ECJ on termination of contracts in public procurement

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> Contracting authorities in EU and EEA who awards contracts without publishing a call for tenders, seriously violate the public procurement regulations. One could think there then was an EU and EEA based obligation for the contracting authorities to terminate these contracts. However, case law from the ECJ seems to indicate the opposite.

In Case E-4/17 (ESA v. Norway) the EFTA court found that Norway violated the procurement regulations in (then) procurement Directive 2004/18/EC, through a municipality's failure to enter into a contract the way the directive prescribed. This raises the question of whether the public body (the contracting authority) is obliged to terminate the contract if it was not entered into in accordance with public procurement regulations that derives from EU (and thus EEA) law. The question seems to have no clear conclusion yet, and for the purpose of this blog post the question will be narrowed down to what case law from the European Court of Justice (ECJ) seems to indicate on the contracting authority's (possible) obligation to terminate the contract after an illegal direct award.

In the public procurement regime, the contracting authority who wishes to procure goods, services or works, is obliged to publish a call for tenders and choose its supplier among the submitted tenders, as set out in art. 26 etc. in Directive 2014/24/EU. If the contracting authority enters into a contract with a supplier without publishing a call for tenders first, it is an illegal direct award of a contract. All other suppliers are then deprived of their right and opportunity to submit their own tenders, and to win the contract for themselves. This violation has been referred to by the ECJ in the Case C-26/03 (Stadt Halle) para. 37 as "*the most serious breach of Community law in the field of public procurement*". Such violation is supposed to lead to enforcement with the so-called rule of ineffectiveness in Article 2d of Directive 2007/66/EC, meaning that a review body in the Member State shall declare the contract to be without effect. The Member States have discretion over further procedural details in this rule, such as determining which review bodies have this power, within the limits of the principles of equivalence and effectiveness.

Contracts not declared ineffective in Norway

In Norway, this rule was in 2012 implemented into the Public Procurement Act, and continued in the current Public Procurement Act of 2016, § 13, which leaves it to the ordinary courts to rule on the

ineffectiveness of a contract. This requires a lawsuit against the contracting authority. Dissatisfied suppliers, which were deprived of their right to compete for the contract, are the party with best legal standing for such a lawsuit. However, this also means that a potential supplier starts its relationship with the contracting authority by suing it, this is, suing its potential costumer. It is therefore no surprise that while the Norwegian Complaint Board for Public Procurement handled 81 cases of illegal direct award of a contract from 2007 to 2012, the amount of such cases handled by the courts since 2012 (when the power to handle them was transferred from the board to the courts), seems to amount to a single digit number.[1] Illegal awards of contracts therefore seem to not be declared ineffective as often as they should. This leads to the question of whether there are other legal grounds for them to be declared ineffective, in the absence of courts' ruling doing so. Or more specifically: Does case-law from the ECJ indicate that the contracting authority is obliged to terminate the contract itself if the contract is based on an illegal direct award?

The developing ECJ case law

The EU procurement and remedies directives contain no clear provision with such an obligation,[2] apart from the ineffectiveness rule mentioned above. The ECJ has in the Case C-166/14 (MedEval) para 40 emphasized that forcing a contract to end constitutes a significant intervention in the contractual relations between individuals and contracting authorities, which can cause considerable upset and financial losses for both parties. Thus, great importance is placed on the requirement for legal certainty.

In the Case C-76/97 (Walter Tögel) a contract award was conflicting with the later-implemented procurement regulations. The ECJ found that EU law did not intervene in existing legal situations, and there therefore was no obligation to terminate the contract. In Case C-328/96 (Commision v. Austria) Advocate General (AG) Alber argued in para. 76 of the opinion that there was a duty to terminate the contract, since the award of the contract "*constituted a serious infringement of Community law*" and the contracting authority acted on its own risk. However, the ECJ rejected this question on procedural grounds and did not deal with it. In the Case C-126/03 (Commission v. Germany) the city of Munich awarded a contract of waste handling as an illegal direct award. In the court, Germany argued there was no obligation to terminate the contract. ECJ made only a short statement saying that if ECJ found a violation of EU law, TEUF art. 260 required Germany to take the necessary measures to comply with ECJ's judgement. True as that is, ECJ did not state an obligation to terminate the contract as a necessary measure.

In the Case C-503/04 (Commission v. Germany) the ECJ had already found that two contracting authorities had awarded contracts of waste water and waste handling in violation with the procurement regulations (see the united Cases C-20/01 og C-28/01 (Commission v. Germany)). The contracting authorities cancelled the contracts about six months later, but in the eyes of the Commission this was too slow, represented a violation of TEUF art. 260, and Germany was sued again. The ECJ, in a chamber

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1 Cf. preliminary works for the Public Procurement Act, Innst. 358 L p. 4, and Kristian Strømsnes, *«Uten virkning – vilkår for og virkninger av at en kontrakt etter en offentlig anskaffelse kjennes uten virkning»,* 2020, thesis for the degree of Ph.D. at UiB, currently pending defence, p. 1.

2 A right to terminate follows from Directive 2014/24/EU art. 73, where the ECJ has found the contract award to be in violation of the regulations. But the wording indicates the contracting authority's right to terminate, not an obligation, cf. Sue Arrowsmith, *The law of public and utilities procurement - regulation in the EU and UK*, bind II av II, 3. utgave, Sweet & Maxwell, 2018, p. 1041 and Kirsi-Maria Halonen, «Termination of a public contract - lifting the veil on art. 73 of 2014/24 Directive», *Public Procurement Law Review*, 2017 p. 187-199, at p. 190.

with five judges, found that Germany failed to fulfill its obligations contained in TEUF art. 260 by not cancelling the contracts sooner. From this it might be derived that an obligation to terminate contracts does exist,[3] even though the ECJ does not explicitly state such an obligation. However, it must be borne in mind that this case was, first and foremost, about Germany's failure to take the necessary measures to comply with the earlier judgment from the ECJ, which stated that Germany acted in violation of EU law, and not about illegal direct awards of contracts or enforcement of EU law in national law. This also fits the aforementioned Case E-4/17 (ESA v. Norway).

The termination question came up again in the grand chamber decision in the Case C-91/08 (Wall), concerning a contract for production, installation, maintenance and cleaning of public lavatories. The contract was a concession contract, which at that time only fell within the scope of EU primary law (four freedoms), and was mainly not regulated by the procurement regulations. The contract was thus untouchable with the rule of ineffectiveness. AG Bot made reference to the ineffectiveness rule and asked if national law was required to impose obligations to terminate the contract, even though he could not see such an obligation in EU law, cf. para. 131 and 136 in his opinion. The ECJ found that national authorities were not required to terminate a contract. However, it still was for domestic legal systems to safeguard suppliers' rights derived from EU law, in accordance with the principles of equivalence and effectiveness. *Wall* seems to leave the question of termination to member states' national law.

The Case C-518/17 (Rudigier) follows up *Wall*, and concerned a contract for bus passenger transport services. No call for tenders was published, which the ECJ found represented a violation of the relevant procurement regulations. On the question for termination, the ECJ stated in para 57:

> "*EU legislation on the award of public contracts does not lay down a general rule that the unlawfulness of an act or omission at a given stage of the procedure renders unlawful all subsequent acts in that procedure and justifies their annulment. Only in specific well-defined situations does that legislation provide for such a consequence.*"

The ECJ seems reluctant to conclude on an obligation for the contracting authority to terminate the contract, despite opportunities and (early) encouragement from the AG to do so. Furthermore, the ECJ seems to find that the rule of ineffectiveness is exhausting on when a contract between a contracting authority and a supplier can be forcefully ended. The ECJ leaves it to member states' national law whether there is an obligation for the contracting authority to terminate the contract, where the rule of ineffectiveness has not been applied.

This does not mean that other parts of EU law may not support such an obligation in national law, i.e. through the purpose of the ineffectiveness rule and the principle of effectiveness. There might also be an obligation to terminate the contract if the ECJ or EFTA Court have already ruled that the contract represents a violation of the procurement regulation, but this is a question of the member state taking the necessary measures to comply with these judgment, cf. TEUF art. 260 and the Agreement between

[3] See to that effect Marianne Dragsten, *Offentlige anskaffelser - regelverk, praksis og* løsninger, Universitetsforlaget, 2013, p. 734-736 and, with a more critical view, Steen Treumer, «Enforcement of the EU Public Procurement Rules: The state of law and current issues», *Enforcement of the EU public procurement rules*, Steen Treumer & Francois Lichère (red.), DJØF Publishing, 2011, p. 17-52, p. 23 etc.

the EFTA States on establishing a surveillance authority and a court of justice art. 33, rather than the contracting authority's own obligation to terminate the contract. Still, ECJ case-law in itself does not seem to impose such an obligation to terminate.

No obligation in Norway – contracts not ineffective

Thus the termination question is left to national law in the member states. In Norwegian law, there seems to be no decisive, weighty or consistent sources of law indicating the contracting authority in itself has an obligation to terminate the contract.[4] The rule of ineffectiveness appears to be exhausting on when contracts can be forcefully terminated in Norway. But in Norway the problem still remains: for a contract to be declared ineffective, a court ruling is needed, which again requires a supplier to sue the contracting authority.

The weak incentives suppliers have to spend resources on suing their potentially customers, can indicate that the Norwegian enforcement regime on illegal direct award of contracts is problematic in relation to the EU principle of effectiveness.

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[4] For a more in depth discussion on this, see Kristian Strømsnes, «*Uten virkning – vilkår for og virkninger av at en kontrakt etter en offentlig anskaffelse kjennes uten virkning*», 2020, thesis for the degree of Ph.D. at UiB, chapter 5.