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Transforming Court Costs into Damages: Noticings on NJA 2013 s 762 and NJA 2018 s 1127

In his Key Note given on the Critical Legal Studies Symposium in Uppsala, August 2019, Adam Gearey spoke of CLS as an *art of notice*. For me, this expressed a call for attentiveness and scrutiny in our handling of legal materials – how else would we as scholars notice what forces are working within the law, and towards which results? What slides out of view[1] when we do not notice, when there is no art, but an absence of notice – an un-notice? What happens to that which is left out of the frame?

The art of notice, as I see it, can, among other things, help us to observe certain changes in relationships marked by tension. In his article *Authoritarian Constitutionalism in Liberal Democracies* Professor Duncan Kennedy writes: "*Over time, many small victories for one side, which are defeats for the other, can move the compromise a long way in one direction, possibly passing a threshold of transformation into a new kind of regime*."[2] By devoting ourselves to the art of notice, we are more equipped to identify these small steps moving in a certain direction, and thus also notice when a change of regime is closing in on us. In this essay I have chosen to focus on the potential tension between the supremacy of EU law and

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[1] Gearey (2018) Poverty Law and Legal Activism – Lives that Slide out of View, Routledge.

[2] Kennedy (2019) Authoritarian Constitutionalism in Liberal Democracies, in eds Alviar, Helena & Frankenberg, Gunter, *Authoritarian Constitutionalism*, Edward Elgar p 3.

the supposed procedural autonomy[3] of the Member States when it comes to the public authorities' tort liability in cases of infringement of public procurement law. The limitations and expansions of this form of liability are formed both in the European Court of Justice (the ECJ) and in the domestic courts. The Swedish Supreme Court (the SSC) has in two cases, NJA 2013 s 762 and NJA 2018 s 1127, ruled that a tenderer in a public procurement process can be awarded compensation, in the shape of damages, for court costs arising from a previous review proceeding. In this essay I try to notice the mechanisms that made this transformation from court costs to damages possible and reflect shortly upon the consequences it brings concerning the question of procedural autonomy.[4]

A First Case

In NJA 2013 s 762, the SSC for the first time ruled that a tenderer could be compensated for court costs from a previous review process in the form of damages. The background was as follows: the tenderer had challenged the procurement decision in the administrative court, had won the case, but was not given the opportunity to compete in a new procurement process, since the contracting authority decided to cancel the

[3] Provided no EU law provisions exist, Member States are generally supposed to have procedural autonomy when it comes to enforcing EU law on the national level as long as the national procedures meet the conditions of equivalence and effectiveness, see ECJ 16 December 1976, C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989 para 5. This autonomy includes how to determine conditions for damages, see ECJ 5 March 1996, C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-1029 para 98. This principle has been upheld also in cases of infringement of EU law on the award of public contracts, see for example ECJ 9 December 2010, C-568/08, *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others v Provincie Drenthe* [2010] ECR I-12655 para 90–91. The principle of procedural autonomy has however been the target of scepticism, see for example Kakouris (1997) Do the Member States possess Judicial Procedural "Autonomy"?, Common Market Law Review, Vol 34, Issue 6 pp 1389–1412, Galetta (2010) Procedural autonomy of EU Member States: paradise lost?, Springer, Bobek (2012) Why There is no Principle of 'Procedural Autonomy' of the Member States, in eds de Witte & Micklitz, *The European Court of Justice and the Autonomy of the Member States*, Intersentia pp 305–323.

[4] The purpose of this essay is thus not to state various reasons why the transformation is "bad" – there are valid arguments for transformation, see Andersson (2017) Ersättningsproblem i skadeståndsrätten, Iustus pp 232–234 and p 254.

procurement. According to the applicable domestic statute,[5] the tenderer should be compensated for losses caused by the contracting authority's infringement of the same statute. However, the general rule in Swedish administrative procedural law is that the parties concerned carry their own court costs, regardless of the outcome of the case. This also applies in procurement review proceedings.[6]

The SSC's argumentation towards the transformation from court costs to damages can be divided into the following themes: first it concluded that the wording of the applicable tort rule expresses a possibility for compensation of court costs, since it does not contain any restrictions regarding what kind of damages that can be compensated – only that the loss should be caused by the infringement.[7] Secondly, it pointed out that without a possibility to be compensated for court costs when successful in the administrative court, the tenderer might refrain from challenging the awarding decision. This is, according to the SSC, at least the case when the tenderer cannot be sure to win the new procurement process – and it would, according to the SSC, counteract both the effectiveness of the review process and the reparative and preventive functions of damages.[8] The SSC's conclusion is that the administrative court costs can be compensated in the form of damages. Even if this case opened up for transformation from administrative court costs to damages, the situations in which the transformation can be motivated are thus somewhat qualified: the tenderer has to be successful in the preceding review proceeding and the costs must be reasonable. Furthermore there has to be

[5] Paragraph 6, chapter 7 in the Public Procurement Act of 1992 (lag (1992:1528) om offentlig upphandling), which transposes article 2.1c in directive 89/665/EEC (the first remedy directive), later amended through directive 2007/66/EC (the amendment directive). Article 2.1c express a duty for the Member State to provide a possibility for a tenderer to be awarded damages if an infringement has taken place.

[6] The reasons for this practice are many: an administrative proceeding is supposed to be simple enough for an individual to take part in without being represented by a counsel. The case is usually settled through written procedure, without a hearing, and there are no court fees. The administrative court also has a duty to make the necessary enquiries in order to contribute to a substantially correct outcome of the case in question, see paragraph 29, The Administrative Procedural Act (Förvaltningsprocesslag (1971:291)).

[7] NJA 2013 s 762 para 21.

[8] NJA 2013 s 762 para 22. The SSC refers to a previous case, NJA 2007 s 349, where the SSC states that the function of the domestic tort rule, which builds on the remedy directives, is both reparative and preventive.

a close connection between the tenderers loss in form of the court costs and the infringement.[9]

In the majority's opinion, the consequences regarding the administrative procedural rule on (non)compensation for court costs in administrative proceedings are not discussed. The dissenting judges however identified several potential problems with the transformation from court costs to damages: the transformation would create an imbalance between the parties in the review process, since the contracting authority, even if it won the case, would never be compensated for its court costs. The minority also held that the possibility of being compensated for administrative court costs in the shape of damages would increase the number of court proceedings and expressed concern for the fact that the claim for compensation would be tried in a different court than the issue itself.

A Second Case

In the latter case of 2018 the background was slightly different: after a tenderer successfully had challenged the procurement decision in the administrative court, it did not take part in the new awarding process. Nevertheless, the tenderer filed a claim for damages regarding the administrative court costs. The SSC stated that even though the general administrative procedural rule on court costs had been upheld in procurement review proceedings, case law (meaning NJA 2013 s 762) had opened up for compensation for these costs in the form of damages. The court also made an additional qualification[10] as to when the transformation from court costs to damages is motivated: the successful tenderer must have been denied the possibility of winning the contract because of reasons for which the tenderer cannot be blamed for. The possibility to get compensation in these situations is, according to the SSC, necessary in order to guarantee the full impact of the EU public procurement rules and the individual's right to effective remedies.[11] Here the SSC refers to its previous statement about the aims of the tort articles of the remedy directives: reparation, prevention of infringements and full impact of the EU law

[9] NJA 2013 s 762 para 23.

[10] See Andersson, Upphandlingsskadeståndsrätt (VI) – frågor om skadesamband och skadelidandes begränsningsåtgärder, InfoTorg Juridik, accessed July 16th 2019.

[11] NJA 2018 s 1127 para 30–32.

on the national level.[12] The SSC reasoned that even though the review process itself can act as a preventive factor, the possibility of damages is nonetheless necessary in situations where otherwise the EU law would not reach its full impact and the individual's right to effective remedies would not be guaranteed.[13] The additional qualification led to a rejecting of the tenderer's claim for damages. Since the tenderer in this case had refrained from competing in the new awarding process, it was not eligible for damages.[14]

Mechanisms Working Towards Transformation from Court Costs to Damages

The Member State's criteria for determining and estimating the damages do not overrule any EU substantive provisions – the criteria decided by the Member State can exist only in the absence of criteria decided by the EU. Neither the remedy directives that the national statutes build upon, nor the case law of the ECJ give any specific provisions for the authority's liability regarding the tenderers administrative court costs. This is important to notice, since it affects the Member State's discretion to decide on what principles should be applied when the tenderer in national court claims the right to damages for previous administrative court costs.

The interpretation that made the transformation possible was in NJA 2013 s 762 and NJA 2018 s 1127 performed by the domestic court itself. The mechanism in force is above all a teleological approach towards the national statutes, where the full impact of the EU law and the right to effective remedies serves as a backdrop. In both cases, the functions of damages become the focus of the SSC's argumentation. This teleological approach where arguments such as effectiveness and the functions of damages are in focus could of course be taken to an extreme, leading to a general right for the tenderer to be compensated for the administrative court costs. However, the SSC in NJA 2018 s 1127 explicitly rejected

[12] NJA 2018 s 1127 para 20.

[13] NJA 2018 s 1127 para 21. This statement indicates that the SSC was of the opinion that a general rejection of the transformation alternative would be in conflict with the principle of effectiveness. The court in the same case stated that the principle of effectiveness requires the Member State to ensure that the national law provides the remedies demanded by EU law and that these are effective enough to guarantee the individual the protection and rights it enjoys under EU law, see para 22 in the opinion.

[14] NJA 2018 s 1128 para 39.

such a general right by stating that neither EU law nor domestic law demands the tenderer to be compensated for the administrative court costs in all possible situations.[15] This is important to notice since it underlines that the case is not a leap into a new regime of limitless possibilities of compensation.[16] The arguments of effectiveness, prevention etc. are counteracted by the general tort law principles, which results in the qualification that the right to compensation demands that the successful tenderer looses the opportunity of the contract due to reasons it cannot be blamed for.[17]

What Slides out of View?

Above, I have been trying to notice the mechanisms that operate in the SSC's judgments, resulting in the transformation from court costs to damages in the field of public procurement law. The step taken in the SSC's judgments is one where the transformation is sometimes deemed necessary to fulfill Sweden's duties under EU law. Has the SSC not then acted within its discretion to decide on the criteria for determining and estimating the damages? Is there anything left to notice?

In order to notice that which slides out of view, we have to further scrutinize the step taken in the two cases. By stating that the tort rule, in the name of effectiveness (and not just any effectiveness but the effectiveness of the EU law) in some situations must be used to grant the tenderer a right to compensation for previous court costs in the form of damages, the SSC lets the administrative procedural rule regarding the distribution of court costs slide out of view. And what is not in view is easier to bypass. Of course, if one were to search for a formal redefinition of the administrative courts practice to not grant the winning party compensation for its court costs, one would search in vain. The administrative procedural rules of compensation for administrative court costs as such remains, since the tenderer still cannot be compensated

[15] NJA 2018 s 1128 para 32. It also stated that such a general right is for the legislator to decide upon.

[16] For a connecting discussion, see Andersson, Upphandlingsskadeståndsrätt (VI) – frågor om skadesamband och skadelidandes begränsningsåtgärder, InfoTorg Juridik, accessed July 16th 2019.

[17] The SSC did however not restrict the possibility of transformation only to situations where the authority cancels the procurement, but to any situation where the tenderer, due to reasons it cannot be blamed for, is denied the possibility of winning the contract.

in the administrative court. The following transformation of the costs into damages will, however discreetly and in limited situations, weaken the administrative procedural rule and disregard the reasons behind it. To me, it is interesting to notice that the SCC chooses (and it is indeed a choice, since there is no clear duty under EU law to compensate the administrative court costs) to open up for transformation, basing its decision on teleological function-friendly argumentation, and not addressing the conflicts this interpretation of the tort rule potentially creates in the national legal system. One could say that by avoiding a conflict between EU law and national law, the conflict is transferred to the national level.

From Autonomy to Submission?

If we turn back to the theme of regime-changing steps, we should look at the context in which the step of transforming court costs into damages is taken. Because of the qualifications made by the SSC, the step taken in these cases is perhaps not very big, and most importantly, applies only in the field of public procurement law. However, as an effect of the SSC's interpretation of a tort rule, the EU law's call for effectiveness subsequently affects also the administrative procedural rules in a sideway manner – a side step.[18] This leaves us with the question: How many steps can be taken, either directly or to the side, before the supposed default of procedural autonomy changes into procedural submission.

[18] The Swedish legislature is now in a process of reviewing the administrative procedural rules, possibly changing them by making it possible for the parties in a public procurement review process to get compensated for court cost and thus making an exception from the main rule, see SOU 2018:44. I will follow with great interest how and if the cases of 2013 and 2018 will contribute to actual legislative reform.