in contrahendo* can be applied to situations where the contract is null and void or ineffective with *ex tunc* effects, it is possible that these principles could be applied also to prospectively ineffective contracts even though the contract has been valid for some time.

A liability may be based on the rules of *culpa in contrahendo* if there is no contract between the parties and if malicious or negligent behaviour of a party within contract’s preparation phase or negotiations has consequently led to contract’s nullity. One might suggest that the legal situation following contractual ineffectiveness meets the criteria presented above. Since a contract has been declared ineffective, there is no contract between the parties (at the moment of the claim). Secondly, a contract may be declared ineffective only if a contracting authority has infringed public procurement rules. Thirdly, under Finnish law, a violation of law, an infringement of procurement rules for example, would in most cases be considered negligent behaviour as such. The ineffectiveness of the contract is a direct consequence of a contracting authority’s infringement at the contract preparation stage. *Culpa in contrahendo* rules could be applied when a contract is retrospectively ineffective. In addition it might be applicable also when the ineffectiveness has only prospective effects. If the consequences differ between *ex tunc* and *ex nunc* ineffectiveness only by temporal dimension, the fact that a contract has existed and been valid for a while prior to the declaration of its prospective ineffectiveness, should not prevent a contractor to recover its damages caused by contracting authority’s failures.

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49 In my doctoral dissertation I have concluded that regardless of whether the ineffectiveness is *ex tunc* or *ex nunc* in nature, the contract is unenforceable and non-binding after the declaration of ineffectiveness. The difference between the *ex tunc* and *ex nunc* ineffectiveness is their time-related dimension (Halonen, *Hankintasopimuksen tehottomuus*, 2015, p. 92). Also Clifton and Henty have pointed out that the consequences of ineffectiveness should only differ by their time-related dimension. See Clifton, P.P.L.R 2009, p. 173 and P. Henty, “OGC consultation on the implementation of the new Remedies Directive” (2009) 1 P.P.L.R. NA48, p. NA50.

See as well Norwegian preparatory work on the remedies reform NOU 2010:2, p. 175.

3.4 Liability under the rules of the Tort Liability Act

Even though a successful claim for damages based on an ineffective contract or the national procurement rules (the APC) is unlikely in Finland, the contractor may recover damages based on the authority’s negligence under the doctrine of *culpa in contrabendo* or the Finnish Tort Liability Act. Nevertheless, a recovery of damages under the Tort Liability Act could in some cases be difficult, as according to chapter 5 section 1 of the Tort Liability Act, pure economic loss (i.e. damages not connected to personal injury or damage to property), are only recoverable on specific grounds.

A pure economic loss is recoverable only if the damage has been caused by an act punishable by law or in the exercise of public authority, or in other cases, where there are especially weighty reasons for the recovery of such damage. However, conditions of liability for a public authority are stricter. An authority or an official is liable for damages inflicted by the exercise of public authority only if the performance of the activity or task, in view of its nature and purpose, has not met the reasonable requirements set for it. Therefore, the question of whether awarding a contract in accordance with procurement rules constitutes as an exercise of public authority or not, should be resolved.

Even though some Finnish academics have reached different conclusion\(^{51}\), in my opinion a contract award does not usually include exercise of public authority.\(^{52}\) It should be borne in mind that under the EU procurement rules, contracting authorities are often public authorities but also private companies can meet the criteria of a contracting authority. According to section 124 of the Finnish Constitution (*Suomen perustuslaki* 731/1999), “a public task may be delegated to others than public authorities only by an Act or by virtue of an Act, if this is necessary for the appropriate performance of the task and if basic rights and liberties, legal remedies and other requirements of good governance are not endangered. However, a task involving significant exercise of public powers can only be delegated to public authorities”. If the award of a public contract would be considered as an exercise of public power, only public authorities would have the competence to award contracts without a delegation order by law. Also in KKO 2013:19 the Finnish Supreme Court considered procurement contracts to fall under the rules of private law. Thus it appears that the participation to a public contract award should be considered as a part of business activities of the economic operator in question and the decision on a contract award would

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not be considered as an exercise of public authority. It appears that similar approach has been adopted in Sweden.\textsuperscript{53} Hence, the pure economic loss due to contractual ineffectiveness should not be recovered based on Tort Liability Act’s rules regarding exercise of public authority but rather if there are other weighty reasons for compensation.

In the Finnish Supreme Court’s case law, though not related to procurement, a breach of law, trust or legitimate expectations has been regarded as such weighty reason and a basis for liability. In KKO 1999:32, the Supreme Court stated, “it is of utmost importance to protect the legitimate expectations of individuals for any information or commitments that are given or may be interpreted to be given in public office” (author’s translation).\textsuperscript{54} Diligent behaviour of public officials and protection of legitimate expectations regarding decisions and actions of public authorities, are considered to be fundamental principles under both EU and national law.\textsuperscript{55} As public procurement rules create duties only to contracting authorities, contracting authorities can be expected to have a higher expertise concerning the legality of their procurement practices.\textsuperscript{56} The protection of legitimate expectations is strong under Finnish Law. Thus, it appears that a contractor’s claim for damages under the rules of Tort Liability Act could be successful provided that a contractor has in good faith relied on the legality of a contracting authority’s actions.\textsuperscript{57}

3.5 Damages recoverable

If the liability of a contracting authority is based on national law, the damages are assessed accordingly. The compensation for damages under the principles of \textit{culpa in contrahendo} or the Tort Liability Act usually excludes loss of profit


\textsuperscript{54} In KKO 1992:44, the Finnish Supreme Court held that an attorney was liable for damages he had inflicted, as he had breached the legitimate expectations attached to his position as a liquidator.

\textsuperscript{55} According to Advocate General Yves Bot’s opinion on C–19/13 \textit{Fastweb}, delivered April 10, 2014, the diligent behaviour of a contracting authority is a fundamental principle also within EU law (para 84]). See as well Halonen, \textit{Hankintasopimuksen tehottomuus}, 2015, p. 195–197.

\textsuperscript{56} See working group memorandum on remedies reform in Finland pp. 81–82 (Julkisten hankintojen oikeususojärjestelmän uudistaminen, työryhmämietintö 2008:6). Also Treumer has suggested that the fact that EU procurement rules only impose duties to contracting authorities may be significant when evaluating authority’s liability for the contractor. See Treumer, \textit{Enforcement of the EU Public Procurement Rules}, 2011, pp. 289–290.

\textsuperscript{57} On the requirement of good faith under Finnish law, see especially Halonen, P.P.L.R., 2015, pp. 114–117.
The liability of a contracting authority for an infringement of public procurement

...
Tort Liability Act, a contractor may under Finnish Law, receive compensation mainly on costs and expenses caused by the contractual ineffectiveness, such as contractor’s investments that have become useless. These expenses (the negative contract interest) consist of, but are not limited to, bidding costs and damages relating to the negotiation of the contract, renting premises, leasing or purchasing equipment or hiring additional labour for the contract’s performance.

4. Conclusions

Public procurement rules impose duties only to contracting authorities. If a contracting authority breaches these rules, it may be held liable for damages caused by such infringement. It is likely that a contractor, regardless of whether the ineffectiveness is prospective or retrospective, suffers damages due to contract’s cancellation. However, due to the lack of case law and ambiguous Finnish legislative preparatory work, the rules applicable to contracting authority’s liability toward its contractor in the event of contractual ineffectiveness are open to interpretation.

It may be argued that the purpose of EU procurement rules is not to protect rights of a contractor suffering damage due to contract’s ineffectiveness as such damage would have not occurred, had the rules been complied with. It is unlikely that a contractor could successfully claim damages in accordance with the Remedies Directive 2007/66 for damages resulting from contractual ineffectiveness, as the contractor is required to show proof that it would have won the contract had there not been an infringement. Therefore, the compensation in the event of a contract’s ineffectiveness is often subject to the rules of national law. Even though it appears that the Remedies Directive does not protect the interests of the contractor, in Sweden it is considered that the contractor can recover damages under the rules of LOU.

In Finland the question of a contracting authority’s liability has not been elaborated in legislative preparatory work or in case law. The views presented by the Finnish Government in the legislative preparatory work seem to imply that the contracting authority’s liability could be based on a contract. However, it seems that the above-mentioned approach is in conflict with the Remedies Directive. According to the Directive, the purpose of ineffectiveness remedy is to cancel all contractual rights and obligations between the contracting parties. If all contractual rights have become unenforceable, a contracting authority’s liability cannot be based on a contract.

Unlike in Sweden and Norway, there are no indications in the Finnish APC or in the legislative preparatory work that damages for ineffectiveness could be recovered under the rules of APC solely on the basis that a contract is declared ineffective. In addition, it seems that in any case, a contractor would have to
show proof that it would have won contract had there not been an infringement. Therefore, a claim for compensation on damages resulting from contractual ineffectiveness is unlikely successful under section 107.1 of the APC.

If a contractor has been in good faith, it might successfully claim damages based on the rules of *culpa in contrahendo*. In addition, an injured party could, based on the breach of legitimate expectations, receive compensation under the rules of Finnish Tort Liability Act. As ineffectiveness in Finland concerns only unperformed obligations, parties to a contract have no obligation for restitution on payments received or supplies delivered prior to a declaration of ineffectiveness.\(^\text{63}\) The compensation under the Finnish delict-based rules would likely exclude loss of profit. However, the approaches adopted in different Member States regarding the recovery of loss of profit are different, as it seems that a contractor may receive compensation on positive contract interest in other Member States such as France and Sweden for example.

\(^\text{63}\) An obligation to pay restitution may however emerge if a contracting authority has made an advance payment without receiving equivalent performance from its contractor or if a contractor has performed obligations without payment that a contracting authority has received benefit from.