BRATISLAVA LAW REVIEW

PUBLISHED BY
COMENIUS UNIVERSITY BRATISLAVA
FACULTY OF LAW

p-ISSN 2585-7088
e-ISSN 2644-6359

CJEU: INGSTEEL II (CASE C-547/22): Compensation for Lost Opportunity – A Pivotal Judgment That Changes Little

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This paper was supported by the Scientific Grant Agency Ministry of Education, Science, Research and Youth of the Slovak Republic and Slovak Academy of Sciences (VEGA) within the project 1/0710/23 "Damages in competition law and public procurement - limits and challenges to effective enforcement of the European Union law".

Abstract: *The judgment of the Court of Justice of the European Union in INGSTEEL II (case C-547/22) appears, at first glance, to mark a significant step in the development of damages remedies for breaches of EU public procurement law, by precluding national legislation or practice that categorically excludes compensation for harm resulting from the loss of an opportunity to obtain a public contract. This commentary argues, however, that the judgment is less transformative than it initially seems. Although the Court confirmed that loss of opportunity cannot be excluded as a matter of principle from the scope of Article 2(1)(c) of the Remedies Directive, it neither recognised loss of opportunity as an autonomous head of damage under EU law nor clarified its content, conditions, or quantification.*

The paper situates INGSTEEL II within the broader context of the Remedies Directive's minimal harmonisation, the Court's fragmented case law on damages (including Commission v Portugal, Strabag, Spijker, and the Fosen-Linjen saga), and the tension between EU-level effectiveness requirements and Member States' procedural autonomy. Particular attention is paid to the Slovak legal context underlying the reference, revealing that the judgment does not substantially alter Slovak law, which already allows—at least in theory—compensation for loss of opportunity within the concept of lost profit.

The analysis demonstrates that INGSTEEL II employs a "double-negative" approach: rather than defining compensable harm, the Court merely prohibits its absolute exclusion. As a result, key issues—such as causation, evidentiary standards, and damages in the context of framework agreements—remain unresolved and are left to national law. The commentary concludes that judicial harmonisation through case law cannot provide a coherent or comprehensive system of compensation for unlawfully excluded tenderers and argues that meaningful clarification requires legislative reform of the Remedies Directive, potentially inspired by the structure of Directive 2014/104/EU on antitrust damages.

Key words: *EU Law; Public Procurement; Damages; Unlawful Exclusion; Remedies Directive; Loss of Opportunity; Loss of Profit*

Suggested citation:
Blažo, O. (2025). CJEU: INGSTEEL II (Case C-547/22): Compensation for Lost Opportunity – A Pivotal Judgment That Changes Little. *Bratislava Law Review*, 9(2), 293-308. https://doi.org/10.46282/blr.2025.9.2.1193

Submitted: 01 December 2025
Accepted: 23 December 2025
Published: 31December 2025

1. INTRODUCTION

In his 2019 paper, Caranta suggested that "*If legislative reform is shelved for the moment, the Fosen-Linjen saga can hardly be seen as the closing chapter for damages in EU procurement law*" (Caranta, 2019, p. 211). Although the European Commission

envisaged reform of public procurement law, reform of the Remedies Directive[1] still appears to be out of sight. The *INGSTEEL II* case adds another brick to the harmonisation-through-judgment approach to compensation for harm resulting from infringements of public procurement law. The Court of Justice (hereinafter "**the Court**" or "**CJEU**") addressed the question of whether harm suffered through the loss of opportunity by an economic operator unlawfully excluded from a public procurement procedure is covered by the obligation to award damages under Article 2(1)(c) of the Remedies Directive.

The conclusions of the judgment[2] are quite straightforward: "*Article 2(1)(c) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, 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 with a view to obtaining the contract concerned.*" Hence, the Court confirmed the right to compensation for damage suffered as a result of the loss of opportunity in public procurement within the ambit the Public Procurement Directive,[3] a concept that has long been recognised in the context of the EU's non-contractual liability for infringements of public procurement law committed by EU institutions.

The operative part of the judgment in INGSTEEL II provides only a limited answer as to the applicability of the right to compensation for damage suffered as a result of the loss of opportunity; it does not, however, provide any details as to the content, scope, or conditions of this type of damages. Moreover, the Court's reasoning is relatively succinct, being set out in only 19 paragraphs on the substance. As a result, deeper insight into the arguments of the parties and the broader case-law context can be drawn from the Opinion of Advocate General Anthony Michael Collins.[4]

Although *INGSTEEL II* appears to be a seminal judgment in the context of damages claims in public procurement, the key question remains whether it has in fact resolved the underlying issue.

2. LEGAL REGULATION AND LEVEL OF HARMONISATION OF DAMAGES

In contrast to the detailed rules laid down in the Public Procurement Directive, the Remedies Directive provides only a framework and a minimal level of harmonisation of remedies for irregularities in public procurement procedures covered by the Public Procurement Directive. Harmonisation with respect to damages is even more limited.

[1] Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, pp. 33–35). Although Art. 2 of the original directive was replaced by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ L 335, 20.12.2007, pp. 31–46), the wording of Art. 2(1)(c) itself remained unchanged.

[2] CJEU, judgment of 6 June 2024, INGSTEEL, C-547/22, EU:C:2024:478 (hereinafter also "**Judgment *INGSTEEL II***").

[3] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, pp. 65–242).

[4] CJEU, opinion of Advocate General Collins of 7 December 2023, INGSTEEL, C-547/22, EU:C:2023:967 (hereinafter also "**Opinion *INGSTEEL II***").

Article 2(1)(c) provides that: "*1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to: (…) (c) award damages to persons harmed by an infringement.*" The Remedies Directive contains no further details regarding the scope or conditions for the award of such damages.

The sixth recital of the Remedies Directive states: "*Whereas it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement*." The Remedies Directive thus contains provisions typical of the definition of the procedural autonomy of the Member States. Under Article 2(7), "*(…) the effects of the exercise of the powers referred to in paragraph 1 of this Article on a contract concluded subsequent to its award shall be determined by national law*." From the wording of Article 1(1) and (2), the standards of effectiveness and equivalence are also apparent.

By contrast with the Remedies Directive applicable in the public sector, Directive 92/13/EEC[5] applicable in the utilities sector contains, in Article 2(7), additional details concerning damages claims: "*Where a claim is made for damages representing the costs of preparing a bid or of participating in an award procedure, the person making the claim shall be required only to prove an infringement of Community law in the field of procurement or national rules implementing that law 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*." Since the Court analysed remedies solely from the perspective of the Remedies Directive applicable to the public sector, it made no comparison with, nor provided any explanation for, this discrepancy between the two directives.

In the context of damages for infringements of public procurement rules, it is useful to recall that the EU has provided harmonisation of damages rules in the field of competition law by defining the right to full compensation as follows:

> "*1. Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm.*
> *2. Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest.*"[6]

As Directive 2014/104/EU does not expressly provide for compensation for loss of opportunity as a specific category of harm under EU law, while at the same time conceiving the scope of compensation as "full", loss of opportunity appears to be a concept specific to public procurement law. On the other hand, situations in which the infringer of EU law deprives the injured party of the benefits of a contract—whether in the context of competition law or public procurement law—seem, in principle, to be covered by damages for loss of profit.

[5] Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76, 23.3.1992, pp. 14–20) as amended.
[6] Article 3(1) and (2) of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349, 5.12.2014, pp. 1–19) (hereinafter also "**Directive 2014/104/EU**").

DOI: 10.46282/blr.2025.9.2.1193

Due to the extremely low standard of minimal harmonisation of damages in public procurement matters, the establishment of further conditions has been left to the case law of the Court.

3. CONTEXT OF THE *INGSTEEL II* CASE

The judgment in *INGSTEEL II* is one of currently two CJEU judgments[7] connected to the judicial saga concerning the reconstruction of football stadiums in Slovakia (the case dealing with the construction of the Bratislava football stadium[8] is unrelated to the *INGSTEEL* saga).

The saga began in 2013, when the Slovenský futbalový zväz (Slovak Football Federation), acting as a contracting authority, launched a public procurement procedure for a framework contract. Unsuccessful tenderers (Ingsteel spol. s r. o. and Metrostav a.s.) challenged the requirement that a loan or credit facility be available from a bank throughout the entire duration of the contract, arguing that it was contrary to public procurement rules.[9] The claim was initially rejected by the contracting authority, Úrad pre verejné obstarávanie (Slovak Public Procurement Regulatory Authority, hereinafter also "**ÚVO**"), and subsequently by the Regional Court in Bratislava, until the case reached the Supreme Court of the Slovak Republic, which referred it to the CJEU.

Following the judgment in *INGSTEEL I*, the Supreme Court annulled both the ÚVO Board's decision and the ÚVO decision and referred the case back to the ÚVO. In 2018, the ÚVO issued a new decision, ordering the annulment of the applicant's exclusion from the procurement procedure.

As the public procurement procedure had concluded and the contract was awarded to the only remaining tenderer, the wrongfully excluded tenderer, Ingsteel spol. s r. o., sought damages. The parties are incorrectly identified in both the judgment and the Opinion of the Advocate General in *INGSTEEL II*. In fact, the applicant sought damages against the Slovak Republic, not against the ÚVO. Under Slovak rules on State liability, actions must be directed against the Slovak Republic, with the responsible authority merely representing the State in the dispute.[10] The correct identification of the defendant is not merely a rhetorical matter but also determines the applicable liability regime under Slovak law.

The legal framework for compensation of harm has been subject to disputes due to a legal dichotomy between civil law *stricto sensu*, governed by liability rules enshrined in the Civil Code,[11] and commercial law, which includes corporate rules as well as contractual and non-contractual liability under the Commercial Code.[12] These two regimes differ with respect to conditions for culpability (civil liability may be based on fault or strict liability, depending on the type and grounds of liability, while commercial law liability is always strict) and limitation periods (Kováčiková, 2025, p. 366). For State liability, a separate regime applies under Act No 514/2003.[13]

[7] Together with Judgment of 13 July 2017, INGSTEEL and Metrostav, C-76/16, EU:C:2017:549 (hereinafter also "**Judgment *INGSTEEL I***").
[8] CJEU, judgment of 17 October 2024, NFŠ, C-28/23, EU:C:2024:893.
[9] CJEU, judgment of 13 July 2017, INGSTEEL and Metrostav, C-76/16, EU:C:2017:549, paras. 15-19.
[10] In the Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice (Case C-547/22), the defendant is correctly named as "the Slovak Republic represented by the Úrad pre verejné obstarávanie".
[11] Act No. 40/1964 Coll. Civil Code as amended.
[12] Act No. 513/1991 Coll. Commercial Code as amended.
[13] Act No. 514/2003 Coll. on Liability for Damage Caused in Performance of Public Authority as amended.

The applicant invokes State liability for the unlawful decision of the ÚVO and its Board, which confirmed the exclusion from the public procurement procedure, a decision later annulled by the Supreme Court. Although the ÚVO subsequently ordered the cancellation of the exclusion, this decision could not be enforced because the tender had closed and the contract had been concluded. Notwithstanding this legal trichotomy, none of the three regimes recognises loss of opportunity as a distinct head of harm for the purposes of damages claims. All three systems recognise only actual loss (*damnum emergens*) and loss of profit (*lucrum cessans*) as compensable harm;[14] non-pecuniary harm is not relevant in this case.

Regarding the substance of the dispute before the District Court Bratislava II, Ingsteel spol. s r. o. claimed damages amounting to EUR 819,498.10, excluding VAT. This sum was calculated on the basis of an expert opinion and represented lost profit arising from the fact that the contract was not awarded to the applicant—despite its tender being more economically advantageous—due to an infringement of public procurement rules. In addition, the applicant sought reimbursement of the costs incurred in obtaining the expert opinion.

In its action, the applicant expressly sought compensation for lost profit, which the defendant contested on the grounds that such damage was too hypothetical. One of the arguments against establishing liability was that, because the applicant had been excluded from the procurement procedure, the selection committee did not assess its tender in full, leaving it uncertain whether the applicant would actually have succeeded. Moreover, even if a framework contract had been concluded, the contracting authority would not have been obliged to order services under that contract or to utilise the full budget allocated thereto.[15]

During the proceedings, however, the applicant amended its claim, framing it as based on a frustrated opportunity (or chance). The applicant regarded the concept of loss of profit as the closest existing category to a claim for compensation for harm resulting from a frustrated opportunity. According to the applicant, this constitutes a form of *loss of profit sui generis*, arising from the frustration of the chance to compete for a public contract. Under Slovak law, individual heads of damage—such as damage caused by the frustration of a chance or opportunity—are not generally distinguished as separate categories; such harm is typically subsumed under loss of profit. The main rationale for invoking this argument appears to relate to differing evidentiary and causation standards, as, according to the applicant, compensation for loss of opportunity requires establishing the actual lost profit itself.[16]

4. PRELIMINARY QUESTIONS AND THEIR REPHRASING

The question referred by the District Court Bratislava II was adjusted during the proceedings and ultimately modified in translation. In its letter of 22 July 2022, the District Court Bratislava II posed the following questions:

> *"1) Is it possible to consider, as compatible with Article 2(1)(c) in conjunction with paragraphs (6) and (7) of Directive 2007/66/EC […], the approach taken by a national court, when adjudicating a claim for compensation for harm suffered by a tenderer unlawfully excluded from a public procurement procedure, which*

[14] In Act No. 514/2003, the types of coverable harm are provided in § 17 thereof.
[15] Letter of the District Court Bratislava II of 22 July 2022, Case No 12C/5/2019, "Návrh na začatie prejudiciálneho konania" [Request for preliminary ruling], part II, para. 4.
[16] *Ibid.,* part II, para. 4.

DOI: 10.46282/blr.2025.9.2.1193

refuses to award damages on the basis of a frustrated chance (loss of opportunity)?

2) *Is it possible to consider, as compatible with Article 2(1)(c) in conjunction with paragraphs (6) and (7) of Directive 2007/66/EC […], the approach taken by a national court in a specific case, when adjudicating a claim for compensation for harm suffered by a tenderer unlawfully excluded from a public procurement procedure, which does not treat as part of the claim for damages a claim for loss of profit resulting from the frustration of the chance to participate in the public procurement procedure?*"[17]

While both the Advocate General and the Court understood the questions as concerning "*the practice of a national court*," the Slovak version of the preliminary question, as included in the letter from the District Court Bratislava II, referred instead to "*the approach of the court deciding the case*". The national court was, in reality, asking whether EU law would be infringed if it were to reject a claim for damages based on harm resulting from a loss of opportunity and, at the same time, decline to subsume such harm under the concept of loss of profit. Although this nuance does not affect the outcome of the case itself, it is noteworthy because there was no established practice of the Slovak courts on the matter, and the district court was essentially seeking guidance on the compatibility of its prospective decision with EU law.

The referring court framed its questions based on the presumption that CJEU case law distinguishes between lost profit and lost opportunity as separate categories of harm for the purposes of damages. In practical terms, the referring court was asking whether § 17 of Act No 514/2003 is compatible with Article 2(1)(c) of the Remedies Directive.

AG Collins proposed that the Court rephrase the question in two respects. First, to focus on the interpretation of EU law rather than directly assessing the conformity of a prospective national court decision, he suggested framing the question negatively, thereby delimiting national procedural autonomy by reference to the requirements of EU law. The Advocate General also recommended omitting references to paragraphs 6 and 7, as they were irrelevant to the substance and it was unclear which options provided by the Directive in these provisions had actually been applied by the Slovak Republic.

On this basis, AG Collins proposed the following consolidated version of the question: "*[…] whether it is contrary to Article 2(1)(c) of Directive 89/665 for a national court to adopt a practice whereby a tenderer unlawfully excluded from a procedure for the award of a public contract governed by that directive is precluded from claiming damages for a loss of opportunity to obtain that contract.*" The Court addressed this single rephrased question. The referring court apparently did not distinguish between the concepts of national law and EU law, despite using the same terminology for both. Whether concepts related to damages constitute autonomous concepts of EU law or fall within the procedural autonomy of the Member States was analysed in detail in the Opinion of the Advocate General, but this discussion was not treated as relevant in the *INGSTEEL II* judgment itself.

5. DAMAGES AS AN AUTONOMOUS CONCEPT OF EU LAW?

The Court had an opportunity to dispel the uncertainty generated by the *Fosen-Linjen* saga before the EFTA Court. The central issue is whether liability for damages under Article 2(1)(c) of the Remedies Directive constitutes a special form of liability that

[17] *Ibid.,* part II, para. 6.

is not subject to additional conditions, or whether it is instead governed by the conditions established by the CJEU for Member State liability for breaches of EU law in *Francovich*[18] and *Brasserie du pêcheur*.[19]

The Judgment *INGSTEEL II*, however, neither addressed these questions in detail nor engaged with the arguments developed in *Fosen-Linjen II*.[20] A more comprehensive account of the parties' positions can be found in the Opinion of Advocate General Collins.

From the submissions of the Member States in the proceedings, several positions emerge:

- it is for the internal legal order of each Member State to determine the criteria for assessing damages resulting from an infringement of EU law in procedures leading to the award of a public contract;[21] these fall within the scope of Member States' procedural autonomy (ÚVO, Austrian, Czech, French and Slovak Governments; Commission).[22]
- The Remedies Directive does not require Member States to provide a damages remedy for the loss of an opportunity to obtain a public contract (ÚVO; Austrian, Czech, French and Slovak Governments).[23]
- The concept of damage under the Remedies Directive is not an autonomous concept of EU law (Czech and French Governments).[24]
- Loss of opportunity and loss of profit constitute distinct categories of harm (ÚVO).[25]
- Loss of opportunity is a subcategory of loss of profit; the distinction lies in the standard of proof required to establish the existence of damage (Czech and Slovak Governments).[26]
- The rules governing the EU's non-contractual liability for infringements of public procurement rules are not applicable within the scope of the Remedies Directive, which is addressed to the Member States (Austrian, Czech and Slovak Governments).[27]

The classification of damages for harm caused by infringements of procurement rules is therefore not merely of theoretical importance.

If damage under Article 2(1)(c) of the Remedies Directive constitutes an autonomous concept of EU law and the general rules on liability for infringement of EU law apply, the conditions for compensation are those laid down in *Francovich* and *Brasserie du pêcheur*. While the existence of an infringement, the occurrence of damage, and a causal link are rarely disputed in the context of public procurement, the requirement that the breach be "sufficiently serious" may operate as a significant limitation, enabling Member States or contracting authorities to avoid liability. By contrast, the wording of Article 2(1)(c) appears closer to the principles of effectiveness and equivalence governing the relationship between EU law and national procedural rules.

[18] CJEU, judgment of 19 November 1991, Francovich and Bonifaci v Italy, C-6/90, EU:C:1991:428.
[19] CJEU, judgment of 5 March 1996, Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others, C-46/93, EU:C:1996:79.
[20] EFTA, judgment of the EFTA Court of 1 August 2019, Fosen-Linjen v AtB (E 7/18, EFTA Court Report 2019).
[21] CJEU, opinion of Advocate General Collins of 7 December 2023, INGSTEEL, C-547/22, EU:C:2023:967, para. 21.
[22] *Ibid.*, para. 21 and 25.
[23] *Ibid.*, para. 21.
[24] *Ibid.*, para. 22.
[25] *Ibid.*, para. 23.
[26] *Ibid.*, para. 23.
[27] *Ibid.*, para. 24.

DOI: 10.46282/blr.2025.9.2.1193

If, however, damage under Article 2(1)(c) falls within the procedural autonomy of the Member States, EU law imposes only the limits inherent in the principles of effectiveness and equivalence. On this view, the conditions for liability, including the types of compensable harm, are not harmonised at EU level.

Finally, if the concept of damage under Article 2(1)(c) is aligned with the principles governing the EU's non-contractual liability in public procurement procedures, it follows that loss of opportunity constitutes a compensable head of damage.

6. PREVIOUS CASE LAW ON DAMAGES WITHIN THE SCOPE OF THE REMEDIES DIRECTIVE

In *Commission v Portugal*, the Court did not engage in any explicit "categorisation" of the nature of liability for damages under Article 2(1)(c) of the Remedies Directive. The Portuguese Government argued that that provision does not impose strict liability. On a contrary, the Court held that a requirement to prove fraud or fault in order to claim damages "*cannot be considered an adequate system of legal protection*", because "*…a bidder harmed by an unlawful decision of the contracting authorities risks being deprived of the right to claim damages for the harm caused by that decision, or at least of obtaining them belatedly, on the grounds that they cannot establish proof of fraud or fault.*"[28] The Court in that case referred neither to the principle of effectiveness nor to the more precise position of damages under Article 2(1)(c) of the Remedies Directive within the system of non-contractual liability under EU law in general.

A similar issue arose in *Strabag and Others*. In that case, the Court expressly held that the concept of damage under Article 2(1)(c) of the Remedies Directive falls within the procedural autonomy of the Member States and that any limits or conditions imposed must therefore be assessed in the light of the principles of effectiveness and equivalence.[29] The Court identified no additional conditions for establishing liability, stating: "*In that regard, it should first be noted that the wording of Article 1(1), Article 2(1), (5) and (6), and the sixth recital in the preamble to Directive 89/665 in no way indicates that the infringement of the public procurement legislation liable to give rise to a right to damages in favour of the person harmed should have specific features, such as being connected to fault – proved or presumed – on the part of the contracting authority, or not being covered by any ground for exemption from liability.*"[30] The principle of *effet utile* was also relied upon in *Strabag and Others*: "*the aim of Directive 89/665, set out in Article 1(1) thereof and in the third recital in the preamble thereto, which is to guarantee judicial remedies which are effective and as rapid as possible against decisions taken by contracting authorities in infringement of the law on public contracts*."[31] In conclusion, the Court held 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, including where the application of that legislation rests on a presumption that the contracting authority is at fault and on the fact that the latter cannot rely on a lack of individual abilities, hence on the defence that it cannot be held accountable for the alleged infringement.*"[32]

Unlike in *Commission v Portugal* and *Strabag and Others*, however, in *Spijker* the CJEU rather built on the *Francovich - Brasserie du Pêcheur* line of cases (Caranta, 2019,

[28] CJEU, judgment of 14 October 2004, Commission v Portugal, C-275/03, EU:C:2004:632, para. 31.
[29] CJEU, judgment of 30 September 2010, Strabag and Others, C-314/09, EU:C:2010:567, para. 34.
[30] *Ibid.*, para. 35.
[31] *Ibid.*, para. 43.
[32] *Ibid.*, para. 45, operative part.

p. 218). The Court identified Art. 2(1)(c) of the Remedies Directive as giving "*concrete expression to the principle of State liability for loss and damage caused to individuals as a result of breaches of EU law for which the State can be held responsible. According to case-law developed since the adoption of Directive 89/665, but which is now consistent, that principle is inherent in the legal order of the Union. The Court has held that individuals harmed have a right to reparation 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 loss or damage sustained by the individuals (…)*".[33] Thus, comparing to the previous case law, the *Spijker* case added condition of "serious breach of EU law" as another condition for application of Art. 2(1)(c) of the Remedies Directive which was not present that case law.[34]

These different approaches lead the referring court in *Fosen-Linjen I* case to preliminary question to the EFTA Court. Thus, the EFTA Court had to reconcile case law of the CJEU. The EFTA Court decided to disapply the condition of serious breach of EEA law as a condition for damages in public procurement cases: "*Therefore, the gravity of a breach of the EEA rules on public contracts is irrelevant for the award of damages. Moreover, it is not decisive for the award of damages pursuant to Article 2(1)(c) of the Remedies Directive, whether the breach of a provision of public procurement law was due to culpability and conduct deviating markedly from a justifiable course of action, or whether it occurred on basis of a material error, or whether it is attributable to the existence of a material, gross and obvious error.*"[35] This deviation from the previous case law, rather than its consolidation was subject to criticism from not only academia (e.g., Sanchez-Graells, 2018), but also lead to further request for opinion in *Fosen-Linjen II*.

Contrary to *Fosen-Linjen I*, in *Fosen-Linjen II*, the EFTA court found that "*Article 2(1)(c) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts does not require that any breach of the rules governing public procurement in itself is sufficient to award damages for the loss of profit to persons harmed by an infringement.*"[36] Hence, the EFTA Court rather more controversy than reconciliation to case law in issue.

The question of loss of opportunity was raised also in *Fosen-Linjen II*: "*Fosen-Linjen submits that if the system only makes available the recovery of bid costs, this would clearly not be sufficient to comply with the requirements of Article 1(1) and 2(1)(c) of the Remedies Directive. In the EU, it is considered necessary to allow access to a claim of damages for the loss of opportunity and the result must be the same under the EEA Agreement, whether the result is based on the Remedies Directive or fundamental principles of effective judicial protection*".[37] The EFTA Court, however, did not address this specific type of harm provided the answer regarding loss of profit, only.

In the ambit of non-contractual liability of the EU in the field of public procurement, the General Cour in *Vakakis Kai Synergates* accepted "*claim for damages in so far as it seeks compensation for the loss of an opportunity to be awarded the contract*

[33] CJEU, judgment of 9 December 2010, Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others, C-568/08, EU:C:2010:751, para. 87.
[34] *Ibid.*, operative part.
[35] EFTA, Judgment of the EFTA Court of 31 October 2017, Fosen-Linjen v AtB (E 16/16, EFTA Court Report 2017), para. 80.
[36] EFTA, Judgment of the EFTA Court of 1 August 2019, Fosen-Linjen v AtB (E 7/18, EFTA Court Report 2019), operative part.
[37] *Ibid.*, para. 61.

DOI: 10.46282/blr.2025.9.2.1193

at issue and compensation for the costs and expenses relating to the participation in the tendering procedure…"[38] The General Court distinguishes loss of profit and loss of opportunity: "*The loss of profit concerns compensation for the loss of the contract itself, whereas the loss of opportunity concerns compensation for the loss of the opportunity to conclude that contract…"*.[39]

7. DAMAGES AS A QUEST FOR PROCEDURAL AUTONOMY

AG Collins concluded that the award of damages under the Remedies Directive "*is not intended as an independent and uniform concept of EU law, but rather one that the laws of the Member States define.*"[40] Consequently, the criteria and rules for awarding damages fall within the procedural autonomy of the Member States, subject to the principles of effectiveness and equivalence.[41]

He supported his conclusion with two arguments. First, he emphasised the well-established understanding of the procedural autonomy of the Member States as an expression of Articles 5 and 19(1), second paragraph, TEU.[42] Second, he referred to the plurality of legal traditions, procedures, and remedies across Member States. In his view, "*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.*"[43]

The judgment in *INGSTEEL II*, however, did not undertake such a theoretical examination and did not even mention the concept of procedural autonomy. This can be inferred only from the Court's observations regarding the level of harmonisation provided by the Remedies Directive: "*… although Directive 89/665 cannot be regarded as providing for complete harmonisation and, therefore, as envisaging all possible remedies in public procurement matters (…), the fact remains that, as stated in the sixth recital of that directive, the directive stems from the intention of the EU legislature to ensure that, in all Member States, adequate procedures permit not only the annulment of decisions taken unlawfully but also the compensation of persons harmed by an infringement of EU law.*"[44]

At the same time, the Court continued in the Spijker line of reasoning, aligning liability under Article 2(1)(c) of the Remedies Directive with the conditions for Member State liability for infringements of EU law.[45] The Court further concluded that "*No possibility of limiting that access is established by that directive.*"[46]

The Court summarised its reasoning as follows: "*As the Court has held with regard to loss of profit, the total exclusion, in respect of the damage for which compensation may be granted, of the loss of the opportunity to participate in a procedure for the award of a public contract in order to obtain that contract, cannot be accepted in the event of an infringement of EU law since, especially in the case of economic or commercial disputes, such total exclusion of that loss of opportunity would be such as to make it practically*

[38] CJEU, judgment of 28 February 2018, Vakakis kai Synergates v Commission, T-292/15, EU:T:2018:103, para. 202.
[39] *Ibid.*, para. 188.
[40] CJEU, opinion of Advocate General Collins of 7 December 2023, INGSTEEL, C-547/22, EU:C:2023:967, para. 33.
[41] *Ibid.,* para. 34.
[42] *Ibid.,* para. 35.
[43] *Ibid.*
[44] CJEU, judgment of 6 June 2024, INGSTEEL, C-547/22, EU:C:2024:478, para. 41.
[45] *Ibid.,* para. 35.
[46] *Ibid.,* para. 37.

impossible to make good the damage suffered…"[47] By these statements, the Court effectively embedded compensation for lost opportunity within the requirement of effective remedies, emphasising that a "*total exclusion of that loss of opportunity*" would frustrate the principle of effectiveness in the application of EU law.

However, the Court referred *per analogiam* to its earlier case law, which makes the concepts somewhat confusing: *Brasserie du Pêcheur*, *Manfredi and Others*,[48] and *AGM-COS.MET*.[49] While *Brasserie du Pêcheur* concerns State liability for breaches of EU law, *Manfredi and Others* addresses damages in antitrust matters, subsequently harmonised by Directive 2014/104/EU, which recognises only actual loss and lost profit as compensable harm. Similarly, *AGM-COS.MET* concerned claims for lost profit. It is therefore unconvincing how these judgments meaningfully contribute to the Court's reasoning, which would remain sufficiently robust even in the absence of such references.

8. PROCEDURAL AUTONOMY AND DOUBLE NEGATIVE

The practice of "harmonising through judgments" encounters several limitations when operating within the procedural autonomy of the Member States. First, such fine-tuning of the system is inherently fragmented and largely contingent, occurring only when a case is referred to the CJEU. Second, the CJEU can provide answers only to the specific questions actually referred for a preliminary ruling. Consequently, the guidance provided to the District Court Bratislava II by the judgment in *INGSTEEL II* is insufficient to resolve the dispute in its entirety; in particular, the scope of compensable damage in the context of framework contracts remains unresolved. Third, the Court's interpretation of EU law has *ex tunc* effects, which may undermine legal certainty in closed cases or even lead to the reopening of proceedings already finally decided, where national law permits such reopening.

Fourth, the principles of equivalence and effectiveness do not generally require Member States to create new remedies or legal rules. Rather, they require the adaptation, streamlining, or effective application of existing remedies and the removal of obstacles to their use.[50] As the Court has stated: "*… although EU law does not, in principle, require Member States to establish before their national courts, in order to ensure the safeguarding of the rights which individuals derive from EU law, remedies other than those established by national law (…), the position is otherwise if it is apparent from the overall scheme of the national legal system in question that no legal remedy exists that would make it possible to ensure, even indirectly, respect for the rights that individuals derive from EU law, or again if the sole means whereby individuals can obtain access to a court is by breaking the law …*".[51]

In *INGSTEEL II*, the Court could not directly establish a rule requiring that compensation for loss of opportunity be included within the concept of "damages" under Article 2(1)(c) of the Remedies Directive for two reasons. First, by placing the concept of damages within the sphere of Member States' procedural autonomy, the Court deprived

[47] *Ibid.,* para. 43.
[48] CJEU, judgment of 13 July 2006, Manfredi and Others, C-295/04 to C-298/04, EU:C:2006:461.
[49] CJEU, judgment of 17 April 2007, AGM-COS.MET, C-470/03, EU:C:2007:213.
[50] CJEU, judgment of the Court of 19 June 1990, The Queen v Secretary of State for Transport, ex parte Factortame, C-213/89, EU:C:1990:257, para. 14 and 19 et seq.; CJEU, judgment of 17 December 2015, Arjona Camacho, C-407/14, EU:C:2015:831, para. 42 et seq.; CJEU, judgment of 21 December 2021, Randstad Italia, C-497/20, EU:C:2021:1037, para. 78.
[51] CJEU, judgment of 14 May 2020, Országos Idegenrendeszeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, C-924/19 PPU, EU:C:2020:367, para. 143.

DOI: 10.46282/blr.2025.9.2.1193

it of an autonomous interpretation under EU law. Second, in the absence of EU secondary legislation, the Court cannot substitute its own interpretation for the legislative activity of the European Parliament and the Council. However, AG Collins noted that "*the scope of the Member States' procedural autonomy is not limitless since the Court may lay down specific obligations to ensure that individuals harmed by an infringement of EU law obtain a minimum standard of protection*."[52]

Nevertheless, as demonstrated in *INGSTEEL II*, the Court may adopt a "*double-negative*" approach, namely by precluding national legislation or practice that categorically excludes the application of certain legal concepts, such as compensation for loss of opportunity. It is therefore for national courts, in their interpretative and applicative practice, to ensure that national law is applied in a manner that avoids an absolute exclusion of the possibility of compensation for loss of opportunity: "*…in order to ensure the effectiveness of all provisions of EU law, the principle of primacy requires, inter alia, national courts to interpret, to the fullest extent possible, their national law in conformity 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* (…)."[53]

9. SEPARATE OR NOT? LOSS OF PROFIT AND LOSS OF OPPORTUNITY

In the judgment in *INGSTEEL II*, the Court considered the application of damages for loss of opportunity; however, the precise content of that notion was left undecided. It also did not address the arguments of the parties and intervenients asserting that a distinction must be drawn between damages compensating lost profit and those for lost opportunity. The Court simply concluded that no type of harm shall be excluded from the scope of Article 2(1)(c) of the Remedies Directive.

The concept of damages for lost opportunity is a term that requires further interpretation, because without a clear understanding of its content, the answer provided by *INGSTEEL II* is not fully meaningful. From a theoretical perspective, the concept of "lost opportunity/lost chance" can take one of three diverging forms: (1) relaxation of the burden of proof for establishing full compensation, (2) proportional or relational liability, and (3) an autonomous type of loss (Schebesta, 2016, p. 206). The loss-of-opportunity theory can affect not only the existence of the right to damages but also its quantum (Caranta, 2011, p. 179).

Legislative approaches to different types of compensable harm vary across Member States. In Germany, § 181 of the *Gesetz gegen Wettbewerbsbeschränkungen (*GWB) provides a specific remedy for cases where an economic operator would have had "a genuine chance" of being awarded the contract had the violation not occurred; damages for the costs of preparing the bid or participating in the procurement procedure may also be claimed (Burgi, 2011, p. 24; Schebesta, 2016, p. 214).[54] Similarly, Swedish legislation provides both a general right to compensation for harm and specific rules for "*compensation to a supplier that has participated in a procurement and has incurred costs for preparing a tender and otherwise participating in the procurement, provided the infringement of the provisions of this Act has had a detrimental effect on the supplier's*

[52] CJEU, opinion of Advocate General Collins of 7 December 2023, INGSTEEL, C-547/22, EU:C:2023:967, para. 39.
[53] CJEU, judgment of 6 June 2024, INGSTEEL, C-547/22, EU:C:2024:478, para. 47.
[54] The referred papers address the previous numbering of the provision of the GWB - § 126.

chances of being awarded the contract."[55] French legislation enables compensation for lost profit for an unsuccessful tenderer as well as for the costs of preparing the tender (Gabayet, 2011, pp. 12–13). In Latvia, long-standing practice recognises lost profit claims of unduly excluded claimants (Danovskis, 2024), and a similar approach has emerged in Slovenia, where the court confirmed compensation corresponding to the profit that would have been generated under the contract after deduction of performance costs (Štemberger Brizani, 2025, p. 357). It is not the purpose of this commentary to provide a comprehensive overview of practice across all Member States; however, these examples illustrate that both legislation and practice are divergent.

The statements of the Slovak Government in the *INGSTEEL II* case added further ambiguity to the issue: "*At the hearing, the Slovak Government stated that, according to the settled case-law of the Slovak courts, a 'loss of profit' must be made good where it is highly probable, or even close to certain, that, having regard to the existing circumstances of the case, the person concerned would have made a profit. However, referring to the European Commission's position that the Slovak courts should use all national means to enable a tenderer unlawfully excluded from a public contract to effectively claim damages for a lost opportunity, that government stated at the hearing that there is nothing to prevent a claimant from making use of the remedies available to it to assert its right and from adducing evidence to prove it*."[56] These statements create a somewhat paradoxical situation. On the one hand, the ÚVO, representing the Slovak Republic, denied the possibility of compensation for loss of opportunity on the ground that it constituted a separate head of damage unknown to Slovak law. On the other hand, the Slovak Government ultimately acknowledged that damages for loss of opportunity could, at least in theory, be subsumed under the category of lost profit. Although the General Court has established that loss of profit and loss of opportunity are conceptually distinct,[57] the Court appears to be satisfied with that assertion that loss of opportunity can be addressed under Slovak law.

10. CONCLUSION OR WHAT REMAINED UNTOLD?

At first sight, the conclusion reached in *INGSTEEL II* appears to be seminal and potentially game-changing, as the Court requires that loss of opportunity be capable of compensation as part of damages for infringements of public procurement rules. In reality, however, the judgment is not transformative for Slovak law, since the Slovak Government confirmed during the hearing that this head of harm is, at least in principle, compensable under Slovak legislation. This position casts the preliminary questions in a particular light. The District Court Bratislava II asked whether EU law would be infringed if damages for loss of opportunity were not awarded. Yet, according to the arguments advanced by the Slovak Government, as recorded both in the judgment and in the Opinion of the Advocate General, a refusal to award such damages would not only raise issues under EU law, but would also be difficult to reconcile with the existing framework of Slovak law itself.

The Court did not address the question of damages in situations where a tenderer was unlawfully excluded from a public procurement procedure for the award of a framework agreement (perhaps an issue for INGSTEEL III, should the Slovak courts

[55] Sweden, The Public Procurement Act(2016:1145), Chapter 20, Section 20.
[56] CJEU, judgment of 6 June 2024, INGSTEEL, C-547/22, EU:C:2024:478, para. 46.
[57] CJEU, judgment of 28 February 2018, Vakakis kai Synergates v Commission, T-292/15, EU:T:2018:103, para. 188.

DOI: 10.46282/blr.2025.9.2.1193

pursue the case further). The calculation of compensation in such circumstances can be extremely difficult and may lead to hypothetical assessments, given the unpredictability of the actual performance of the contract and the profits that might have been generated.

"A rose by any other name would smell as sweet…?", Juliet asks Romeo in Shakespeare's well-known drama. This prompts the question of what, in substantive terms, is meant by damages for loss of opportunity.

Directive 92/13/EEC expressly provides, in Article 2(7), for compensation of the costs incurred in preparing tender documents – a form of damage comparable to that recognised in *Vakakis kai Synergates*, as well as in, for example, German and Swedish legislation. In other contexts, loss of opportunity may overlap with lost profit, even though the General Court has maintained that these categories of harm are conceptually distinct.

A closer reading of the operative part of the judgment in *INGSTEEL II* reveals that the Court does not employ "loss of opportunity" as an autonomous legal concept. Instead, it refers to the right to compensation "*for the damage suffered as a result of the loss of the opportunity to participate in that procedure with a view to obtaining the contract concerned*." Ultimately, therefore, the Court did not create a new, distinct head of compensable harm. Rather, it concluded that it cannot, as a matter of principle, be impossible to compensate an economic operator for harm resulting from its unlawful exclusion from a public procurement procedure. Beyond this negative clarification, the Court provided no guidance on the conditions for such claims, the assessment of causation, or the quantification of damages, leaving these matters to the Member States.

There is thus a clear opportunity for further harmonisation through legislative reform of the Remedies Directive. First, the substance of Article 2(7) of Directive 92/13/EEC should be extended to the public sector. Moreover, the structure of Directive 2014/104/EU may serve as a useful model. A reformed instrument could lay down common standards, including the right to full compensation, possible limitations on damages, the identification of the liable entity, minimum limitation periods and rules on their interruption, strict liability, recognised heads of compensable harm, and specific conditions governing damages in particular situations, such as framework agreements.

While judgments such as *INGSTEEL II* may become increasingly frequent, they are not capable, on their own, of establishing a comprehensive and coherent system of compensation for economic operators unlawfully excluded from public procurement procedures.

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