



## Loss of opportunity is compensable in public procurement

*Judgment of the Court of Justice of the European Union of 6 June 2024 (C-547/22)*

How many times have you heard that “the important thing is to participate”? Whoever said it surely did not think that a judgment of the Court of Justice of the European Union (CJEU) would ever uphold their thesis. Or, at the very least, that it would point out that Member States cannot exclude at first glance compensation for missed opportunities to participate.

### Background

The background of the case dates back to 2013, when the Slovak Football Association excluded a consortium, of which the company INGS-TEEL was a member, from a tender procedure concerning works for the refurbishment and construction of football stadiums. The reason that they provided for the exclusion was that the consortium did not meet the requirements of the tender notice regarding its economic and financial capacity.

Following an earlier preliminary ruling (Judgement of the CJEU of 13 July 2017, Case C-76/16), the Slovak Supreme Court annulled the exclusion. Unfortunately, a framework agreement had already been concluded with the only remaining tenderer after excluding the Consortium.

As a result, the consortium sought compensation for the damages it suffered before the District II Court of Bratislava. After analysing the case, the Court decided to stay the proceedings and to refer the matter to the CJEU for a preliminary ruling about whether a national court

refusing compensation for loss of opportunity acts in accordance with Directive 89/665. In its referral, it explained that INGSTEEL had sought compensation for loss of profit, since Slovak law provides that “compensation is to be paid for actual loss and loss of profit, unless otherwise specifically provided”, without explicitly recognising compensation for loss of opportunity.

### Compensation for loss of opportunity

As a starting point, Article 2(1)(c) of the Directive 89/665 broadly provides that “Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to “(c) award damages to persons harmed by an infringement”.

As we have emphasised in previous Capsules, it is settled case-law of the CJEU that in order to interpret a provision of EU law “it is necessary to consider not only the wording of that provision but also the context in which it occurs and the objectives pursued by the rules of which it is part”. These three concepts, as understood by the CJEU in this case, are described as it follows:

- On the literal interpretation: the CJEU points out that Directive 89/665 is a broadly formulated provision and that, in the absence of any indication to distinguish different categories of damage, it may cover any type of damage. This interpretation suggests, therefore, that the Union’s legislators did not intend to exclude the loss of opportunity



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to participate in a tender procedure as a compensable loss.

- On the contextual interpretation: the CJEU points out that it is settled case law that “individuals harmed by a breach of EU law attributable to a Member State have a right to compensation where three conditions are met: the rule of EU law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between the breach and the damage sustained by those individuals”.

The highlight of this reading is that it is clear from the Directive 89/665 itself that the purpose of the appeal system is to ensure respect for the right to effective judicial protection, in accordance with Article 47 of the Charter of Fundamental Rights of the European Union.

- On teleological interpretation: the CJEU briefly points out that although the Directive 89/665 does not fully harmonise all possible remedies in the field of public tenders, it is clear that the legislator’s intention is to ensure that in all Member States the annulment of unlawful decisions as well as the compensation of injured parties is possible, without the legislator wishing to exclude any type of damage.

This objective would not be fulfilled if the Directive was interpreted as Member States being able to exclude, as a matter of principle, that compensation is obtained in case of loss of opportunity.

The CJEU’s reasoning is particularly clear when it ascertains that “while damage may result from the failure to obtain, as such, a public contract, it must be held that (...) the tenderer who has been unlawfully excluded to suffer separate damage,

which corresponds to the lost opportunity to participate in the procedure for the award of a public contract concerned in order to obtain that contract”.

### The quantification issue

The theoretical approach is clear. However, the CJEU notes that it will up to the legal system of each Member State to lay down the criteria for determining and quantifying the damage arising from loss of opportunity. On this point, the CJEU indicates that, although it is true that the Slovak courts have been interpreting that loss of profit must be compensated when it is “highly probable, or even close to certain”, the principle of primacy binds the courts to interpret their domestic law in accordance with EU law “and that that obligation to interpret national law in conformity with EU law requires national courts to change established, and even settled, case-law if it is based on an interpretation of domestic law that is incompatible with the objectives of a directive”.

This can be interpreted as a recommendation to the Bratislava Court to cautiously review whether the narrow interpretation of “loss of profit” in Slovakia would, as a matter of principle, preclude the award of compensation for loss of opportunity because the threshold of proof requested (“highly probable loss of profit”) would be unattainable.