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Judgment in Case E-7/18 *Fosen-Linjen AS v AtB AS*

THE EFTA COURT DELIVERS A SECOND ADVISORY OPINION TO NORWEGIAN COURTS IN THE FOSEN-LINJEN CASE

In a judgment delivered today, the Court held that Article 2(1)(c) of the Remedies Directive¹ 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.

The case concerned a damages claim raised by Fosen-Linjen AS, a Norwegian undertaking providing ferry services, against AtB AS, a company administering public transport services in the Norwegian county of Sør-Trøndelag, following the cancellation of a tender procedure for the procurement of ferry services.

The dispute in the national proceedings had already given rise to a request to the Court for an advisory opinion from Frostating Court of Appeal (*Frostating lagmannsrett*) and to the Court's judgment in Case E-16/16 (*Fosen-Linjen I*). In that judgment, the Court held that a simple breach of public procurement law is in itself sufficient to trigger the liability of the contracting authority to compensate the person harmed for the damage incurred, pursuant to Article 2(1)(c) of the Remedies Directive, provided that the other conditions for the award of damages are met. In the present request, the Supreme Court of Norway (*Norges Høyesterett*) essentially asked whether this also applies where damages are claimed for the loss of profit.

The Court held that the Remedies Directive is an instrument of minimum harmonisation. Article 2(1)(c) requires EEA States to ensure that the measures taken concerning the review procedures include provision for powers to award damages to persons harmed by an infringement. However, neither Article 2(1)(c) nor any other provision of the Remedies Directive lays down specific conditions for the award of damages.

The Court noted that, in the absence of EEA rules governing the matter, it is for the legal order of each EEA State, in accordance with the principle of the procedural autonomy of the EEA States, to determine the criteria on the basis of which harm caused by an infringement of EEA law in the award of public contracts must be assessed.

The Court found that as such, EEA States enjoy discretion in determining the criteria on the basis of which damage for loss of profit arising from an infringement of EEA law on the award of public contracts is determined and estimated, provided that the principles of equivalence and effectiveness are respected. Furthermore, the Court noted that the total exclusion of loss of profit as a head of damages for which reparation may be awarded in the case of a breach of EEA law cannot be accepted.

While the standard of liability is not harmonised by the Remedies Directive, the Court held that according to the principle of State liability, an EEA State may be held responsible for breaches

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.

of its obligations under EEA law. In this regard, the Court noted that the requirement of a sufficiently serious breach, as a minimum standard, is considered sufficient for the purposes of safeguarding the rights of individuals.

Consequently, the Court held that Article 2(1)(c) of the Remedies Directive 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.

The full text of the judgment may be found on the internet at: www.eftacourt.int.

This press release is an unofficial document and is not binding upon the Court.