1. Introduction

A question of utmost importance in practice

The traditional and common perception has been that there is no duty to terminate a public contract concluded in breach of the rules

Challenged in literature and in the case law namely in Germany and Denmark

A slow and gradual development of an obligation to terminate contracts concluded in breach of the EU public procurement rules followed by the introduction of the remedy ineffectiveness
1.1. Introduction

A breach can imply that there is a duty to terminate the contract/that the contract becomes ineffective

- C-503/04, Commission v Germany (supranational enforcement)
- C-91/08, Wall (national enforcement)
- Remedies Directive 2007/66 Art. 2 d in particular (national enforcement)
- National implementation

2. Ineffectiveness

Remedies Directive 2007/66 and national legislation

Art. 2(d)(2): "The consequences of a contract being considered ineffective shall be provided by national law".

- Consideration 21 of Remedies Directives 2007/66 "the rights and obligations of the parties under the contract should cease to be enforced and performed"

- Ineffectiveness ex tunc or ex nunc in the Member States?
2.1 Ineffectiveness

Primary Grounds

Art. 2d:
- Direct illegal award (a)
- Violation of standstill-provisions and interim measures where the infringement of the procurement rules has affected the chances of the complaining tenderer (b)

See also Art. 2e(1)

*Can you use primary law (the principles of effectiveness & loyalty) to expand the grounds?*

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3. Notice for voluntary ex ante transparency

Art.3a notices for voluntary ex ante transparency in the Official Journal

A safeguard against ineffectiveness for direct illegal award, cf. Art 2d(4)

*Is this protection absolute or are there limitations in cases of incorrect assessments?*

You can expect a noteworthy tightening of the approach in at least a couple of Member States
4. Ineffectiveness and damages

- Can the contractual partner facing ineffectiveness claim damages - including loss of profit - from the contracting authority?

- Contractual clauses as a way to safeguard the interests of the contracting authority

  Can these clauses be set aside?

5. Is ineffectiveness a paper tiger?

  Depends to a large extent on

  1) the market in question
  2) the attitude of the review bodies
  3) whether the grounds will be expanded

  Current tendencies in the Member States

  Enforcement of the EU Public Procurement Rules, Steen Treumer and François Lichère (eds.), DJØF Publishing 2011, European Procurement Law Series